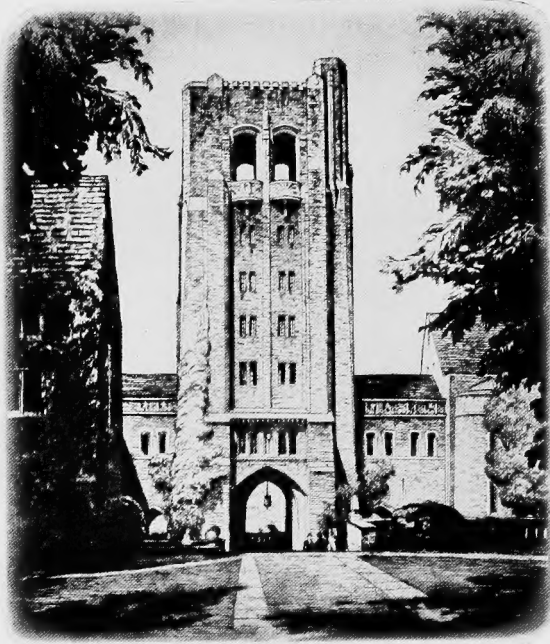


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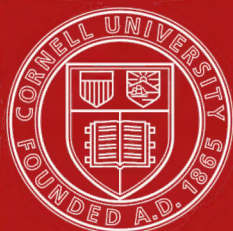
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COMMENTARIES

ON THE

LAW OF CONTRACTS

BEING A CONSIDERATION
OF THE NATURE AND GENERAL PRINCIPLES OF THE
LAW OF CONTRACTS AND THEIR APPLICATION
IN VARIOUS SPECIAL RELATIONS

BY
WILLIAM F. ELLIOTT
CO-AUTHOR OF
"ROADS AND STREETS," "RAILROADS," "EVIDENCE,"
ASSISTED BY THE PUBLISHERS' EDITORIAL STAFF

IN SEVEN VOLUMES
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ELLIOTT ON CONTRACTS

CHAPTER XL.

DISCHARGE OF CONTRACT BY AGREEMENT.

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|--------------------------------------------------------------------------------------|------------------------------------------------------------------------|
| § 1855. Discharge of contracts—Introductory. | § 1863. Old contract not abrogated when new agreement is invalid. |
| 1856. Ways in which contract may be discharged. | 1864. New contract expressly substituted for old. |
| 1857. Discharge by agreement generally—Consideration. | 1865. New contract inconsistent with old. |
| 1858. Discharge by waiver, rescission or cancellation. | 1866. Contract composed of new terms and old terms. |
| 1859. Discharge by substituted agreement—Generally. | 1867. Substitution of new party—Novation. |
| 1860. Form of new agreement—Contracts under seal. | 1868. Provisions in contract itself for discharge—Generally. |
| 1861. Form of new agreement—Written contract discharged by subsequent oral contract. | 1869. Nonfulfilment of specified term or condition. |
| 1862. Form of new agreement—Contract within statute of frauds. | 1870. Discharge on occurrence of specified event—Condition subsequent. |
| | 1871. Discharge by exercise of option. |

§ 1855. Discharge of contracts — Introductory. — The next branch of our subject is the discharge of contracts. Having considered the nature and elements of a contract, its formation or execution, and its operation and interpretation, together with matters incidental to those phases of the subject, it remains to consider the modes or ways in which the contractual tie may be loosed; or, in other words, the various modes of terminating a contract or discharging a contractual obligation. It is the purpose in this chapter to treat particularly of discharge by agreement.

§ 1856. Ways in which contract may be discharged.— A contract may be discharged in a number of ways. (1) It may be discharged by the same process which created

it, namely, by a valid agreement to that effect. (2) It may be discharged by performance. (3) It may be discharged by impossibility of performance in some cases. (4) It may be discharged by operation of rules of law upon certain sets of circumstances. (5) It may be discharged by breach. And the right of action arising in case of breach may be extinguished or discharged by agreement, judgment of a court of competent jurisdiction, or lapse of time.¹

§ 1857. Discharge by agreement generally—Consideration.—An executory contract, that is, one not performed on either side, may be discharged by agreement of the parties that it shall no longer bind either of them.² But if the contract has been performed on one side an agreement that it should no longer be binding, without more, would be without consideration and would not operate as a discharge³ unless, perhaps, when under seal. In short, to render an agreement effective as a discharge it must, in general, have all the elements of a valid contract, including consideration,⁴ although there are some excep-

¹ See Anson Cont. (8th ed.), 272, 315.

² Rollins v. Marsh, 128 Mass. 116; Hobbs v. Brick Co., 157 Mass. 109, 31 N. E. 756; McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793; McNish v. Reynolds, 95 Pa. St. 483; Dyer v. Middle Kittitas Irrigation Dist., 25 Wash. 80, 64 Pac. 1009. In such a case, the contract being bilateral, the relinquishment of each party of his rights against the other or the discharge of each by the other from his liabilities under the contract is a sufficient consideration. Cutter v. Cochrane, 116 Mass. 408; Flegal v. Hoover, 156 Pa. St. 276, 27 Atl. 162; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Kelly v. Bliss, 54 Wis., 187, 11 N. W. 488. See also, to the same effect, Parmly v. Buckley, 103 Ill. 115; Bryant v. Thesing, 46 Nebr. 244, 64 N. W. 967; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142.

³ Maness v. Henry, 96 Ala. 454, 11

So. 410; Westmoreland v. Porter, 75 Ala. 452; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. 367; Metcalf v. Kent, 104 Iowa 487, 73 N. W. 1037; Moore v. Detroit Locomotive Works, 14 Mich. 266; Young v. Power, 41 Miss. 197; Hale v. Dressen, 76 Minn. 183, 78 N. W. 1045; Murphy v. Katsner, 50 N. J. Eq. 224, 24 Atl. 564; Landon v. Hut-ton, 50 N. J. Eq. 500, 25 Atl. 953; Crawford v. Millspaugh, 13 Johns. (N. Y.), 87.

⁴ Westmoreland v. Porter, 75 Ala. 452; Stix v. Roulston, 88 Ga. 743, 15 S. E. 826; Murray v. Harway, 56 N. Y. 337; Wood v. Moriarty, 16 R. I. 201, 14 Atl. 855; Wheeler v. New Brunswick & C. R. Co. 115 U. S. 29, 29 L. ed. 341, 5 Sup. Ct. 1061, 1160. See also, King v. Gillett, 7 M. & W. 55; Smith v. Watson, 82 Va. 712, 1 S. E. 96. In the recent case of Shriner v. Craft, 166 Ala. 146, 51 So. 884, 28 L. R. A. (N. S.) 450n, 139 Am. St. 19, 26, it is said: "It is manifest that, in order for there to

tions or qualifications in regard to the doctrine of consideration. In England it seems that the rights of the holder of a bill of exchange or promissory note may be waived and discharged without any consideration;⁵ but in this country, in the absence of statute, such instruments stand on the same footing in this regard as other simple contracts,⁶ with the exception or qualification that the liability thereon is discharged by the destruction or surrender of the instrument with such intent and for such purpose.⁷

§ 1858. Discharge by waiver, rescission or cancellation.

—A discharge by agreement, such as that particularly considered in the last preceding section, may be said to be a discharge by waiver, cancellation or rescission. This is to be distinguished, however, from a mere waiver by one party of some particular condition or act otherwise required on the part of the other and from a modified or substituted performance or contract by a new and substituted agreement. The latter may operate as a discharge of the old contract, but it thus operates by substituted agreement (to be considered in another section), rather than by a waiver or rescission wholly freeing the parties from their rights and liabilities under the contract without substitution.

be a mutual assent, there must be something to be assented and agreed to on each side. Where the parties agree to rescind the contract, each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. Where one piece of work is substituted for another, the contractor is released from doing one, in consideration that he will do the other. But where one party refuses to do the work, which his contract requires him to do, or even threatens to abandon the work, unless he is paid more, and the other promises to pay more, the original contract still remaining subsisting, we consider it merely a promise to pay for what he was already obliged to do, and a nudum pactum."

⁵ *Foster v. Dawber*, 6 Exch. 839. So, in some states under the Negotiable Instruments Law.

⁶ See *Bragg v. Danielson*, 141 Mass. 195, 4 N. E. 622; *Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87; *In re Campbell's Estate*, 7 Pa. St. 100, 47 Am. Dec. 503.

⁷ *Sherman v. Sherman*, 3 Ind. 337; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168; *Stewart v. Hidden*, 13 Gil. (Minn.) 29; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, 4 *Silvernail* (N. Y.) 315; *Albert v. Ziegler*, 29 Pa. St. 50; *Ellsworth v. Fogg*, 35 Vt. 355. The reason given for this is that the transaction is in the nature of a valid executed gift.

As already stated, the agreement of waiver or rescission must in general have all the essential elements of a valid contract; but, as in other instances, a waiver, rescission or abandonment may be implied or shown by circumstantial evidence, in a proper case, as well as by direct evidence of an express agreement.⁸

§ 1859. Discharge by substituted agreement—Generally.—A second mode of discharging an executory contract by agreement of parties is by a new contract or substituted agreement.⁹ This may be expressly substituted for the old contract, or a similar result may be reached where the new contract is inconsistent with the old one; or, where new terms are agreed upon, there may result a new contract, consisting of the new terms, together with the terms of the old contract, not inconsistent with such new terms. So a new party may be substituted for an original party by agreement of all.

§ 1860. Form of new agreement—Contracts under seal.

⁸ *Lasher v. Loeffler*, 190 Ill. 150, 60 N. E. 85; *Iroquois Furnace Co. v. Bignall Hardware Co.*, 201 Ill. 297, 66 N. E. 237; *Ralya v. Atkins*, 157 Ind. 331, 61 N. E. 726; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Chouteau v. Jupiter Iron-Works*, 94 Mo. 388, 7 S. W. 467; *Evans v. Jacobitz*, 67 Kans. 249, 72 Pac. 848; *Kilpatrick v. Kansas City & C. R. Co.*, 38 Nebr. 620, 57 N. W. 664, 41 Am. St. 741; *Hall v. Eccles*, 46 Nebr. 880, 65 N. W. 1058; *Monroe Water-Works Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685; *Hutchinson v. Holme's Sanitarium*, 93 Wis. 23, 66 N. W. 700. Abandonment by both parties precludes either from complaining. *Haigler v. Adams*, 5 Ga. App. 637, 63 S. E. 715. As to when an agent has or has not implied authority to abrogate or agree to a rescission, see note to *American Sales Book Co. v. Whitaker* (Ark.), 140 S. W. 132, in 37 L. R. A. (N. S.) 91.

⁹ *Mylin v. King*, 139 Ala. 319, 35 So. 998; *Sheats v. Scott*, 133 Ala. 642,

32 So. 573; *Stewart, Law & Collection T. Co. v. Krambs*, 139 Cal. 318, 73 Pac. 854; *Bray v. Loomer*, 61 Conn. 456, 23 Atl. 831; *Hutchinson v. Coonley*, 209 Ill. 437, 70 N. E. 686; *Ward v. Walton*, 4 Ind. 75; *Sargent v. Robertson*, 17 Ind. App. 411, 46 N. E. 925; *Hannibal & C. Co. v. Knott*, 86 Iowa 113, 53 N. W. 88; *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625. See also, *Smith v. Salt Lake City*, 83 Fed. 784; *Fox v. Tyler*, 109 Fed. 258, 48 C. C. A. 356; *Union Switch & Signal Co. v. Johnson*, 72 Fed. 147, 18 C. C. A. 490; *Sioux City Stock Yards Co. v. Packing Co.*, 110 Iowa, 396, 81 N. W. 712; *Rollins v. Marsh*, 128 Mass. 116; *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Youngberg v. Lamberton*, 91 Minn. 100, 97 N. W. 571; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793; *Murphy v. Liberty Nat. Bank*, 184 Pa. St. 208, 39 Atl. 143; *Brownfield v. Brownfield*, 151 Pa. St. 565, 25 Atl. 92; *Lynch v. Henry*, 75 Wis. 631, 44 N. W. 837.

—It is an old common-law rule that in order to discharge a contract by a new agreement, the latter must be in the same form as the original contract, and, hence, that a contract under seal could not be modified or discharged before breach by a subsequent executory contract not under seal.¹⁰ This seems to be the view still taken in a number of jurisdictions in this country;¹¹ but, as already stated more than once in other connections, either by statute or judicial decision, the seal has largely lost its importance in this country; and even at common law, and especially in this country, there were many fine distinctions drawn to prevent the harsh operation and application of this rule. So, in equity, the strict common-law rule did not prevail, and it has been held not to prevail in jurisdictions where the same court may administer both law and equity in the same case.¹² Where the subsequent contract, though not under seal, has been performed, it may abrogate or modify the original contract under seal, and this seems to be the generally accepted doctrine in this country wherever the subsequent contract has been so far acted upon and performed, and the parties have so changed their situation, that they can not be restored to their former position and it would be inequitable to hold them to the original contract.¹³ So it seems to have been possible under the old rule, in equity at least, for the parties to make a parol contract creating obligations separate from yet substantially at variance with a deed, and in

¹⁰ *West v. Blakeway*, 2 Man. & G. 729; *Spence v. Healey*, 8 Exch. 668. See also, *Albrecht v. Kraisinger*, 44 Ill. App. 313; *Woodruff v. Dobbins*, 7 Blackf. (Ind.) 582; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628.

¹¹ See *Tischler v. Kurty*, 35 Fla. 323, 17 So. 661; *West Chicago St. R. Co. v. Morrison & Co.*, 160 Ill. 288, 43 N. E. 393; *Hume v. Taylor*, 63 Ill. 43.

¹² *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793. See also, *Gannon v. Shepard*, 156 Mass. 355, 31 N. E. 296; *Van Syckel v. O'Heran*, 50 N. J. Eq. 173, 24 Atl. 1024. And compare German

Bank v. Iron Works, 123 Iowa 516, 99 N. W. 174; *Luddington v. Goodnow*, 168 Mass. 223, 46 N. E. 627.

¹³ *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809. See also, to the same effect, *Dickerson v. Ripley County*, 6 Ind. 128, 63 Am. Dec. 373; *Herzog v. Sawyer*, 61 Md. 344; *McClay v. Gluck*, 41 Minn. 193, 42 N. W. 875; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793; *LeFevre v. LeFevre*, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522, 25 L. ed. 792; *Bonsack Mach. Co. v. Woodrum*, 88 Va. 512, 13 S. E. 994.

effect contravening the terms of the deed, so as to give a right of action to which the deed furnishes no answer.¹⁴ And where the obligee prevents performance by the obligor, by an oral waiver, or the like, parol evidence thereof has been held admissible.¹⁵

§ 1861. Form of new agreement—Written contract discharged by subsequent oral contract.—It is a general rule that an unsealed written contract, as well as one not in writing, may be discharged or modified by a subsequent oral agreement, and that the parol evidence rule does not exclude oral evidence thereof in a proper case.¹⁶ Illustrations of this rule and its application are numerous.¹⁷ It is also well settled that a provision in the written contract to the effect that it shall not be changed or modified except in writing does not prevent a subsequent oral agreement to change, modify or abrogate it.¹⁸ But a statute may

¹⁴ *Nash v. Armstrong*, 10 C. B. (N. S.) 529. See also, *Luddington v. Goodnow*, 168 Mass. 223, 46 N. E. 627.

¹⁵ *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528. "It is a sound principle," says the court, "that he who prevents a thing being done, shall not avail himself of the nonperformance he has occasioned." See also, *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132.

¹⁶ *Tucker v. Tucker*, 113 Ind. 272, 13 N. E. 710; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273; *Smith v. Kelley*, 115 Mich. 411, 73 N. W. 385; *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92; *Mead v. Parker*, 111 N. Y. 259, 18 N. E. 727; *Solomon v. Valette*, 152 N. Y. 147, 46 N. E. 324; *Negley v. Jeffers*, 28 Ohio St. 90; *Beatty v. Larzelere*, 194 Pa. St. 605, 45 Atl. 653; *A. J. Anderson Electric Co. v. Cleburne Water &c. Co. (Tex.)*, 27 S. W. 504 (even though the original written contract provides otherwise); *Teal v. Bilby*, 123 U. S. 572, 31 L. ed. 263, 8 Sup. Ct. 239; *Manistee Iron Works Co. v. Shores Lumber Co.*, 92 Wis. 21, 65 N. W. 863. See also, *Goss v. Lord Nugent*, 5 B. & Adol. 58, 65; *Pecos Valley Bank v. Evans-*

Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534.

¹⁷ Many cases are reviewed and the facts sufficiently stated to show the application of the rule so as to include waiver, discharge, abandonment, change of time or manner of performance, and the like in various kinds of cases, in the note to *Harris v. Murphy* (119 N. Car. 34), in 56 Am. St. 656, 659-672. See also, the following recent cases: *Bray v. Loomer*, 61 Conn. 456, 23 Atl. 831; *Gunby v. Drew*, 45 Fla. 350, 34 So. 305; *Strahl v. Western Grocer Co.*, 5 Nebr. 482, 98 N. W. 1043; *First Nat. Bank of Trenton v. Burney (Nebr.)*, 136 N. W. 37; *Zanella v. Watson &c. Iron Works (Ore.)*, 124 Pac. 660.

¹⁸ *Chicago & E. I. R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Continental Ins. Co. v. Pierce*, 39 Kans. 396, 18 Pac. 291, 7 Am. St. 557; *Copeland v. Hewett*, 96 Maine 525, 53 Atl. 36; *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625; *Michaud v. McGregor*, 61 Minn. 198, 63 N. W. 479; *Gibbs v. School District*, 195 Pa. St. 396, 46 Atl. 91; *Demattos v. Jordan*, 15 Wash. 37, 46 Pac. 402; *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash.

prohibit such an oral agreement, so long at least as executory, from modifying a prior written contract.¹⁹

§ 1862. Form of new agreement—Contract within statute of frauds.—Where the original written contract is within the statute of frauds, that is, one required by such statute to be evidenced or proved by writing, there is some difference of opinion as to whether it can be modified or changed by a subsequent oral executory contract. The weight of authority is to the effect that, as a general proposition, this can not be done;²⁰ but in other jurisdictions it may be done, at least to a certain extent.²¹ And it has been said that while such a new oral contract can not be substituted, "an absolute discharge might probably take place by word of mouth."²² In some jurisdictions much seems to depend upon the nature or part of the

268, 69 Pac. 784. But compare, *North-ern Light Lodge v. Kennedy*, 7 N. Dak. 146, 73 N. W. 524.

¹⁹ *Thompson v. Garner*, 104 Cal. 168, 37 Pac. 900, 45 Am. St. 81; *Mettel v. Gales*, 12 S. Dak. 632, 82 N. W. 181; *Share v. Coats* (S. Dak.), 137 N. W. 402. See also, *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628. And see as to modification not allowed to be shown against third parties, *Clarke Bros. v. McNesatt*, 132 Ga. 610, 64 S. E. 795, 26 L. R. A. (N. S.) 585.

²⁰ *Noble v. Ward*, L. R. 2 Exch. 135; *Clements v. Fairchild Co.*, 15 Manitoba, 478; *Reid v. Plate Glass Co.*, 85 Fed. 193, 29 C. C. A. 110; *Hawkins v. Studdard*, 132 Ga. 285, 63 S. E. 853; *Willis v. Fields*, 132 Ga. 242, 63 S. E. 828; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165, and note reviewing cases on both sides and reaching this conclusion. *Burns v. Fidelity Real Estate Co.*, 52 Minn. 31, 53 N. W. 1017; *Warren v. A. B. Mayer & Co.*, 161 Mo. 112, 61 S. W. 644; *Rucker v. Harrington*, 52 Mo. App. 481; *Northup v. Jackson*, 13 Wend. (N. Y.) 85; *Gordon v. Niemann*, 118 N. Y. 152, 23 N. E. 454; *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. 103.

See also, *Carpenter v. Galloway*, 73 Ind. 418; *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638. See note in 4 L. R. A. (N. S.) 980; *McConathy v. Lanham*, 116 Ky. 735, 25 Ky. L. 971, 76 S. W. 535; *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433; *Musselman v. Stoner*, 31 Pa. St. 265; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.

²¹ *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Lee v. Hawks*, 68 Miss. 669, 9 So. 828, 13 L. R. A. 633; *Negley v. Jeffers*, 28 Ohio St. 90. But see *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Bryan v. Hunt*, 4 Sneed. (Tenn.) 543, 70 Am. Dec. 262. See also, *McClelland v. Rush*, 150 Pa. St. 57, 24 Atl. 354; *Crawford v. Bellevue & Gas Co.*, 183 Pa. St. 227, 38 Atl. 595. In *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13, it is said that the rule is not fully settled in New York.

²² *Clark Cont.* (Hornbrook Series), 621, citing *Gorman v. Salisbury*, 1 Vern. 240; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273; *Buel v. Miller*, 4 N. H. 196; *Hurley v. Schring*, 62 Hun (N. Y.) 621, 43 N. Y. St. 240, 17 N. Y. S. 7.

original contract sought to be affected by the new contract. In an Indiana case it is said:

"Where an unconditional sale has been so entirely consummated that nothing further remains to be done, a contract for its rescission stands upon the footing of a new and independent contract, and hence is not a binding contract when it falls within the statute of frauds, that is to say, when such a contract is required to be in writing, and is not; but that where the sale has some condition or contingent agreement connected with it, or some material thing remains to be done before the transaction is complete, an oral agreement for its rescission is binding, provided the agreement is clear and distinct, and provided further, that the party seeking a rescission promptly complies with the agreement on his part. This is upon the principle that an agreement to undo a contract, which to some intent still remains open or incomplete, is an agreement merely incidental and subordinate to the original contract, and hence one which requires no new consideration to support it and to which the statute of frauds does not so readily apply as to the original contract."²³ It has been held in Illinois that a written contract for the sale of land may be modified as to the time of payment by a subsequent oral agreement.²⁴ And in Pennsylvania it has been held that a written oil and gas lease containing a provision for its extension from year to year as long as production continued, upon payment of a certain royalty, might be modified by subsequent parol agreement so as to discharge the lessee from liability as to such royalty.²⁵ In

²³ *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273, citing *Bishop Cont.*, § 1241; *Benj. Sales* (Bennett's Ed.), 660; 2 *Reed Stat. of Fraud*, § 461; *Arrington v. Porter*, 47 Ala. 714; *Guthrie v. Thompson*, 1 Ore. 353.

²⁴ *Anderson v. Moore*, 145 Ill. 61, 33 N. E. 848. But see *Stowell v. Robinson*, 3 Bing. N. Cas. 928, 32 E. C. L. 425; *Harvey v. Graham*, 5 Ad. & El. 61, 31 E. C. L. 525; *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869. And compare *Thomson v. Poor*, 147 N. Y.

402, 42 N. E. 13; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862.

²⁵ *Crawford v. Bellevue &c. Gas Co.*, 183 Pa. St. 227, 38 Atl. 595. And in Ohio it is held that an oil lease providing that the lessee shall pay to the lessor as royalty a certain share of the oil produced, such agreement is not within the statute of frauds and the parties may subsequently, for a consideration, increase or decrease the royalty by parol agreement. *Nonamaker v. Amos*, 73 Ohio

any event it would seem that equity may relieve in a proper case where the oral agreement has been acted upon and the condition of the parties thereby changed so as to require it,²⁶ and a substituted performance agreed upon by parol and executed and accepted would seem to be effective to discharge the contract.²⁷

§ 1863. Old contract not abrogated when new agreement is invalid.—It would seem that if the new agreement is invalid and unenforcible it should not be held to abrogate or modify the old contract, and for this reason many of the authorities cited in the last preceding section hold that a new contract which is invalid or can not be enforced under the statute of frauds has no effect on the original contract, and that the latter remains intact.²⁸ So, as already shown, the same is true of a contract invalid for want of consideration, or where there is not the necessary mutuality.²⁹ And if the later agreement is avoided for duress or because made with an unauthorized agent or the like, it will not abrogate or modify the earlier one.³⁰

§ 1864. New contract expressly substituted for old.—Where the new contract is expressly substituted for the

St. 163, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 112 Am. St. 708.

²⁶ Wilkins v. Evans, 1 Del. Ch. 156. See also, Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34.

²⁷ See also, Norton v. Simonds, 124 Mass. 19; Johnson v. Clarkson (Tex. Civ. App.), 30 S. W. 71. And compare Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Smiley v. Barker, 83 Fed. 684, 28 C. C. A. 9; Freeman v. Bell, 150 N. Car. 146, 63 S. E. 682. But see Leavitt v. Stern, 159 Ill. 526, 42 N. E. 869.

²⁸ See also, Adler v. Friedman, 16 Cal. 138; Harvey v. Morey, 22 Colo. 412, 45 Pac. 383; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Wharton v. Missouri Car. Foundry Co., 1 Mo. App. 577.

²⁹ Ehrman v. Rosenthal, 117 Cal. 491, 49 Pac. 460; Central Coal & Co. v. Good, 120 Fed. 793; 57 C. C. A. 161; Oklahoma Vinegar Co. v. Carter,

116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. 112; Stix v. Roulston, 88 Ga. 743, 15 S. E. 826; Kendrick v. Visage, 88 Ga. 275, 14 S. E. 612; St. Louis S. W. R. Co. v. Elgin Condensed Milk Co., 175 Ill. 577, 51 N. E. 911, 67 Am. St. 238; Currier v. Kretzinger, 162 Ill. 511, 44 N. E. 882; McCormick Harvesting Mach. Co. v. Markert, 107 Iowa 340, 78 N. W. 33; Bowen v. Carolina, C. G. & C. R. Co., 34 S. Car. 217, 13 S. E. 421; Utley v. Donaldson, 94 U. S. 29; Gibbons v. Grinsel, 79 Wis. 365, 48 N. W. 253.

³⁰ Weatherford v. McCrocklin, 17 Ky. L. 1297, 34 S. W. 24 (duress). So held where agent was unauthorized in Campau v. Detroit, 106 Mich. 414, 64 N. W. 336; Mt. Holly Mining & Co. v. Caraleigh Phosphate & Co., 72 Fed. 244, 18 C. C. A. 535; Rowland Lumber Co. v. Ross, 100 Va. 275, 40 S. E. 922; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426.

old, there is little difficulty in determining its effect. If it expressly abrogates the earlier contract, the general rule is that it abrogates it in toto unless there is some restriction in the later contract limiting its effect.³¹ But it may purport to change or modify it only in part. In such a case the effect of the new contract depends on its proper construction, and the contract will usually consist of the terms of the old so far as not changed or modified, together with the modifications or changes made by the new.³²

§ 1865. New contract inconsistent with old.—A contract may also be discharged or modified by a new contract inconsistent with the earlier contract so that they can not subsist together, even though there is no express agreement that the new contract shall have that effect.³³ As a general rule, where the new contract is in regard to the same matter and has the same scope as the earlier contract and the terms of the two contracts are inconsistent either in whole or in a substantial part, so that they can not subsist together, the new contract abrogates the earlier one in toto and takes its place.³⁴ But much

*Union Switch & Signal Co. v. Johnson, 72 Fed. 147, 18 C. C. A. 490; DeBeaumont v. Webster, 71 Fed. 226; Hutchinson v. Holmes Sanitarium, 93 Wis. 23, 66 N. W. 700. See also, Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134.

*See Littlepage v. Neale Pub. Co., 34 App. Cas. (D. C.) 257. Illustrations and examples of this will be found in Vol. IV of this work, Tit. "Building, Construction and Working Contracts." See also, vol. III, ch. XLII, § 1866.

*Hall v. Wright, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912a, 1255, 1258 and note. To this effect see also, Patmore v. Colburn, 1 Crompt. M. & R. 65; Sprague v. Hart, 11 Cal. App. 782, 106 Pac. 590; Malkan v. Henning, 82 Conn. 293, 73 Atl. 752; Harrison v. Lodge, 116 Ill. 279, 5 N. E. 543; Paul v. Meservey, 58 Maine 419; Smith v. Kelley, 115 Mich. 411, 73 N. W. 385; Herboth v. American

Radiator Co., 145 Mo. App. 484, 123 S. W. 533; Morecraft v. Allen, 78 N. J. L. 729, 75 Atl. 920; Redding v. Vogt, 140 N. Car. 562, 53 S. E. 337, 6 Am. & Eng. Ann. Cas. 312; Caples v. Port Huron Engine Co. (Tex.), 131 S. W. 303; Rhoades v. Chesapeake & O. R. Co., 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. 826; Grant Marble Co. v. Abbott, 142 Wis. 279, 124 N. W. 264.

*See cases cited in last preceding note; also Housekeeper Pub. Co. v. Swift, 97 Fed. 290, 38 C. C. A. 187; Consumer's Cotton Oil Co. v. Ashburn, 81 Fed. 331, 26 C. C. A. 436; Stow v. Russell, 36 Ill. 18; McDonough v. Kane, 75 Ind. 181; Sioux City Stock Yards Co. v. Packing Co. 110 Iowa 396, 81 N. W. 712; Tuggles v. Callison, 143 Mo. 527, 45 S. W. 291; Renard v. Sampson, 12 N. Y. 561; Spreckels v. Bender, 30 Ore. 577, 48 Pac. 418; United States v. Lamont, 155 U. S. 303, 39 L. ed. 1601, 15 Sup.

depends upon the nature and extent of the inconsistency and the scope and proper construction of the particular contract, and the new contract may supersede or modify the old only in part. It may not be as broad in its scope as the old and may cover or relate to only a particular provision or part of the subject-matter. In such case it would not, ordinarily at least, abrogate and supersede the old contract in toto, but only in regard to the particular provision or subject to which it refers and as to which the inconsistency exists.⁸⁵

§ 1866. Contract composed of new terms and old terms.

—The result in cases of the kind referred to at the close of the last preceding section is usually a contract composed both of new terms and old terms, that is, of the new terms so far as inconsistent with the old and the old terms not inconsistent with the new.⁸⁶ Thus, modifications in

Ct. 97. See also, *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385. Thus where the defendant and the plaintiff agreed in writing that the latter should sell the land of the former for not less than \$19,600 and should have one-third of all realized over \$16,250, and a subsequent oral contract was made under which the plaintiff was to sell the land for not less than \$21,000 and receive all realized above that price, it was held that the latter contract rescinded the former. The court said that no other conclusion seemed reasonable, and the terms of the two contracts were so inconsistent that they could not be operative at the same time. *Simmons v. Sweeney*, 13 Cal. App. 283, 109 Pac. 265. But compare *Slaughter v. Hall* (Tex.), 133 S. W. 496. So, a second deed or a second lease has been held to abrogate or vacate and supersede the first one. *Hall v. Wright*, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912A, 1255; *Herboth v. American Radiator Co.*, 145 Mo. App. 484, 123 S. W. 533. But compare *King v. Slater*, 96 Ark. 589, 133 S. W. 173. And an agreement to convey or devise land has been held avoided by the acceptance of a lease of such land inconsistent with the former agreement and rights there-

under. *Harmon v. Harmon*, 51 Fed. 113; *Unger v. Unger*, 65 Ohio St. 495, 63 N. E. 67. But an option for purchase of the fee has been held not abrogated or surrendered by merely taking a lease. *Wade v. Oil Co.*, 45 W. Va. 380, 32 S. E. 169. So, a new contract for construction work has been held to abrogate a provision in a prior contract that the engineer's decision should be final. *Chicago & E. I. R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Galveston v. Devlin*, 89 Tex. 319, 19 S. W. 395. But not where it only undertook to modify as to the grade. *McCauley v. Keller*, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. 758.

⁸⁵ *McDale v. Kingsley*, 163 Ill. 433, 45 N. E. 281; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Uhlig v. Barnum*, 43 Nebr. 584, 61 N. W. 749; *McCauley v. Keller*, 130 Pa. St. 53, 18 Atl. 607, 17 Am. St. 758; *Keeley v. Hartrauft*, 178 Pa. St. 384, 35 Atl. 984; *Pike v. Pike*, 69 Vt. 535, 38 Atl. 265.

⁸⁶ See *Thornhill v. Neats*, 8 C. B. (N. S.) 831; *Cornish v. Suydam*, 99 Ala. 620, 13 So. 118; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. 40; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Huckestein v. Kelly*, 152 Pa. St. 631, 25 Atl. 747;

building contracts, such as provisions for changes as to certain details or for additional work, do not abrogate the original contract entirely, but, on the contrary, the terms of the old contract are still to be followed so far as not changed or inconsistent with the new terms, and the governing contract may thus be said to be composed of the new terms and the unchanged terms of the old.³⁷ And the intention to discharge a contract will not be presumed from a mere promise to accept performance at a time or place other than that stipulated in such contract.³⁸ The inconsistency of the new terms with the old must be such that they can not stand together, or it must at least in some way appear that the parties intended to discharge the old contract in order for the new agreement to have that effect in itself.³⁹

§ 1867. Substitution of new party—Novation.—A contract may also be discharged by a change in the parties thereto, as by the substitution of a new party in place of one of the original parties by agreement of all, although the terms otherwise remain the same.⁴⁰ Thus, if A is indebted to B in the sum of one hundred dollars and B owes C the same amount, and it is agreed by all that A shall pay C the one hundred dollars, B's debt is extinguished and C may recover such sum from A. This is a species of novation, and it may exist in more complicated

Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134.

³⁷ Thornhill v. Neats, 8 C. B. (N. S.) 831, 2 L. T. (N. S.) 539; Greene v. Paul, 155 Pa. St. 126, 25 Atl. 867; Hood v. Smiley, 5 Wyom. 70, 36 Pac. 856. See also, Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 64 S. W. 760; Rhoades v. Chesapeake & O. R. Co., 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. 826.

³⁸ Jickman v. Haynes, L. R. 10 C. P. 598, 606; Ogle v. Earl Vane, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272; Bacon v. Cobb, 45 Ill. 47; Lawson v. Hogan, 93 N. Y. 39; McCombs v. McKennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505. See also, Watkins v. Hodges, 6

Har. & J. (Md.) 38; Franklin Fire Ins. Co. v. Hamill, 5 Md. 170.

³⁹ Millsaps v. Merchants' & Planters' Bank (Miss.), 13 So. 903.

⁴⁰ Tatlock v. Harris, 3 Term. 174; Dillard v. Dillard, 118 Ga. 97, 44 S. E. 885; Hoffa v. Hoffman, 33 Ind. 172; McClellan v. Robe, 93 Ind. 298; Foster v. Paine, 63 Iowa, 85, 18 N. W. 699; Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660; Martin v. Curtis, 119 Mich. 169, 77 N. W. 690; Schlicher v. Vogel, 61 N. J. L. 158, 47 Atl. 448; Munson v. Magee, 161 N. Y. 182, 55 N. E. 916; Union Cent. L. Ins. Co. v. Hoyer, 66 Ohio St. 344, 64 N. E. 435.

forms than the simple form of which the above is an illustration.⁴¹ All must agree, for it requires the consent of the original parties to change the old contract or their relations to it and extinguish the liability, and of the parties to the new contract to create it.⁴² But such assent may be implied,⁴³ and such a substitution and discharge may arise or be shown by circumstances and the conduct of the parties showing an acquiescence in the change.⁴⁴ So it is not necessary, so long as they all finally consent in time, that they should all consent at the same moment.⁴⁵

§ 1868. Provisions in contract itself for discharge—Generally.—A contract may contain within itself provisions, either express or implied, for its determination or discharge under certain circumstances, and discharge under such provisions may be regarded and treated as another mode of discharge by agreement. As elsewhere shown, the very existence or validity of a contract may depend upon the existence of certain facts, and if they do not exist, the contract can not be enforced. It may be expressly

⁴¹ See *Henry v. Ritenour*, 31 Ind. 136; *Lester v. Bowman*, 39 Iowa 611; *Finan v. Babcock*, 58 Mich. 301, 25 N. W. 294; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135; *York v. Orton*, 65 Wis. 6, 26 N. W. 166. See also, *Hart v. Alexander*, 2 Mees. & W. 484; *Castle v. Persons*, 117 Fed. 835, 54 C. C. A. 133. It may result where a mortgagor conveys the mortgaged premises and the grantee assumes and agrees to pay the mortgaged debt and the mortgagee accepts him and agrees to the substitution. *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Merriman v. Moore*, 90 Pa. St. 78.

⁴² *McKinney v. Alvis*, 14 Ill. 33; *Commercial Nat. Bank v. Kirkwood*, 172 Ill. 563, 50 N. E. 219; *Kirchman v. Standard Coal Co.*, 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318; *Dean v. Ellis*, 108 Mich. 240, 65 N. W. 971; *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Hard v. Burton*, 62 Vt. 314, 20 Atl. 269; *Murphy v. Hanrahan*, 50 Wis. 485, 7 N.

W. 436. See also, *Cuxon v. Chadley*, 3 Barn. & Cr. 391; *Liversidge v. Broadbent*, 4 Hurl. & N. 603; *Illinois Car & Co. v. Linstroth Wagon Co.*, 112 Fed. 737, 50 C. C. A. 504. And see further as to new promise of substituted debtor and release of debtor being necessary, *Pugh v. Barnes*, 108 Ala. 167, 19 So. 370; *Carpy v. Dowdell*, 131 Cal. 495, 63 Pac. 778; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *In re Lemerise*, 73 Vt. 304, 50 Atl. 1062.

⁴³ *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Shoemaker Piano & Co. v. Bernard*, 12 La. (Tenn.) 358.

⁴⁴ *Hart v. Alexander*, 2 M. & W. 484; *Wright v. Brasseau*, 73 Ill. 381; *Ludington v. Bell*, 77 N. Y. 138. See also, *Bilborough v. Holmes*, L. R., 5 Ch. Div. 255. But compare *Leabo v. Goode*, 67 Mo. 126; *In re Gardner's Estate*, 199 Pa. St. 524, 49 Atl. 346.

⁴⁵ *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135. But see *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. 610.

made contingent upon one of the parties having done a specified thing, or the doing of some act by a third party, or conditional on the existence or nonexistence of a specified thing without which it can not be enforced.⁴⁶ So, goods may be sold on condition that the buyer shall be satisfied or the like.⁴⁷ But these, and similar provisions, are conditions precedent, or in the nature of such conditions, and should be regarded as affecting the validity or enforceability of the contract rather than as providing by agreement for the discharge of the contract. There may, however, be a nonfulfilment of a specified term of a contract which gives to one of the parties the option of treating it as discharged, and this may be regarded as a discharge by agreement, although it is very similar to a discharge by breach, or the provision might even be regarded as in the nature of a condition precedent, whereas in most instances at least we have here to deal with conditions subsequent.

§ 1869. Nonfulfilment of specified term or condition.—

Cases of the kind referred to at the close of the last preceding section, where the contract is made determinable upon the nonfulfilment of a term of the contract, find their best and most common illustration, if not almost their only one, in contracts of sale providing that the thing bargained or sold may be returned if it is not satisfactory, or the like.⁴⁸ Thus, in a leading case, a horse had been sold

⁴⁶ *Sterrick v. McBride*, 157 Ill. 70, 41 N. E. 744 (contingent on nonexistence of seam of stone); *Miller v. Nugent*, 12 Ind. App. 348, 40 N. E. 282; *Dodson v. Crocker*, 16 S. Dak. 481, 94 N. W. 391 (agreement to purchase mechanic's lien if first claim, existence of prior lien for taxes held to discharge from obligation to purchase); *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479. See also, *Frisbie v. Moore*, 51 Cal. 516; *Simonds v. East Windsor Electric R. Co.*, 73 Conn. 513, 48 Atl. 210 (refusal of third person preventing act and operating as discharge); *Union Sawmill Co. v. Lake Lumber Co.*, 120 La. Ann.

106, 44 So. 1000; *Lowry v. Hawaii*, 215 U. S. 554, 54 L. ed. 325, 30 Sup. Ct. 209; *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833.

⁴⁷ *Allen v. Mutual Compress Co.*, 101 Ala. 574, 14 So. 362; *Goodrich v. Van Nortwick*, 43 Ala. 445; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157. See also, Vol. IV, chapter on Sales,

⁴⁸ *Head v. Tattersall*, L. R. 7 Exch. 7; *Goodrich v. Van Nortwick*, 43 Ill. 445; *Westinghouse Co. v. Gainor*, 130 Mich. 393, 90 N. W. 52; *Adams & Co. v. Schnader*, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. 893; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56

under a contract in which it was stipulated that if the horse did not comply with a certain warranty the buyer might return it within a specified time, and it did not comply with the warranty and was returned within such time, but the seller refused to accept it because it had been injured, though without fault of the buyer. The court said that the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revert in the seller, and held that the buyer was entitled to return the horse.⁴⁹ So, a contract of employment may contain a provision giving the employer the right to discharge the employé whenever the employer becomes dissatisfied with him.⁵⁰ And in a recent case it is said: "It is entirely competent for the parties to a contract to provide for the discharge or annulment thereof, either by subsequent agreement or by incorporating provisions or conditions to that end in the original agreement, and they may fix and limit the rights and liability of each in the event of a failure of performance." The contract provided that if the title of the premises agreed to be sold was not good and could not be made good, the contract should be void, and on its appearing that the vendor could not convey a good title because his wife, who had a life estate in part and a third interest in the remainder, would not join, the court held that the contract thereupon became null and of no further force.⁵¹

§ 1870. Discharge on occurrence of specified event.—Condition subsequent.—A contract may be made determinable upon and by the fulfilment of a condition subsequent or the occurrence of a specified event.⁵² Thus, in

Am. Rep. 557. See also, *Hunt v. Wyman*, 100 Mass. 198; *J. I. Case Thresh. Mach. Co. v. Huber*, 160 Mich. 92, 125 N. W. 66, 32 L. R. A. (N. S.) 212; *Platt v. Broderick*, 70 Mich. 577, 38 N. W. 579.

⁴⁹ *Head v. Tattersall*, L. R. 7 Exch. 7.

⁵⁰ *Frary v. Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644. See also, *Sax v. Detroit &c. R. Co.*,

125 Mich. 252, 84 N. W. 314, 84 Am. St. 572, and ch. 41 on Performance for other authorities and discussion as to when this is an absolute right or depends on good faith or exists only when the dissatisfaction is reasonable.

⁵¹ *Schwab v. Baremore*, 95 Minn. 295, 104 N. W. 10.

⁵² *Geipel v. Smith*, L. R. 7 Q. B. 404; *Elliott v. Crutchley* (1906), A.

the case of a penal bond, there is a promise to pay which is defeasible upon a condition expressed in the bond. So, in an official bond, the condition is usually the faithful performance of the duties of the office.

Another common illustration or example is found in a charter party and the occurrence of one of the risks therein excepted, which may justify the abandonment of the voyage and operate as a discharge.⁵³ And very similar is the case of the occurrence of one of the excepted risks under the provisions of a bill of lading issued by a railroad company, or other common carrier, provided it is legal and binding, by which the liability of the carrier to deliver is to terminate if the goods are destroyed by reason of certain perils.⁵⁴ Indeed, even without any express stipulation the promise of the carrier to make safe delivery is defeasible upon the occurrence of certain excepted risks such as the act of God or inherent defects and vice in the thing carried.⁵⁵ So, insurance policies usually provide that they shall be void if the building insured shall be or become vacant or unoccupied and so remain for a specified time, and such a provision as this and some others often found in contracts of insurance may be regarded as further illustrations or examples of conditions or provisions for discharge found in the contract itself.⁵⁶ The termination of a contract by one party in accordance with its provisions is not a breach and does not ordinarily entitle the

C. 7, 75 L. J. K. B. 147; *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 42 Atl. 923; *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

⁵³ *Geipel v. Smith*, L. R. 7 Q. B. 404; *The Calvin S. Edwards*, 50 Fed. 477, 1 C. C. A. 533.

⁵⁴ See 4 Elliott R. R. (2d ed.) Chapter 64; also Vol. IV of this work, Chapter LXXVIII on Carriers of Goods and Freight.

⁵⁵ See Vol. IV, Chapters LXXVIII-LXXXII on Carriers of Goods and Freight and on Carriers of Live Stock; also 4 Elliott R. R. (2d ed.), §§ 1481, 1546; and consult *Nugent v. Smith*, L. R., 1 C. P. Div. 423.

⁵⁶ See *Schuermann v. Dwelling-*

house Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. 577; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. 77; *Clifton Coal Co. v. Scottish Union &c. Ins. Co.*, 102 Iowa 300, 71 N. W. 433; *Johnson v. Norwalk Fire Ins. Co.*, 175 Mass. 529, 56 N. E. 569; *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359; *Moody v. Amazon Ins. Co.*, 52 Ohio 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. 699; Vol. IV, Chapter CXXXVI on Insurance. We do not mean, however, that such provisions necessarily constitute a complete discharge and end the contract for all time.

other party to damages.⁵⁷ Nor does it necessarily discharge such other party if by the terms of the contract it was not to so operate.⁵⁸ So, a provision for the benefit of one party authorizing him to terminate the contract in case of default by the other can not be taken advantage of by the other.⁵⁹ And the contract may be such as to require the party relying on the condition subsequent to discharge him to give the other party notice of the facts so operating.⁶⁰ But some of these and similar matters would seem to more properly fall within the purview of the next section, and provisions giving an option to one party to discharge or terminate the contract will be treated in that section.

§ 1871. Discharge by exercise of option.—A contract may be made determinable at the option of one of the parties.⁶¹ Thus, contracts of employment for a definite time frequently provide that either party may terminate them on giving a specified notice, or the like.⁶² And many continuing contracts contain the same or a similar provision.⁶³

⁵⁷ Not a breach, *Sibley v. Life Assn.*, 87 Ga. 738, 13 S. E. 838; *Over v. Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302, 117 Am. St. 327; *Sirk v. Ela*, 163 Mass. 394, 40 N. E. 183; does not entitle to damages, *Merriam v. Machine Co.*, 96 Wis. 600, 71 N. W. 1050. See also, *Sparhawk v. United States*, 134 Fed. 720, 67 C. C. A. 274; *Sharp v. Behr*, 136 Fed. 795. But compare *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388.

⁵⁸ *Lowell v. Wash. County R. Co.*, 90 Maine 80, 37 Atl. 869.

⁵⁹ *Orr v. State*, 56 Ark. 107, 19 S. W. 319; *Shouse v. Doane*, 39 Fla. 95, 21 So. 807; *Lasher v. Union Cent. Life Ins. Co.*, 115 Iowa 231, 88 N. W. 375; *National Contracting Co. v. Commonwealth*, 183 Mass. 89, 66 N. E. 639; *Robbins v. Morgan*, 56 Minn. 304, 57 N. W. 799.

⁶⁰ *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443.

⁶¹ *Louisiana A. & M. R. Co. v. Dist. Comrs.*, 87 Fed. 594, 31 C. C. A. 121; *Thayer v. Allison*, 109 Ill. 180;

Indianapolis v. Bly, 39 Ind. 373; *Morrisey v. Broomal*, 37 Nebr. 766, 56 N. W. 383; *Booth v. Ratcliffe*, 107 N. Car. 6, 12 S. E. 112; *Foster v. Henderson*, 29 Ore. 210, 45 Pac. 899; *Dick v. Ireland*, 130 Pa. St. 299, 18 Atl. 735.

⁶² *McCormick Harvesting Mach. Co. v. Cordsiemon*, 101 Ill. App. 140; *Jenkins v. Long*, 8 Md. 132; *Nashua & L. R. Corp. v. Paige*, 135 Mass. 145; *Lyon v. Pollard*, 20 Wall. (U. S.) 403, 22 L. ed. 361. In *Derry v. Board of Education of East Saginaw*, 102 Mich. 631, 61 N. W. 61, the plaintiff was employed as a school teacher for one year, but the contract provided that the board might discharge him at any time it might desire on giving one week's written notice, and it was held that on the notice being given even before the term began he was entitled to only one week's salary.

⁶³ *Bour v. Kimball*, 46 Ill. App. 327; *Dick v. Ireland*, 130 Pa. St. 299, 18 Atl. 735.

But until the option is exercised, the contract remains binding on both parties.⁶⁴ A provision in a mining contract that the owner of a mine might terminate the contract if satisfied that the system adopted was prejudicial to the mine has been held not to give such owner the right to terminate it arbitrarily,⁶⁵ and a provision allowing a contract to be canceled for any good cause on sixty days' notice has been held to mean any cause assigned in good faith.⁶⁶ Even though there is no express provision for terminating a contract which is indefinite in duration and continuous in its nature, there is usually an implied option in either party to terminate such a contract as to the part remaining executory.⁶⁷ Thus, contracts of indefinite employment have often been held determinable in this way.⁶⁸ So, it has been held that a custom or usage of trade may justify the discharge on a month's notice of one em-

⁶⁴ *Kenney v. Knight*, 119 Fed. 475. See also, *Ford v. Dyer*, 148 Mo. 528, 49 S. W. 1091 (written request for extension of time to enable party to determine whether he could go on, not exercise of option); *Jessop v. Ivory*, 158 Pa. St. 71, 27 Atl. 840. As to when and how it may be exercised, see *Lord v. Board of Trade*, 163 Ill. 45, 45 N. E. 205. See also, *Western Hardware & Mfg. Co. v. Steel Co.*, 116 Fed. 176, 53 C. C. A. 548; *Florida N. R. Co. v. Southern Supply Co.*, 112 Ga. 1, 37 S. E. 130.

⁶⁵ *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. 876.

⁶⁶ *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530. See also, *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Crawford v. Mail & C. Pub. Co.*, 163 N. Y. 404, 57 N. E. 616.

⁶⁷ *Long v. Kee*, 42 La. Ann. 899, 8 So. 610; *Quinn v. Distilling Co.*, 171 Mass. 283, 50 N. E. 637; *Savage v. Drs. K. & K. Medical Assn.*, 59 Mich. 400, 26 N. W. 652; *Kenderline Hydro-Carbon Fuel Co. v. Plumb*, 182 Pa. St. 463, 38 Atl. 480. See also, *Chattanooga R. & C. R. Co. v. Cincinnati & C. R. Co.*, 44 Fed. 456. But compare *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400; *St. Barnabas Hospital v. Electric Co.*,

68 Minn. 254, 70 N. W. 1126, 40 L. R. A. 388. These last cases show that the nature of the contract and its subject and other circumstances may indicate that it was not intended that a party might discharge it at his option even though no time was expressly fixed for its duration. *Marble v. Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783. See also, *Tennessee Coal, Iron & R. Co. v. Pierce*, 81 Fed. 814, 26 C. C. A. 632; *Babcock & Wilson Co. v. Moore*, 62 Md. 161; *Beach v. Mullin*, 34 N. J. L. 343; *Kane v. Moore*, 167 Pa. St. 275, 31 Atl. 631; *San Antonio & A. P. R. Co. v. Sale* (Tex. Civ. App.), 31 S. W. 325.

⁶⁸ *Howard v. East Tenn. & C. R. Co.*, 91 Ala. 268, 8 So. 868; *Louisville, & C. R. Co. v. Offut*, 99 Ky. 427, 18 Ky. L. 303, 36 S. W. 181, 59 Am. St. 467, 472; *Long v. Kee*, 42 La. Ann. 899, 8 So. 610; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416; *East Line & Red River R. Co. v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. 758 (so holding but stating it is otherwise where term of service is fixed by party having option). See also, *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. 82.

ployed for a year.⁶⁹ But even though there is an implied option to terminate a contract of indefinite duration, a party should not be permitted to exercise it improperly and unjustly to the injury of the other party and at the same time escape all liability. Just what may be required in a particular case must depend largely upon the subject-matter and nature of the particular contract and the circumstances of the case. It can not ordinarily be supposed that the parties contemplated that unnecessary injury should be inflicted, and as this may be obviated or lessened by giving notice of the exercise or intended exercise of such option, reasonable notice under the circumstances may well be required.⁷⁰

⁶⁹ *Parker v. Ibbetson*, 4 C. B. (N. S.) 346.

⁷⁰ See *Chattanooga R. & C. R. Co. v. Cincinnati & C. R. Co.*, 44 Fed. 456; *Philadelphia & R. R. Co. v. River Front R. Co.*, 168 Pa. St. 357, 31 Atl. 1098. So, when a master takes advantage of his right to end at will an indefinite contract of hiring, he must pay for the time services

were rendered thereunder. *Morrison v. Ogdensburg & C. R. Co.* 52 Barb. (N. Y.) 173. See also, *Long v. Kee*, 42 La. Ann. 899, 8 So. 610. And see to effect that a partner terminating partnership at will must do so in good faith and not at an unreasonable time, *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376.

CHAPTER XLI.

PERFORMANCE.

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§ 1875. **Generally—When discharges contract.**—Full performance of a contract on both sides, of course, discharges it. So where a promise has been given upon an executed consideration and such promise is performed by the promisor in accordance with the contract, it discharges the contract. But where the contract is wholly executory, as where a promise is given for a promise, performance by one party does not discharge the contract, although it may and usually does discharge the party performing from further liability under the contract.

§ 1876. **Effects of performance by one party.**—As already intimated, performance by one party discharges him from further liability under the contract.¹ It also gives to the party performing the right to enforce the contract against the other party who has not fully performed, when

¹ This is self-evident. The following cases, however, may be consulted as furnishing good illustrations: *Palmer v. Atchison*, T. & S. F. R. Co., 101 Cal. 187, 35 Pac. 630; *Startup v. Macdonald*, 6 M. & G. 593; *Palmer v. Atchison & Co.*, 101 Cal. 178, 35 Pac. 630; *Reynolds v. Louisville & Co.*, 143 Ind. 579, 40 N. E. 410; *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182.

performance by him is due;² and if the contract has not been broken or ended by the adverse party, the party performing may so perform, even without the consent of such adverse party.³ If the party performing has done what he agreed to do, his right to enforce the contract against the other party does not depend upon the wisdom of the agreement or the extent of the benefit to such other party and the latter may be held liable, even though the performance has not benefited him as much as he had supposed it would.⁴

§ 1877. Time and place of performance.—The time and place of performance are matters depending largely upon the terms and construction of the particular contract, and this subject has already been considered. It may be said generally that, under the strict common-law rule, time is usually regarded as of the essence of the contract and attempted performance made after the time stipulated is not strictly performance in the eye of the law;⁵ but in equity the rule is more liberal and time is not now ordinarily regarded as of the essence of the contract, unless it is clear that such was the intention of the parties,⁶ and

² But where a promise is given for a promise, it is the promise and not the performance that constitutes the consideration, except where by the terms or necessary intendment of the agreement performance on one side is made a condition precedent to performance on the other. *United States &c. Mfg. Co. v. Conrad*, 80 N. J. L. 286, 78 Atl. 203, Ann. Cas. 1912a, 412.

³ *Central Coal & Coke Co. v. Good*, 120 Fed. 793, 57 C. C. A. 161; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. 112, and note. But see as to right of other party to stop performance and subject himself to damages at that stage, *Trinidad Asphalt Mfg. Co. v. Buckstaff &c. Co.*, 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710, and authorities cited in opinion and note. See also, *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. 783 and note.

⁴ *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 So. 983; *Thompson v. Searcy*, 57 Fed. 1030, 6 C. C. A. 674; *May Mantel Co. v. United States Blow-pipe Co.*, 93 Ga. 778, 21 S. E. 142; *Carroll County v. O'Conner*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *Morse v. Puffer*, 182 Mass. 423, 65 N. E. 804; *Knoch v. Von Bernuth*, 145 N. Y. 643, 40 N. E. 398; *Wallace v. Williams*, 111 Tenn. 632, 69 S. W. 267; *Perkins v. North End Bank*, 17 Wash. 100, 49 Pac. 241; *Schwede v. Heinrich*, 29 Wash. 124, 69 Pac. 643.

⁵ *Hill v. Fisher*, 34 Maine 143; *Dermott v. Jones*, 23 How. (U. S.) 220, 16 L. ed. 442.

⁶ *Fullenwider v. Rowan*, 136 Ala. 287, 34 So. 975; *Steele v. Branch*, 40 Cal. 3; *Taylor v. Baldwin*, 27 Ga. 438, 73 Am. Dec. 736; *Boldt v. Early*, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. 255; *Frink v. Thomas*, 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239 and note; *Kirchoff v. Voss*, 67 Tex.

where no time is fixed by the contract, the law usually implies that performance is to be made within a reasonable time, or, in other words, that a reasonable time is allowed, but no more.⁷

§ 1878. Substantial performance.—Under the old common-law rule, a strict performance is usually required as a condition precedent to recovery;⁸ but the modern rule is more liberal and it may now be stated as a general rule that a substantial performance in all respects in good faith is sufficient to satisfy the law.⁹ It is not meant, however, that where there is a deviation or failure to perform some part of the contract, even though in good faith, there is always a right to recover the entire contract-price. On the contrary, even where, as in building contracts, the rule is most liberal, the contract-price is reduced to that extent,¹⁰ and in some jurisdictions recovery is on the quan-

320, 3 S. W. 548. See, however, the following recent cases holding time to be of the essence though not expressly so stated: *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363; *McQuary v. Missouri Land Co.*, 230 Mo. 342, 130 S. W. 335; *Federal Trust Co. v. Coyle (Okla.)*, 126 Pac. 800.

⁷ *Cotton v. Cotton*, 75 Ala. 345; *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221n, 3 Am. & Eng. Ann. Cas. 1032; *Johnson v. Staley*, 32 Ind. App. 628, 70 N. E. 541; *Palmer v. Breen*, 34 Minn. 39, 24 N. W. 322; *Pope v. Terre Haute & C. Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Minneapolis Gas Light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300, 30 L. ed. 1190, 7 Sup. Ct. 187.

⁸ See *Farrer v. Nightingal*, 2 Esp. 639; *Duffell v. Wilson*, 1 Camp. 407; *Ellis v. Hamlen*, 3 Taunt. 52; *Norris v. School District*, 12 Maine 293, 28 Am. Dec. 182; *Dauchy v. Drake*, 85 N. Y. 407; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546, 21 Atl. 231.

⁹ *Fitzgerald v. LaPorte*, 64 Ark. 34, 40 S. W. 261; *Hill v. McKay*, 94 Cal.

5, 29 Pa. 406; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Finegan v. L'Engle*, 8 Fla. 413; *Bohrer v. Stumpff*, 31 Ill. App. 139; *Houston v. Miner*, 5 Blackf. (Ind.) 89; *Aetna Iron & C. Works v. Kossuth*, 79 Iowa 40, 44 N. W. 215; *Hattin v. Chase*, 88 Maine 237, 33 Atl. 989; *Gleason v. Smith*, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; *Phelps v. Beebe*, 71 Mich. 554; 39 N. W. 761; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Madden v. Oestrich*, 46 Minn. 538, 49 N. W. 301; *Crouch v. Gutman*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. 608; *Goldsmith v. Hand*, 26 Ohio 101; *Kane v. Ohio Stone Co.*, 39 Ohio St. 1; *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243; *Linch v. Paris Lumber Co.*, 80 Tex. 23, 15 S. W. 208; *Meincke v. Falk*, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327 and note. See also, *Hoffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323.

¹⁰ *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Hattin v. Chase*, 88 Maine 237, 33 Atl. 989; *Smith v. Packard*, 94 Va. 730, 27 S. E. 586; *Foeller v. Heintz*, 137

tum meruit not exceeding the contract-price, and in others on the quantum meruit on a quantum valebat basis.¹¹

§ 1879. Illustrative cases of substantial performance.—

As a general rule, a slight difference between the performance and the specification, or a very technical breach which causes no damages, and where the result is the same and fully as good as if there had been a literal compliance, can not be taken advantage of as inconsistent with or failing to constitute substantial performance.¹² Under a contract for delivery of a deed within six months, it has been held sufficient where the deed was delivered within such time to one authorized by the grantee to receive it or to one who, although not then so authorized, was afterwards authorized to retain it for his use.¹³ A contract for the sale of realty free from encumbrance was held to be substantially performed, even though there were encumbrances, if a release of them was obtained and duly tendered.¹⁴ A contract to devote all one's time to a certain business is substantially performed, although he may be absent for a short period of time when his presence is not necessary to the business.¹⁵ And so a contract that work shall be per-

Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327 and note. See also, *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750. Nor is it meant that a party can be compelled to accept and pay for what he did not bargain for, and the liberal rule as to building contracts does not fully obtain to the same extent at least in all jurisdictions. The reasons for the liberal rule in case of building contracts are well stated in the Wisconsin case above cited and in *Bowen v. Kimball*, 203 Mass. 364, 89 N. E. 542, 133 Am. St. 302. See also, *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.

¹² See note to *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327n; also *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. 673 and note. In the Wisconsin case, the court draws a distinction between cases in which there was substantial performance and the imperfection was remediable without any change except

the reconstruction of a minor part of a building at an outlay easily ascertainable and cases where this is not so and where the cost of remedying the imperfection is greater than the difference between the reasonable value and the contract price.

¹³ *Singer Mfg. Co. v. McClain*, 105 Ala. 316, 16 So. 912; *Morgan Park v. Gahan*, 136 Ill. 515, 26 N. E. 1085; *Crawford v. Witherbee*, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561. See also, *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *New Orleans v. Fireman's Charitable Assn.*, 43 La. Ann. 447, 9 So. 486; *Rose v. O'Riley*, 111 Mass. 57; *Oberlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999, 4 Silvernail (N. Y.) 250.

¹⁴ *Turner v. Whidden*, 22 Maine, 121.

¹⁵ *McCourt v. Johns*, 33 Ore. 561, 53 Pac. 601.

¹⁶ *Singer Mfg. Co. v. McClain*, 105 Ala. 316, 16 So. 912; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

formed under one's own personal and immediate superintendence and not by subcontract, while it calls for the personal attention of the contractor, does not require his constant presence nor preclude his employing assistance.¹⁶ A contract giving one a right to buy stock in a corporation is substantially performed by giving him an opportunity to buy such stock at the price for which it is finally sold.¹⁷ And a contract to sell land during the existence of an option thereon is substantially performed by the conveying of a valid contract for such sale, although the deeds were not executed until the option had expired.¹⁸ So a contract to convey land to a certain person has been held to be substantially performed where the contractor conveys to another person who then conveys to such first person.¹⁹ But where the contract is for conveyance by warranty deed the purchaser ordinarily has a right to insist that such deed shall be executed by his vendor.²⁰ It has also been held that a contract to consolidate two corporations and to assign all the stock of one of them is substantially performed by transferring the assets, good will and three-fourths of the stock and suppressing the competition.²¹ A contract to locate a business at a certain town is substantially performed by locating such business there in good faith, although the property and franchises are afterwards sold at judicial sale to one who moves the business.²²

¹⁶ Reed v. Conway, 26 Mo. 13.

¹⁷ Harris v. Scott, 67 N. H. 437, 32 Atl. 770.

¹⁸ Reed v. Crane, 89 Mo. App. 670.

¹⁹ Benge v. Potter, 21 Ky. L. 1380, 55 S. W. 431; Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787 (agreement to convey by quitclaim deed); O'Keefe v. Dyer, 20 Mont. 477, 52 Pac. 196.

²⁰ Crabtree v. Levings, 53 Ill. 526; George H. Paul Co. v. Shaw, 86 Kans. 136, 119 Pac. 546, 37 L. R. A. (N. S.) 1123; Steiner v. Swickey, 41 Minn. 448, 43 N. W. 376; Bigler v. Morgan, 77 N. Y. 312; Gottschalk v. Meisenheimer, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79. See also, Hussey v. Roquemore, 27 Ala. 281; Smith v. Addleman, 7 Black.

(Ind.) 119; Gaar v. Lockridge, 9 Ind. 92; Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459; Weitzel v. Leyson, 23 S. Dak. 367, 121 N. W. 868. In McVeety v. Harvey Mercantile Co. (N. Dak.), 139 N. W. 586, this is held to be the law both in the absence of any statutory provision upon the subject and under the North Dakota statute.

²¹ German Savings Institution v. Refrigerator Co., 70 Fed. 146, 17 C. C. A. 34.

²² Elizabethtown v. Chesapeake, O. & S. W. R. Co., 94 Ky. 377, 15 Ky. L. 313, 22 S. W. 609. But see Ft. Wayne Electric Light Co. v. Miller, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804; Keys v. Weaver, 95 Iowa 13, 63 N. W. 357. An agreement to

So there are many cases in which contracts to locate railroads or depots at certain places have been held performed, although there was not a literal performance.²³ A contract to haul all the wood cut upon a certain tract amounting to about eight thousand cords has been held substantially performed by hauling all but a few scattered blocks.²⁴ And a contract to place and keep fourteen hundred signs on an elevated railway was held to be substantially performed where all were kept up except twenty, and those were placed in galleries leading to a bridge and were removed and placed in temporary galleries while the other galleries were being reconstructed.²⁵

§ 1880. Illustrative cases of performance held insufficient.—In the absence of waiver, the general rule is that no recovery can be had upon a contract by one who has not at least substantially performed his part.²⁶ Even in case of building contracts where the rule of substantial performance has been most greatly liberalized, if the building is materially different from that contracted for, and an allowance out of the contract-price would not give the owner essentially what he contracted for, it can not be said that there is a substantial performance.²⁷ In a California

settle on land is substantially performed when the settlement becomes fixed. *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744, 4 Am. St. 810.

²³ See *Judson v. Gage*, 91 Cal. 304, 27 Pac. 676; *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Fort Worth & D. C. R. Co. v. Williams*, 77 Tex. 121, 13 S. W. 637; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. 846. But compare *Stevens v. Ambler*, 39 Fla. 575, 23 So. 10; *Northup v. Standifer*, 15 Ky. L. 740, 23 S. W. 348.

²⁴ *Dreer v. Goodhue*, 74 Vt. 436, 52 Atl. 971.

²⁵ *Desmond-Dunne Co. v. Friedman-Drosher Co.*, 162 N. Y. 486, 56 N. E. 995.

²⁶ *Greene v. Linten*, 7 Port. (Ala.) 133, 31 Am. Dec. 707; *Swanzy v. Moore*, 22 Ill. 63, 74 Am. Dec. 134;

Lowry v. Cooper, 21 Ind. 269; *Barr v. Henderson*, 105 La. 691, 30 So. 158; *Miller v. Goddard*, 34 Maine 102, 56 Am. Dec. 638; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Taylor v. Marcum*, 60 Minn. 292, 62 N. W. 230; *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Butt v. Williams*, (Miss.) 15 So. 130; *Omaha Consolidated & Co. v. Burns*, 44 Nebr. 21, 62 N. W. 301; *Jenning v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; *Mehurin v. Stone*, 37 Ohio St. 49; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (U. S.) 524. See also, *Craig v. Weitner*, 33 Nebr. 484, 50 N. W. 442; *Auburn Bolt & Works v. Shultz*, 143 Pa. St. 256, 22 Atl. 904.

²⁷ *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408; *Spence v. Ham*, 163 N. Y. 220, 57 N.

case, a contract to repair an old house and build an addition was held not to have been substantially performed where it appeared that no part of the second coat of paint required on the new part by the contract had been put on, that two of the doors were not hung and that there were no locks or fastenings on the front door and no fastenings on the windows, and that the house had not been delivered to the owner.²⁸ Again, where the roof was less than the required pitch and the shingles were of inferior quality and poorly laid and the siding was unsound and split, leaving holes in the roof and siding, it was held that there was no substantial performance.²⁹ Contracts to put in a steam plant or an elevator of certain capacity and the like have likewise been held not to be substantially performed where the power or capacity was much less than that specified.³⁰ A contract to build a monument has also been held not substantially performed where the dimensions were materially different from those specified.³¹ Turning to a somewhat different class of cases, we find that it has been held that a contract to obtain an assignment of a note as collateral security for one debt as further security for another is not substantially performed where an assignment is made that is invalid as to attach-

E. 412, 51 L. R. A. 238; *Braseth v. State Bank*, 12 N. Dak. 486; 98 N. W. 79; *Swain v. Seamans*, 9 Wall. (U. S.) 254, 19 L. ed. 554. See also, *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323; *Anderson v. Todd*, 8 N. Dak. 158, 77 N. W. 599; *Linch v. Paris Lumber Co.*, 80 Tex. 23, 15 S. W. 208; *Aldrich v. Wilmarth*, 3 S. Dak. 523, 54 N. W. 811.

²⁸ *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677.

²⁹ *Cornish v. Antrim & Co. Dairy Assn.*, 82 Minn. 215, 84 N. W. 724. See also, *Braseth v. State Bank*, 12 N. Dak. 486, 98 N. W. 79. But for somewhat slighter defects or deviations in building contracts held not to prevent the work being regarded as a substantial performance, see *Coen v. Birchard*, 124 Iowa 394, 100 N. W. 48; *Bergfors v. Caron*, 190 Mass.

168, 76 N. E. 655; *Hahn v. Bonacum*, 76 Nebr. 837, 107 N. W. 1001, 109 N. W. 368; *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175.

³⁰ *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Manitowoc Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543, 97 N. W. 389; *Fuller-Warren Co. v. Shurts*, 95 Wis. 606, 70 N. W. 683. See also, *Kramer v. Messner*, 101 Iowa 88, 69 N. W. 1142; *Clark v. Johnson & Co. Machine Co. (Ky.)*, 42 S. W. 844. See also, *Heine Safety Boiler Co. v. Francis*, 117 Fed. 235, 54 C. C. A. 267; *Sherman v. Conner*, 88 Tex. 35, 29 S. W. 1053 (where a system of water-works furnished only fifty thousand gallons of water a day instead of two hundred and fifty gallons as agreed).

³¹ *Cutler v. Dix*, 67 Vt. 347, 31 Atl. 780. See also, *Mehurin v. Stone*, 37 Ohio St. 49.

ing creditors, even though valid as between the parties.³² And a contract to bring suit to contest the legality of certain charges is not substantially performed by the mere bringing of the suit where it is dismissed before final judgment without the consent of the promisee.³³ Nor is a contract to form a partnership sufficiently performed by forming a corporation.³⁴ And as shown in the last preceding section, when the contract is for conveyance by warranty deed of the vendor, it is not sufficient to tender the deed of a third person.

§ 1881. Contracts to be performed "to the satisfaction" of adverse party.—Contracts which require that performance shall be "satisfactory" or "to the satisfaction" of the adverse party do not ordinarily justify him in arbitrarily, unreasonably and capriciously claiming that he is not satisfied or that the performance is not satisfactory to him in order to evade liability;³⁵ and the courts in doubtful cases, especially when the thing furnished is so attached to the real property of the buyer that its value would be lost to the seller, either wholly or in great part, unless paid for, are inclined to construe such a stipulation as one to furnish such a thing as ought reasonably to satisfy the buyer.³⁶ But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must

³² First National Bank v. Park, 117 Iowa 552, 91 N. W. 826.

³³ Dougherty Co. of Baltimore County v. Gring, 89 Md. 535, 43 Atl. 912.

³⁴ Knottsville Roller Mill Co. v. Mattingly, 18 Ky. L. 246, 35 S. W. 1114.

³⁵ Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Lockwood Mfg. Co. v. Regulator Co., 183 Mass. 25, 66 N. E. 420; Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. 398; Livesley v. Johnston, 45 Ore. 30, 76 Pac. 13, 946, 106 Am. St. 647. See also, Lillenthal v. Stearns, 121 Fed.

197; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. Some courts, however, go very far toward allowing an arbitrary refusal to approve and preclude inquiry as to good or bad faith. See Vol. II, Ch. XXXVI, §§ 1603, 1605; also Vol. IV, Tit. "Building, Construction and Working Contracts."

³⁶ McNeil v. Armstrong, 81 Fed. 943, 27 C. C. A. 16; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. 422; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; Richison v. Mead, 11 S. Dak. 639, 80 N. W. 131.

act in good faith, and if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him.³⁷ This rule is particularly applicable where the subject-matter of the contract involves personal taste or feeling, as where an artist agrees to paint a portrait of another, or some member of his family, to the satisfaction of such other or the like,³⁸ but, as shown by the authorities cited in the last preceding note, the rule is not confined to such cases.

§ 1882. Illustrative cases of performance held insufficient under such contracts.—It has been held that a contract for personal services, so long as they are satisfactory to the employer, may be terminated by him whenever he is dissatisfied in good faith.³⁹ But while this is true, it does not justify an employer in discharging an employé who is employed permanently as long as his services are satisfactory where such discharge is for some other reason than that of satisfaction.⁴⁰ The general rule has been applied in somewhat similar cases of employment in which

³⁷ *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153; *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737, 100 N. W. 860; *Haney-Campbell Co. v. Preston Primary Assn.*, 119 Iowa 188, 93 N. W. 297; *Hollingsworth v. Colthurst*, 78 Kans. 455, 96 Pac. 851, 18 L. R. A. (N. S.) 741n, 130 Am. St. 382; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Magée v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781; *Adams Radiator & C. Works v. Schnader*, 155 Pa. St. 394, 26 Atl. 745, 25 Am. St. 893; *Pormann v. Walsh*, 97 Wis. 356, 72 N. W. 881, 65 Am. St. 125. See also, *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 So. 983; *Allen v. Compress Co.*, 101 Ala. 574, 14 So. 362; *Bush v. Kall*, 2 Colo. App. 48, 2 Pac. 919; *May v. Hoover*, 112 Ind. 455, 14 N. E. 472; *Campbell Preserve Co. v. Holcomb*, 67 Kans. 48, 72 Pac. 552; *Sax v. Detroit G. H. & M. R. Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572; *Cann v. Rector & C. of Church of Redeemers*, 111 Mo. App. 164, 85

S. W. 994. See also, *Campbell Printing Press Co. v. Thorp*, 36 Fed. 414, 1 L. R. A. 645.

³⁸ *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *McNeil v. Armstrong*, 81 Fed. 943, 27 C. C. A. 16; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Pennington v. Howland*, 21 R. I. 65, 41 Atl. 891, 79 Am. St. 774.

³⁹ *Daniels v. Decatur Co.*, 99 Iowa 440, 68 N. W. 718; *Frary v. American Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Rossiter v. Cooper*, 23 Vt. 522; *Evans v. Bennett*, 7 Wis. 404.

⁴⁰ *Sax v. Detroit & C. R. Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572. Compare generally, *Pennsylvania R. Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, and note, 57 Am. St. 488. See also, *Louisville, N. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 59 Am. St. 467; *Tyler v. Ames*, 6 Lans. (N. Y.) 280.

the amount of wages is left to the decision of the employer, and it is held in such cases that the employer, acting in good faith, is the sole judge.⁴¹ Similar rulings have been made in cases of contracts to manufacture or furnish articles to the satisfaction of the other party, even though a reasonable man would or ought to have been satisfied.⁴² So it has been held under contracts for the sale of land providing that the vendor should furnish an abstract showing satisfactory title that the vendee is the party to be satisfied and that it is not sufficient, even if the title is good, if it does not satisfy the vendee acting in good faith.⁴³

§ 1883. Illustrative cases of performance held sufficient under such contracts.—On the other hand, a contract to finish woodwork in the best workmanlike manner, to the entire satisfaction of the owner, has been held sufficiently performed by doing the work in a good and workmanlike manner.⁴⁴ And where a machine was purchased with a special guarantee that it would do good work and give general satisfaction, it was held that the defendant in an action to recover the value thereof was not entitled to an instruction that if it did not give satisfaction to him the jury should find in his favor, regardless of the fact as to

⁴¹ Taylor v. Brewer, 1 M. & S. 290; Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277; Blaine v. Knapp, 140 Mo. 241, 41 S. W. 787; Howe v. Kenyon, 4 Wash. 677, 30 Pac. 1058.

⁴² Campbell Printing Press Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645; McCarren v. McNulty, 7 Gray (Mass.) 139; Plano Mfg. Co. v. Ellis, 68 Mich. 101, 35 N. W. 841; Wood & Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Adams Radiator & Works v. Schnader, 155 Pa. St. 394, 26 Atl. 745, 25 Am. St. 893; Singerly v. Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207; McClure v. Briggs, 58 Vt. 87, 2 Atl. 583, 56 Am. Rep. 557; Barrett v. Coke Co., 51 W. Va. 416, 41 S. E. 220, 90 Am. St. 802.

⁴³ Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; Stotts v. Miller, 128 Iowa 633, 105 N. W. 127; Hollingsworth v. Colthurst, 78 Kans. 455, 96 Pac. 851, 130 Am. St. 382, 18 L. R. A. (N. S.) 741n; Gilson v. Cambridge Sav. Bank, 180 Mass. 444, 62 N. E. 728; Mullally v. Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. 613; Averett v. Lipscombe, 76 Va. 404. But see Moot v. Business Men's Inv. Assn., 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. 634.

⁴⁴ Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. 398.

whether or not the machine was defective or did or did not do good work.⁴⁵ So a contract to do good work to the satisfaction of the adverse party has been held to be performed when done in a proper manner and so that he clearly ought to have been satisfied.⁴⁶ And there are many cases not involving personal taste or feeling in which it is said: "When a contract is required to be performed to the satisfaction of one of the parties, the meaning necessarily is that it must be done in a manner satisfactory to the mind of a reasonable man." "That which the law shall say a contracting person ought to be satisfied with, that the law will say he is satisfied with."⁴⁷

§ 1884. Contracts to be performed to the satisfaction of a third party.—The general rule is the same where an article is to be approved by or performance made satisfactory to some third person. It is an implied condition that such third person shall act in good faith as to both of the contracting parties and the want of it may dispense with the condition requiring his approval.⁴⁸ But mere error or mistake of judgment will not vitiate his determination, as, in the absence of fraud, or bad faith, or such gross mistake as would imply bad faith or failure to exercise an honest judgment, his action in the premises is conclusive.⁴⁹ Substantial performance may, however, justify re-

⁴⁵ May v. Hoover, 112 Ind. 455, 14 N. E. 472.

⁴⁶ McNeil v. Armstrong, 81 Fed. 943, 27 C. C. A. 16; Sloan v. Hayden, 110 Mass. 141; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. 422; Smith v. Robson, 148 N. Y. 252, 42 N. E. 677. See also, Olson v. Snake River Val. R. Co., 22 Wash. 139, 60 Pac. 156.

⁴⁷ Richison v. Mead, 11 S. Dak. 639, 80 N. W. 131, citing Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248, and Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469. See also, Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709.

⁴⁸ Baltimore & O. R. Co. v. Bryden, 65 Md. 198, 611, 3 Atl. 306, 9

Atl. 126, 57 Am. Rep. 318. See also, Badger v. Kerber, 61 Ill. 328; Arnold v. Bournique, 144 Ill. 132, 33 N. E. 530, 20 L. R. A. 493, 36 Am. St. 419; Cook County v. Harms, 108 Ill. 161.

⁴⁹ See also Sharpe v. San Paulo R. Co., L. R. 8 Ch. App. 597; Martinsburg & C. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. 1035; McAuley v. Carter, 22 Ill. 53; Flint v. Gibson, 106 Mass. 391; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Williams v. Chicago & C. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403; Nofsinger v. Ring, 71 Mo. 149, 36 Am. Rep. 456. But compare Baltimore O. & C. R. Co. v. Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. 307.

covery where the approval or certificate of such third person is arbitrarily and unjustly withheld.⁵⁰

§ 1885. Contract for alternative performance.—Where a contract is in the alternative, that is, where it is for the doing of one or the other of two things, the right to choose the one of such things that shall be done in order to perform the contract is ordinarily with the promisor up to the time of the breach.⁵¹ But after breach, or after the time of performance, the promisor loses his right of election.⁵² And it has been held that where the promisor has a right to discharge his obligation within a certain time by either conveying certain property or paying a certain sum of money, and he does neither within such time, the promisee acquires the right of election.⁵³

§ 1886. Contract for something other than money at election of promisor.—It is a general rule that where a party is allowed to pay or make satisfaction in either of two ways, he may elect the same.⁵⁴ According to the weight of authority, a contract to pay a certain sum of

⁵⁰ *Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A. (N. S.) 774; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129; *Mahoney v. Rector &c. of St. Paul's Church*, 47 La. Ann. 1064, 17 So. 484; *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661; *Thomas v. Stewart*, 132 N. Y. 580, 30 N. E. 577; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Norfolk & W. R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556. See generally Vol. IV, Tit. "Building, Construction and Working Contracts" and Vol. II, Ch. XXXVI, §§ 1601, 1602. See also, as to effect upon contract obligation, of failure of third person to take action essential to performance, note to *Danenhower v. Hayes*, 35 App. D. C. 65, 33 L. R. A. (N. S.) 698.

⁵¹ *Kramer v. Ewing*, 10 Okla. 357, 61 Pac. 1064; *Duke v. Griffith*, 13 Utah 361, 45 Pac. 276; *Patchin v. Swift*, 21 Vt. 292; *Dessert v. Scott*, 58 Wis. 390, 17 N. W. 14. See also,

Plowman v. Riddle, 7 Ala. 775; *Hoys v. Tuttle*, 8 Ark. 124, 46 Am. Dec. 309; *Marlor v. Texas &c. R. Co.*, 21 Fed. 383, affd. 123 U. S. 687, 31 L. ed. 303, 8 Sup. Ct. 311; *Mettler v. Moore*, 1 Blackf. (Ind.) 342.

⁵² *Mueller v. Pels*, 192 Ill. 76, 61 N. E. 472; *Kramer v. Ewing*, 10 Okla. 357, 61 Pac. 1064.

⁵³ *Phillips v. Cornelius* (Miss.), 28 So. 871. And the agreed sum is payable in money. *McGillin v. Bennett*, 132 U. S. 445, 33 L. ed. 422, 10 Sup. Ct. 122. See also, *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *Pratt v. Graff*, 15 Ind. 1; *Wyman v. Winslow*, 11 Maine 398, 26 Am. Dec. 542; *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485; *Smith v. Coolidge*, 68 Vt. 516, 35 Atl. 432, 54 Am. St. 902.

⁵⁴ *Layton v. Pearce*, 1 Dougl. 15; *Tielens v. Hooper*, 5 Exch. 830; *Reed v. Kilburn Co-Operative Soc.*, L. R. 10 Q. B. 264; *Elkins v. Parkhurst*, 17 Vt. 105.

money to be discharged by delivering goods or the like at a designated value gives the debtor the right of election up to the time of payment.⁵⁵ And before breach, a creditor can not elect and enforce payment in money.⁵⁶ But upon breach of the contract, the creditor will usually be entitled to enforce payment in money.⁵⁷ And where a contract gave a party the option to deliver a certain amount in bonds of a corporation or to pay the amount in money within a certain time, the delivery of an order upon the treasurer of the company for certain bonds was held not a sufficient performance, where the corporation had not yet issued the bonds and the capital invested in the corporate business is very small, and it was held that the other party was entitled to demand payment in cash.⁵⁸ But some courts hold that such a contract is one merely to deliver chattels and construe the valuation in money as merely for the purpose of determining the amount of chattels which the debtor is to deliver, and in such jurisdictions it is held that the debtor has no election before a breach

⁵⁵ *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305; *Sims v. Cox*, 40 Ga. 76, 2 Am. Rep. 560; *Owen v. Barnum*, 2 Gilm. (Ill.) 461; *Leiter v. Emmons*, 20 Ind. App. 22, 50 N. E. 40; *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302. See also, *Harris v. Baker*, 1 Root (Conn.) 220; *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *Pinney v. Gleason*, 5 Wend. (N. Y.) 393, 21 Am. Dec. 223; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Choice v. Moseley*, 1 Bailey L. (S. Car.) 136, 19 Am. Dec. 661.

⁵⁶ *Ragland v. Wood*, 71 Ala. 145, 46 Am. Rep. 305; *Farmers Loan & Trust Co. v. Canada & C. R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740n; *Nipp v. Diskey*, 81 Ind. 214, 42 Am. Rep. 124; *American Gas Co. v. Wood*, 90 Maine 516, 38 Atl. 548, 43 L. R. A. 449; *Pierce v. Marple*, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. 808. See also, *Allen v. Wall*, 7 Wash. 316, 35 Pac. 65, where the purchaser of a printing establishment contracted to pay a certain amount in printing and the court held that the seller could not enforce the collec-

tion of such amount in cash, since a profit presumably attached to the printing and to enforce payment of the amount in cash would, or at least might, be equivalent to compelling the purchaser to pay more than he agreed to pay for the plant.

⁵⁷ *Hannan v. Anderson*, 15 Colo. App. 433, 62 Pac. 961; *Crowl v. Goodenberger*, 112 Mich. 683, 71 N. W. 485; *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425; *Haskins v. Dern*, 19 Utah 89, 56 Pac. 953; *McGillen v. Bennett*, 132 U. S. 445, 33 L. ed. 422, 10 Sup. Ct. 122; *Smith v. Coolidge*, 68 Vt. 516, 35 Atl. 432, 54 Am. St. 902. See also, *Schnier v. Fay*, 12 Kans. 184; *Gray v. White*, 108 Mass. 228; *Edwards v. McKee*, 1 Mo. 123, 13 Am. Dec. 474; *Grieve v. Annin*, 6 N. J. L. 461.

⁵⁸ *Barrett v. Twin City Power Co.*, 118 Fed. 861, affd. 126 Fed. 302, 61 C. C. A. 288. See also, *Patent Tile Co. v. Stratton*, 89 Fed. 174; *Texas & P. R. Co. v. Marlbor*, 123 U. S. 687, 31 L. ed. 303, 8 Sup. Ct. 311.

to pay in money and that after breach the creditor can not recover the value in money, but is restricted to damages for nondelivery of the articles as agreed.⁵⁹ So where the contract is to deliver certain goods, to do certain work, or the like, for a consideration agreed upon, but no money value for such consideration is estimated, the debtor has no right of election.⁶⁰ And even if the consideration is estimated at a money value, a contract by which the creditor agrees to accept goods in payment may be so worded as to give the debtor no election.⁶¹

§ 1887. Performance is usually a question of fact.—The question as to whether or not the contract has been performed is usually a question of fact.⁶² But it may in some instances be a question of law, or, at least, so clear under the evidence that the court will not permit a verdict contrary to the evidence to stand. In a recent Kentucky case the court says that where the evidence is such as to leave it in doubt or to be determined from conflicting evidence, whether the performance of a contract was substantial, and whether any departure was material or merely trivial, is for the jury, who may determine the fact largely by the standard of their own common sense and experience, but where the evidence shows without dispute that the work or the article furnished was not substantially in accordance with the contract, but was mate-

⁵⁹ Johnson v. Dooley, 65 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74; Mattox v. Craig, 2 Bibb (Ky.) 584; Cole v. Ross, 9 B. Mon. (Ky.) 393, 50 Am. Dec. 517; Wilson v. George, 10 N. H. 445. See also, McDonald v. Hodge, 5 Hayw. (Tenn.) 85.

⁶⁰ Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58; Butler v. Baker, 5 Ohio St. 584.

⁶¹ Barbour v. Hickey, 2 App. D. C. 207, 24 L. R. A. 763; Morgan v. East, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558; Cleveland & P. R. Co. v. Kelley, 5 Ohio St. 180.

⁶² Lincoln v. Orthwine, 120 Fed. 880, 57 C. C. A. 540; Pitcairn v. Philip Hiss Co., 113 Fed. 492, 51 C.

C. A. 323; United States Wind-Engine & Pump Co. v. Manufacturers' Automatic Sprinkler Co., 84 Mo. App. 204; Charley v. Potthoff, 118 Wis. 258, 95 N. W. 124. Thus, the question whether a building contract has been substantially performed is generally one of fact. Fitzgerald v. LaPorte, 64 Ark. 34, 40 S. W. 261; Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626; Loh v. Broadway Realty Co., 77 N. J. L. 112, 71 Atl. 112; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Russell v. Iredell County, 123 N. Car. 264, 31 S. E. 717; Hulst v. Benev. Hall Assn., 9 S. Dak. 144, 68 N. W. 200.

rially different, the trial court should instruct the jury to so find and not permit a verdict to stand which found that the contract was substantially performed.⁶³

§ 1888. Waiver.—The question of waiver as a discharge of a contract or some condition therein has already been considered in the chapter on Discharge by Agreement, but it may be said in this connection that a party may waive performance so as to preclude himself from taking advantage of the failure to perform in the manner, time or the like stipulated in the contract.⁶⁴ And where the performance or fulfilment of a condition by any party is prevented by the other, the latter is ordinarily precluded from taking advantage of such nonperformance.⁶⁵ But in order to constitute a waiver, the general rule is that the party against whom such waiver is claimed must have had knowledge of what was done and in what respect the other party had failed to perform, and a waiver of one stipulation or condition of the contract is not necessarily a waiver of other stipulations, at least where they are independent.⁶⁶

⁶³ *Nance v. Patterson Building Co.*, 140 Ky. 564, 131 S. W. 484, 140 Am. St. 398. See also, *Rochkind v. Jacobson*, 126 App. Div. (N. Y.) 357, 110 N. Y. S. 583. And compare *Swain v. Seamans*, 9 Wall. (U. S.) 254, 19 L. ed. 554.

⁶⁴ See *Westerveldt v. Huiskamp*, 101 Iowa 196, 70 N. W. 125; *Boone v. Templeton*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. 126; *Moore's Estate*, 8 Pa. St. 84. See also, *King v. Wilson*, 6 Beav. 124, 49 Eng. Reprint 772; *Defenbaugh v. Weaver*, 87 Ill. 132; *Morse v. Moore*, 83 Maine 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. 783. See and compare

Stonega Coke & Coal Co. v. Addington, 112 Va. 807, 73 S. E. 257, 37 L. R. A. (N. S.) 969 and note.

⁶⁵ *Mackay v. Dick*, 6 App. Cas. 251; *Smyth v. Craig*, 3 Watts & Serg. (Pa.) 14, *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46, 15 Ct. Cl. (U. S.) 622; *Ketchum v. Zeilsdorff*, 26 Wis. 514. See also, *McPherson v. Walker*, 40 Ill. 371.

⁶⁶ *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714. See also, *Pence v. Langdon*, 99 U. S. 578; *Supreme Tribe v. Lennert* (Ind.), 98 N. E. 115. But compare *Thomas, Huycke Martin Co. v. Gray*, 94 Ark. 9, 125 S. W. 659, 140 Am. St. 93.

CHAPTER XLII.

IMPOSSIBILITY OF PERFORMANCE—IMPOSSIBLE CONTRACT GENERALLY.

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§ 1890. **Impossibility—Generally.**—Perhaps the only contracts that are impossible in the true sense are those in which the consideration is impossible. A distinction must be drawn between impossibility of consideration and impossibility of performance. If the consideration for the promise is obviously and absolutely impossible of performance and such fact is apparent upon the face of the contract and is known to the parties, the consideration is unreal and will not support the contract.¹ "If the covenant

¹ Lord v. Tyler, 14 Pick. (Mass.) 156. (Rule that impossible condition is inoperative applies to a condition precedent of bringing adverse suit when no such remedy existed.) To same effect, LeRoy v. Jacobosky, 136 N. Car. 443, 48 S. E. 796, 67 L.

R. A. 977 (contract entered into on April 28th to convey land on April 23d of the same year). See also, Harvey v. Gibbons, 2 Lev. 161; Kline v. Royal Ins. Co., 192 Fed. 378, 388. See, however, Blome v. Wahl-Henins Institute of Ferment-

be within the range of possibility, however absurd or impossible the idea of execution may be, it will be upheld. * * * To bring the case within the rule of dispensation, it must appear that the thing to be done can not by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible."² Mere impossibility of performance of the consideration by the individual promisor does not necessarily relieve such promisor from his liability on the contract.³

§ 1891. The general rule.—The general doctrine that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do, is well settled.⁴ As a man consents to bind himself so shall he be bound.⁵ Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction, founded on the absolute and unqualified term of the promise, that the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship.⁶ It must be borne in mind,

olgy, 150 Ill. App. 164, which holds that where one party promises to accomplish a given result or do a piece of work, knowing it to be impossible, he is none the less liable to pay damages for not doing it.

² *Supt. of Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.

³ Inability to perform is not synonymous with impossibility of performance. See *Bates Mach. Co. v. Norton Iron Works*, 113 Ky. 372, 25 Ky. L. 931, 68 S. W. 423.

⁴ This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane*, Aleyn 26, is that, as against such contingencies, the party could have provided by the contract. *Lorillard*

v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113. See *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Budgett v. Binnington* (1891), 1 Q. B. 35; *Paradine v. Jane*, Aleyn, 26; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Hanthorn v. Quinn*, 42 Ore. 1, 69 Pac. 817; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (U. S.) 524.

⁵ *Broom Leg. Max.* *690. See also, *Costa v. Cranford Tp.*, 75 N. J. L. 542, 68 Atl. 160; *Clifford v. Watta*, L. R. 5 C. P. 577; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *Reid v. Alaska Packing Assn.*, 43 Ore. 429, 73 Pac. 337.

⁶ *Vyse v. Wakefield*, 6 M. & W. 442; *Makin v. Watkinson*, L. R. 6 Ex. 25; *James v. Morgan*, 1 Lev. 111; *Indiana B. & W. R. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5;

however, that it is equally well settled that when performance depends on the existence of a given person, purpose or thing and such existence or continued existence was assumed as the basis of the agreement, the death of the person or the destruction or nonexistence of the thing without fault puts an end to the obligation.⁷ Thus, an obligation in a contract providing for the organization of a corporation, and that defendant shall have the management thereof, and in consideration shall guarantee plaintiff a dividend of not less than seven per cent. per annum for seven years, terminates *prima facie* with the dissolution of the corporation.⁸ A contract for space in a department store was held subject to the implied condition of the continued existence of the building, and on the total destruction thereof was terminated and plaintiff was not entitled to an allotment of space in another building in which defendant obtained a new location.⁹ Likewise it has

Chapman v. Clements, 22 Ky. L. 17, 56 S. W. 646; Phillips v. Stevens, 16 Mass. 238; Switzer v. Pinconning Lumber Co., 59 Mich. 488, 26 N. W. 762; Vicksburg Water Supply Co. v. Gorman, 70 Miss. 360, 11 So. 680; Riley-Wilson Grocer Co. v. Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Sauner v. Phoenix Ins. Co. of Brooklyn, 41 Mo. App. 480; Harrison v. Missouri Pacific R. Co., 74 Mo. 364, 41 Am. Rep. 318; White v. Missouri Pacific R. Co., 19 Mo. App. 400; Fulkerson v. Eads, 19 Mo. App. 620; Wood v. Malone, 131 Pa. St. 554, 18 Atl. 984; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. 779. See also, Thornborow v. Whitacre, 2 Ld. Raym. 1164.

⁷Taylor v. Caldwell, 3 B. & S. 826; Appleby v. Myers, L. R. 2 C. P. 651; Western Hardw. & Mfg. Co. v. Bancroft-Charney Steel Co., 116 Fed. 176, 53 C. C. A. 548; Martin Emerich Outfitting Co. v. Siegel, 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114; Bruce v. Indianapolis Gas Co., 46 Ind. App. 193, 92 N. E. 189; Johnson v. Lyon, 75 Mich. 477, 42 N. W. 993 (contract to pay \$25,000.00 for interest in business "not later than the time set

by the Supreme Court" for the payment of a certain judgment. The Supreme Court reversed the judgment. It was held parties contracted upon the basis of the continued existence of the judgment and performance was excused). Nordyke & Marmon Co. v. Kehlor, 155 Mo. 643, 78 Am. St. 600, 56 S. W. 287; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; People v. Globe Mut. Life Ins. Co., 91 N. Y. 174, 64 How. Pr. (N. Y.) 485. See also, Dixon v. Breon, 22 Pa. Super. Ct. 340 (in which one who agreed to cut and deliver certain standing timber was relieved from performance by an uncontrollable forest fire). This rule has no application, however, where the thing destroyed is that which one of the parties expressly contracted to construct and deliver. Logan v. Consolidated Gas Co., 107 App. Div. (N. Y.) 384, 95 N. Y. S. 163. As pointing out the same distinction, see Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90.

⁸Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113.

⁹Martin Emerich Outfitting Co. v. Siegel, 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114. See also, Western Hardware & Co. v. Ban-

been held that an agreement to pay all assessments and premiums on a certain life insurance policy contemplated the continued existence of that particular contract of insurance and made the existence of that contract an implied condition of performance, and the insolvency of the insuring company and the assumption of its obligations by another company created an entirely different contract which relieved the obligor from his liability to pay premiums and assessments.¹⁰ And most contracts for personal services which can be performed only by the party contracting are subject to the implied condition that the party contracting to perform shall continue in health, and performance is excused upon his incapacity from illness to perform.¹¹ Nor does any liability in such a case attach for failure to perform.¹² Cases of this character do not, however, constitute an exception to the general rule above stated. The courts merely, in accordance with the manifest intention of the parties, construe the contract as subject to an implied condition that the person or thing to which the contract relates should be and continue in existence when the time of performance arrives.¹³

§ 1892. Impossibility by act of God.—Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightning, earthquakes, sudden deaths and even illnesses have been held to be acts of God.¹⁴ The agency of God excludes all idea of human

croft Charnley Steel Co., 116 Fed. 176, 53 C. C. A. 548 (where defendant's iron mill was destroyed by fire).

¹⁰ Meritt v. Haas, 113 Minn. 219, 129 N. W. 379.

¹¹ Robinson v. Davison, L. R. 6 Exch. 268 (illness on part of piano player); Boast v. Firth, L. R. 4 C. P. 1 (illness on part of apprentice); Caden v. Farwell, 98 Mass. 137 (apprentice); Powell v. Newell, 59 Minn. 406, 61 N. W. 335 (contract on part of doctor to treat patient held revocable by patient when doctor became ill and unable to fulfill agreement).

¹² Dickey v. Linscott, 20 Maine 453, 37 Am. Dec. 66; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Clark v. Gilbert, 26 N. Y. 279; 84 Am. Dec. 189; Fahy v. North, 19 Barb. (N. Y.) 341. So if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused. Jones v. Judd, 4 N. Y. 411. See also, cases cited in note 13.

¹³ Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. See also cases cited in note 12.

¹⁴ Boast v. Firth, L. R. 4 C. P. 1

agency.¹⁵ The act of God is in some cases said to excuse the breach of a contract; but this is in fact an inaccurate expression. All that is meant is that the accident called "act of God" was not within the contract.¹⁶ The general rule is that, where an obligation or a duty is imposed upon a person by law, he will be absolved from liability for non-performance of the obligation, if such nonperformance was occasioned by an act of God; but when one undertakes by an express contract to do a given act, he is not absolved from liability for nonperformance, even though he is prevented from doing the same by an act of God. In the latter class of cases, if a person desires to absolve himself from liability for nonperformance under any circumstances, he should so stipulate in his contract.¹⁷ Where

(illness); *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708 (high wind held under circumstances not act of God); *Wolfe v. Howes*, 24 Barb. (N. Y.) 174, 666 affd. 20 N. Y. 197, 75 Am. Dec. 388, *Allen v. Baker*, 86 N. Car. 91, 41 Am. Rep. 444 (sickness relieving from breach of marriage promise); *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62 (sickness); *International & G. N. R. Co. v. Bergman* (Tex.), 64 S. W. 999 (unprecedented storm); *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859; *Fenton v. Clark*, 11 Vt. 557; *Sanders v. Coleman*, 97 Va. 690, 34 S. W. 621, 47 L. R. A. 581 (illness excusing breach of marriage promise). That illness is not an act of God, see *Ringeman v. State*, 136 Ala. 131, 34 So. 351. And compare also, *Davidson v. Gaskill* (Okla.), 121 Pac. 649.

¹⁵ *Central of Georgia R. Co. v. Hall*, 124 Ga. 322; 52 S. E. 679, 4 L. R. A. (N. S.) 898. See the above case for a discussion of insanity and illness as an act of God.

¹⁶ *Baily v. De Crespigny*, L. R. 4 Q. B. 180. See *Canham v. Barry*, 15 C. B. 597, where the court said that a man might, by apt words, bind himself that it shall rain tomorrow, or that he will pay damages. See *Mayor of Berwick Upon Tweed v. Oswald*, 3 E. & B. 653,

where the court said: "There is nothing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law."

¹⁷ *Nichols v. Marsland*, L. R. 2 Ex. Div. 1; *Wear Commissioners v. Adamson*, L. R. 1 Q. B. Div. 546; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Central Trust Co. v. Wabash R. Co.*, 31 Fed. 440; *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. 872; *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232; *Oakland Electric Co. v. Union Gas & Electric Co.*, 107 Maine, 279, 78 Atl. 288; *Adams v. Nichols*, 19 Pick. (Mass.) 275; 31 Am. Dec. 137; *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. 642; *Superintendent &c. of Schools v. Bennet*, 27 N. J. L. 513, 72 Am. Dec. 373; *Mutual &c. Assn. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Harmony v. Bingham*, 12 N. Y. 99; 62 Am. Dec. 142 and note; *Smoot's Case*, 15 Wall. (U. S.) 36, 21 L. ed. 107, 8 Ct. Cl. (U. S.) 96. "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party by his own contract

one employed to teach in a public school for a certain time is able and willing to teach during that time, the fact that the school was necessarily closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, does not deprive the teacher of the right to compensation for the entire time, since such closing of the schools is not caused by the act of God.¹⁸ On the other hand, it has been held that sickness will not excuse the nonperformance of a contract to finish carpenter work on a building by a certain day.¹⁹

§ 1893. Contracts excepting acts of God.—In the absence of any contract by which a railroad limits its common-law liability, it becomes an insurer of goods delivered to it for transportation against all risks except those caused by the act of God or the public enemy,²⁰ and this is the

creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine v. Jane*, *Allyn* 26. To same effect, but adding that this rule does not apply where the impossibility is caused by a change in the law or action taken under governmental authority, see *Adler v. Miles*, 69 *Misc.* (N. Y.) 601; 126 N. Y. S. 135. "An act of God will excuse the non-performance of a duty created by law; it will not excuse a duty created by contract." *Mitchell v. Hancock County*, 91 *Miss.* 414, 45 *So.* 571, 15 *L. R. A.* (N. S.) 833n, 124 *Am. St.* 706. See also, *Davidson v. Gaskill* (Okla.), 121 *Pac.* 649; *Contra Singleton v. Carroll*, 6 *J. J. Marsh* (Ky.) 527, 22 *Am. Dec.* 95; *Smith v. Durell*, 16 *N. H.* 344, 41 *Am. Dec.* 732; *Parker v. Macomber*, 17 *R. I.* 674, 24 *Atl.* 464, 16 *L. R. A.* 858. See also, *Doster v. Brown*, 25 *Ga.* 24, 71 *Am. Dec.* 153; *Board of Education v. Townsend*, 8 *Ohio C. Dis.* 732, 15 *Ohio Cir. Ct.* 674; *Janes v. Scott*, 59 *Pa. St.* 178, 98 *Am. Dec.* 328; *Asplund v. Mattson*, 15 *Wash.* 328, 46 *Pac.* 341. This rule may be changed by statute. This statute is merely de-

claratory of the civil law. *Romero v. Newman*, 50 *La. Ann.* 80; 23 *So.* 493.

¹⁸ *Carthage v. Gray*, 10 *Ind. App.* 428, 37 *N. E.* 1059. Compare with *School Dist. No. 16 v. Howard*, 5 *Nebr.* (Unof.) 340, 98 *N. W.* 666, in which recovery was not permitted on the ground of impossibility caused by law.

¹⁹ *Cassady v. Clarke*, 7 *Ark.* 123. See further on the impossibility by act of God under the subsequent subheads of this chapter.

²⁰ *Gregory v. Wabash R. Co.*, 46 *Mo. App.* 574; *Park v. Preston*, 108 *N. Y.* 434, 15 *N. E.* 705; *Merritt v. Earle*, 29 *N. Y.* 115, 86 *Am. Dec.* 292; *Cormack v. New York, N. H. & H. R. Co.*, 196 *N. Y.* 442; 90 *N. E.* 56, 24 *L. R. A.* (N. S.) 1209n. See *Bank of Kentucky v. Adams Express Co.*, 93 *U. S.* 174, 23 *L. ed.* 872, where the court said: "The duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to perform his duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God." For a discussion of the meaning of the term "act of God" see *Nugent v. Smith*, *L. R.* 1 *C. P. Div.* 423. This rule, however, is recognized by all the authorities

rule with regard to all common carriers. In the absence of an express stipulation to the contrary, common carriers are responsible for all loss save that caused by act of God and the public enemy.²¹ The contract of longshoremen, bargemen, lightermen, canal-boatmen and boatmen of every description, who engage in the business of carrying goods indifferently for all who may employ them, is, in the absence of an express contract regulating the terms, subject by the common law to the same implied liabilities and exceptions as that of a common carrier by land.²² And ferrymen, proprietors of land vehicles, like stage coaches, water craft, express companies, and in fact all persons who make it a business to carry for hire the goods of such as choose to employ them, no matter what the method of carriage is, are common carriers, and liable as such.²³

§ 1894. Events exempting carrier.—A landslide in a railway cut, caused by an ordinary fall of rain, is not “an

as being subject to certain limitations. In *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432, it was declared that the liability of a common carrier was at an end “if the owner of the goods himself receives them short of the place of destination, or if they are not delivered by the fault of the owner; or that they have been taken from the carrier by title paramount, and, lastly, that they have been taken from him by legal process. He has not lost the goods; they have not been stolen or been destroyed, but his undertaking as a carrier has been determined.” *Southern Express Co. v. Sotille Bros.*, 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139n.

²¹ *Elliott R. R.*, § 1454 et seq. showing loss caused by act of public authority, and by act of shipper himself, and loss arising from inherent nature of the goods, to be excepted from the carrier's common-law liability. *Hardman v. Montana Union R. Co.*, 83 Fed. 88, 27 C. C. A. 407, 38 L. R. A. 300. See also, *Compania De Navigacion La Flecha v.*

Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. 12.

²² *Hutchinson Carriers* (2d ed.) § 58a, citing *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *DeMott v. Laraway*, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; *Humphreys v. Reed*, 6 Whart. (Pa.) 435; *Fuller v. Bradley*, 25 Pa. St. 120.

²³ *Hutchinson Carriers*, (2d ed.), § 59. See the following cases: *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Parmelee v. McNulty*, 19 Ill. 556; *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276; *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; *Levi v. Lynn & C. R. Co.*, 11 Allen (Mass.) 300, 87 Am. Dec. 713; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; and see, also, *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

act of God" which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway.²⁴ So, also, a fire which originated in the battery room of a hotel is not "an act of God" absolving an innkeeper from liability.²⁵ But a snow-storm of such violence as to prevent the moving of trains is an act of God.²⁶ And a furious wind which blows a car from the track is "an act of God," and the carrier is not liable if the car took fire and burned from a stove or lamp after it has been turned over by the wind.²⁷ This is also true of an unprecedented storm,²⁸ or an extraordinary flood,²⁹ and the flood may be extraordinary without necessarily being unprecedented.³⁰ And the occurrence of such a flood in each of two preceding years does not deprive a flood of its "extraordinary character,"³¹ but precautions must be taken against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year.³² The fall of a sign caused by

²⁴ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859.

²⁵ *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943.

²⁶ *Briddon v. Great Northern R. Co.*, 28 L. J. Ex. 51; *Ballentine v. North Mo. R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 257; *Black v. Chicago, B. & Q. R. Co.*, 30 Nebr. 197, 46 N. W. 428; *Cormack v. New York, N. H. & H. R. Co.*, 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, and note citing many cases. (The above case had to do with the delay of a passenger on account of a heavy snow storm.) A snow slide which struck and derailed a train at a point where one had never been known before and where there was no reason to anticipate such slide has been termed an inevitable accident. *Denver & C. R. Co. v. Andrews*, 11 Colo. App. 204; 53 Pac. 518.

²⁷ *Blythe v. Denver & R. G. R. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. 403.

²⁸ *International & G. N. R. Co. v.*

Bergman (Tex.), 64 S. W. 999. Goods thrown overboard during a tempest in order to save the life of the passengers are destroyed by the act of God. *Mouse's Case*, 12 Coke 63.

²⁹ *Davis v. Wabash R. Co.*, 89 Mo. 340, 1 S. W. 327; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. 732; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859.

³⁰ *People v. Utica Cement Co.*, 22 Ill. App. 159; *Pittsburgh Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 98; *Smyrl v. Nioilon*, 2 Bail. (S. Car.) 421, 23 Am. Dec. 146; *Faulkner v. Wright, Rice (S. Car.)* 107.

³¹ *Norris v. Savannah & C. R. Co.*, 23 Fla. 182, 1 So. 475, 11 Am. St. 355.

³² *Great Western R. Co. of Canada v. Braid*, 1 Moore P. C. (N. S.) 101; *Dorman v. Ames*, 12 Gil. (Minn.) 347; *New Brunswick S. S. & C. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Moffat's Exrs. v. Strong*, 10 Johns. (N. Y.) 12; *Ewart v. Street*, 2 Bailey L. (S. Car.) 157, 23

such a wind as was likely to occur at that season of the year is not attributable to an act of God.³³ So, also, losses caused by fire, not originating in lightning,³⁴ but by explosion,³⁵ by collision³⁶ or by a landslide,³⁷ are not caused by an "act of God." But a loss caused by an earthquake exempts the carrier from his common-law liability.³⁸

§ 1895. Act of God not exempting.—The true rule is that the nonperformance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.³⁹ And the negligent act of

Am. Dec. 131; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859.

³³ *St. Louis R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189. See also, *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708, in which a high wind, perhaps above the average at a season during which high winds prevail, was held not an act of God. (Obiter.) *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367 (A brick blown off a wall; landowner held liable for damages); *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Salisbury v. Herchen-oder*, 106 Mass. 458, 8 Am. Rep. 354 (The case of a sign, hung over a street in a city and with due care as to its construction and fastenings, but in violation of a city ordinance, which subjected its owner to a penalty for placing and keeping it there, was blown down by the wind in an extraordinary gale, and in its fall a bolt which was part of its fastenings struck and broke a window in a neighboring building. It was held that the owner of the sign was liable for the injury of the window); *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. 717.

³⁴ *Forward v. Pittard*, 1 T. R. 27; *Miller v. Steam Navigation Co.*, 10 N. Y. 431, affg. 13 Barb. (N. Y.) 361; *Story on Bailments* (9th ed.), § 507a.

³⁵ *Propellor Mohawk*, 8 Wall. (U. S.) 153, 19 L. ed. 406.

³⁶ *Plaisted v. Boston & K. Steam*

Navigation Co., 27 Maine, 132, 46 Am. Dec. 587; *Hays v. Kennedy*, 41 Pa. St. 378, 60 Am. Dec. 627.

³⁷ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. 859.

³⁸ *Slater v. South Carolina R. Co.*, 29 S. Car. 96, 6 S. E. 936.

³⁹ *Nugent v. Smith*, 45 L. J. C. P. 697, 1 C. P. Div. 423, a leading case, containing Lord Cockburn's exposition of "act of God;" *Coosa & Co. River Steamboat Co. v. Barclay & Henderson*, 30 Ala. 120; *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 5 So. 864, 11 Am. St. 58n; *Smith v. Western R. Co. of Alabama*, 91 Ala. 455, 8 So. 754, 11 L. R. A. 619, 24 Am. St. 929, holding that a railroad is not bound to provide against unusual floods; *McHenry v. Philadelphia W. & B. R. Co.*, 4 Harr. (Del.) 448; *Central R. & Banking Co. v. Kent*, 87 Ga. 402, 13 S. E. 502; *Chicago & Northwestern R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *White v. Mann*, 26 Maine, 361; *Fergusson v. Brent*, 12 Md. 9; 71 Am. Dec. 582; *Keystone Lumber & Co. v. Dole*, 43 Mich. 370, 5 N. W. 412; *Dewey v. Union School Dist.*, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206. The carrier undertook to carry a horse from London to Aberdeen, but after the ship got out to sea the horse injured himself through fright, caused by the rolling of the vessel. The court held that the carrier was not liable. *Cowley v. Davidson*, 13 Minn. 92; *Vanderslice v. Newton*, 4

a person, concurring with an act of God, which produces damages, makes the party liable. The act of God must be the sole and proximate cause of the damage in order to exempt one from liability on that ground.⁴⁰

§ 1896. **Delivery of goods by carrier.**—Not only is a carrier excused from loss which results from an act of God or the public enemy, but the duty of the carrier to safely carry and promptly deliver to the consignee the goods entrusted to it does not require it to forcibly resist judicial proceedings in the courts of the state into or through which the goods are carried. The carrier may appear and contest the validity of a seizure, under judicial process, of goods in custody, but if it seasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and in absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner.⁴¹

N. Y. 130; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415. See the following cases where "act of God" is discussed: *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352, 2 N. Y. S. 94, 17 N. Y. St. 461 (where a quantity of sand was deposited opposite plaintiff's house and blew into the house it was held that defendant could not excuse himself from liability because of the wind, it being his duty to remove the sand); *Norling v. Allee*, 13 N. Y. S. 791, 37 N. Y. S. 409, affd. 131 N. Y. 622, 30 N. E. 865; *Hummell v. Seventh St. Terrace Co.*, 20 Ore. 401, 26 Pac. 277; *Hays v. Kennedy*, 3 Grant (Pa.) 357; *Hays v. Kennedy*, 41 Pa. St. 378, 80 Am. Dec. 627 (contains an elaborate opinion distinguishing "act of God," "inevitable accident," "unavoidable dangers of the river navigation"); *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, 23 Atl. 459,

14 L. R. A. 741, 30 Am. St. 732; *The Bark Charlotta*, 9 Bened. (U. S.) 1.

⁴⁰ *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708; *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. 170; *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352, 2 N. Y. S. 94, 17 N. Y. St. 461, affd. 132 N. Y. 602, 30 N. E. 1152. See also, cases in preceding notes.

⁴¹ *St. Louis Southwestern R. Co. v. Gans*, 69 Ark. 252, 62 S. W. 738 (liquor seized); *Southern R. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491, revd. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. 104 (liquor seized); *Southern Exp. Co. v. Sotille Bro.* 134 Ga. 40, 67 S. E. 414, 28 L. R. A. (N. S.) 139n. In the above case the court conceded that the statute under which the goods were seized was unconstitutional but nevertheless held that the express company was excused from delivery by reason of such seizure. See however, *Bennett v. American Exp. Co.*, 83 Maine, 236, 22 Atl. 159, 13 L. R. A.

The courts have held that a carrier was excused from liability for damages resulting from the delay of cattle in route,⁴² or the loss of a carload of bananas⁴³ caused by a quarantine inaugurated by public authorities of a certain district.

§ 1897. Delivery of goods sold.—"It is no excuse for the nonperformance of a condition that it is impossible for the obligor to fulfill it, if the performance be in its nature possible. But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God, as if A agree to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end."⁴⁴ A contract for the sale and delivery of a certain quantity out of a specific crop of potatoes was held to be impliedly conditional upon the crop producing that quantity; and upon a failure of the crop the seller was held not to be liable for the deficiency in the quantity contracted for.⁴⁵ But upon a contract to raise, sell and deliver a specified quantity of beans of various kinds, no particular kinds and no particular land upon which they were to be raised being specified, it was held that the fact that unexpected early frosts so far destroyed the party's crop that he could not deliver the whole quantity specified did not excuse his

33, 23 Am. St. 774, in which the carrier was not excused when game was seized by officer without warrant or other legal process. And to same effect, *Merriman v. Great Northern Exp. Co.*, 63 Minn. 543, 65 N. W. 1080, where game was seized under a statute which had been impliedly repealed. *Thomas v. Northern Pac. Exp. Co.*, 73 Minn. 185, 75 N. W. 1120 (seizure of fish illegally caught). See also, *Seligman v. Armijo*, 1 N. Mex. 459 (liquor seized by United States soldiers). See also, *Wells v. Maine S. S. Co.*, 4 Cliff. (U. S.) 228, Fed. Cas. No. 17401 (liquor seized); *American Exp. Co. v. Mullins*, 212 U. S. 311,

53 L. ed. 525, 29 Sup. Ct. 381; 15 Am. & Eng. Ann. Cas. 536.

⁴² *New York & C. R. Co. v. Weil*, 65 Misc. (N. Y.) 179, 119 N. Y. S. 676 (cattle properly cared for while detained).

⁴³ *Alabama & V. R. Co. v. Tirelli*, 93 Miss. 797, 48 So. 962, 21 L. R. A. (N. S.) 731n, 136 Am. St. 559.

⁴⁴ *Benjamin on Sales*, (Bennett's ed.) p. 552.

⁴⁵ *Howell v. Coupland*, L. R. 1 Q. B. Div. 258. See also, *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit & C. Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. 231 (contract for sale and delivery of peaches. Crop cut short by dry weather).

nonperformance of the contract.⁴⁶ The general rule is that if a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, the vendor is not liable to the vendee in damages for nondelivery.⁴⁷ One who has entered into a contract to make and deliver a certain manufactured article within a specified time, having ample time for performance, can not, however, postpone performance to the last moment and then excuse it upon plea of an accident; in such case he takes the responsibility of the delay.⁴⁸

§ 1898. Physical impossibility at time of contracting known to the parties.—Obvious and absolute physical impossibility, apparent upon the face of the promise, and thus known to the parties, renders the promise void.⁴⁹ Thus, a charter-party, executed on the 15th of March, covenanting that the ship would proceed from where she then lay on or before the 12th of February, was held void, and the owner, having made the trip, could recover freight, as the sailing on the 12th of February, being impossible,

⁴⁶ *Anderson v. May*, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. 642. See also, *Newell v. New Holstein Can Co.*, 119 Wis. 635, 97 N. W. 487.

⁴⁷ *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Dolan v. Rodgers*, 149 N. Y. 489, 493, 44 N. E. 167; *Nickoll v. Ashton* (1900), 2 Q. B. 289.

⁴⁸ *Jones v. Anderson*, 82 Ala. 302, 2 So. 911, where the court said: "Where a contract imposes some duty not purely personal—that is, which may be done by others as well as the promisor himself—his inability to perform, by reason of accident, want of means, insolvency, or other reason, does not excuse nonperformance." And see following cases where performance of delivery was excused and the seller allowed to recover the price from the buyer after the chattels perished. *Townsend v. Hargraves*, 118 Mass. 325. See also,

Stone v. Waite, 88 Ala. 599, 7 So. 117; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11n; *Seckel v. Scott*, 66 Ill. 106 (butter sold, and destroyed by Chicago fire); *Sweeney v. Owsley*, 14 B. Mon. (Ky.) 413; *Wing v. Clark*, 24 Maine, 366; *Phillips v. Moor*, 71 Maine, 78; *Townsend v. Hargraves*, 118 Mass. 325; *Bissell v. Balcom*, 39 N. Y. 275 (where cattle were drowned); *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *West v. Van Tuyl*, 49 Hun (N. Y.) 605, 1 N. Y. S. 718, 17 N. Y. St. 273, affd. 119 N. Y. 620, 23 N. E. 450, 2 *Silvernail* (N. Y.) 501; *Ruthrauff v. Hagenbuch*, 58 Pa. St. 103. Compare, *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591.

⁴⁹ Performance is impossible when it is impossible according to the state of knowledge of the day. *Clifford v. Watts*, L. R. 5 C. P. 588; *Bennett v. Morse*, 6 Colo. App. 122, 39 Pac. 582.

was not a condition precedent.⁵⁰ On the same principle a covenant to insure is not broken by the covenantor not insuring the very next minute after he has entered into a covenant to do so; and if no time be expressed, he must have a reasonable time in which to do it.⁵¹ And all conditions annexed to estates, that contain in them matter at the time of making them impossible to be done, are void.⁵² "If a man be bound in an obligation, with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, then the obligation shall be void. The condition is void and impossible, and the obligation standeth good."⁵³ The same is true of a contract to divide five thousand shares of stock among sixteen men, giving each four hundred shares.⁵⁴

§ 1899. Further illustrations.—Where a person contracts to build a building of a certain kind of stone, and to complete the same within a specified time, the impossibility of procuring the stone, to be an excuse for delay, must have existed when the contract was made.⁵⁵ As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And such an impossibility may release the party from liability to suit for nonperformance, but not so as to enable the party to sue and recover as if he had performed.⁵⁶

§ 1900. Legal impossibility at the time of contracting.—Legal impossibility at the time of contracting renders the contract unenforceable.⁵⁷ A promise to marry by one who

⁵⁰ Hall v. Cazenove, 4 East 477. To same effect, LeRoy v. Jacobosky, 136 N. Car. 443, 48 S. E. 796, 67 L. R. A. 977.

⁵¹ Doe v. Ulph, 13 Q. B. 204.

⁵² Sheppard's Touchstone of Common Assurance, 132.

⁵³ Coke on Littleton, 206b. See also, The Harriman, 9 Wall. (U. S.) 161, 19 L. ed. 629.

⁵⁴ Bennett v. Morse, 6 Colo. App. 122, 39 Pac. 582.

⁵⁵ Yetter v. Hudson, 57 Tex. 604; Wright v. Meyer (Tex. Civ. App.), 25 S. W. 1122; Dermott v. Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

⁵⁶ Smoot's Case, 15 Wall. (U. S.) 36, 21 L. ed. 107, 8 Ct. Cl. (U. S.) 96.

⁵⁷ Smith v. Stoughton, 185 Mass. 329, 70 N. E. 195.

is already married, and known so to be by the other, is a void promise,⁵⁸ but if the fact that one of the parties is married is not known to the other, the former is liable in damages for deception.⁵⁹ Where a person being indebted to another agreed with the bailiff of his creditor that, in consideration of the bailiff discharging him from the debt, he would do certain work, it was held that as the bailiff could not legally discharge the debt of his master, the proposed consideration was impossible and the promise void.⁶⁰ A covenant by a person to pay a sum of money to himself and others was held void.⁶¹ A bond was conditioned that, if the obligee should procure the formation of a company for taking the assignment of a patent, and in consideration thereof the obligor should pay him certain sums of money, the bond should be void; the patent contained a proviso that it should be void if assigned to more than five persons, and consequently the assignment to the company, which was intended to consist of more than five persons, was legally impossible. It was held that the possibility of such an assignment was the basis of the contract and that the bond was void.⁶² But it was held, where the defendant had covenanted that he would perfect in England a patent right granted in America so as to insure the plaintiff the exclusive right of vending the article patented in the province of Upper and Lower Canada, that he was not excused from performance, although it appeared that the power of granting exclusive privileges of this kind appertained not to England, but to the provinces, and they were never granted except to subjects of Great Britain and residents of the provinces, and could not be granted to either the plaintiff or defendant, as both were citizens of the United States.⁶³

⁵⁸ Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Haviland v. Halstead, 34 N. Y. 643.

⁵⁹ Wild v. Harris, 7 C. B. 999; Millward v. Littlewood, 5 Ex. 775; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336.

⁶⁰ Harvey v. Gibbons, 2 Lev. 161.

⁶¹ Faulkner v. Lowe, 2 Ex. 595.

"The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself."

⁶² Duvergier v. Fellows, 5 Bing. 248.

⁶³ Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.

§ 1901. **Impossibility caused by subsequent law.**—The authorities are practically unanimous in holding that no contract can be carried into effect which was originally made contrary to the provisions of the law,⁶⁴ or where being made consistently with the then rules of law the act contracted for is rendered unlawful by the subsequent enactment of a statute before the expiration of the time for performance.⁶⁵ Performance is excused by a supervening impossibility caused by operation of a change in the law.⁶⁶ Accordingly, a contract by an owner of land with a builder to erect houses is discharged and the owner

⁶⁴ See ante § 1900.

⁶⁵ *Atkinson v. Ritchie*, 10 East 534. See also, *Brewster v. Kitchell*, 1 Salk. 198; *American Mercantile Exchange v. Blunt*, 102 Maine, 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414n, 120 Am. St. 463; *Heart v. East Tennessee Brew. Co.*, 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964n, 130 Am. St. 753, holding that a lease for years of property to be used as a place in which to conduct the sale of intoxicating liquors is terminated by the enactment of a law during the term of such lease making the sale of liquor illegal. See also, note on this subject in 19 L. R. A. (N. S.) 964.

⁶⁶ *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Fresno Milling Co. v. Fresno Canal & Irrigation Co.*, 126 Cal. 640, 59 Pac. 140 (canal company lawfully restrained from the delivery of water); *Macon & B. R. Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442, 21 Am. St. 135 (executory contract of railroad company as to its route discharged by subsequent act of legislature); *Jamieson v. Indiana Nat. Gas & Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; 3 Int. Com. 613 (injunction proceeding. Contract for building and operating a line for transportation of natural gas was rendered incapable of performance by a statute passed after part performance which prohibited the transportation of gas at as high pressure as that contracted for); *Julienne v. Touriac*, 13 La. Ann. 599 (performance of an agreement to emancipate a slave excused by a subsequent law prohibiting emanci-

pation); *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430 (covenant by lessor to erect a frame building in a certain district discharged by an ordinance which prohibited the erection of a building of this character within such district). To same effect as foregoing case: *Rooks v. Seaton*, 1 Phila. 106 (In the above case lessee was to erect a building. In case a city ordinance prevented the erection of a building such as the lessee contracted to erect he might rescind, in which event the lessor could maintain ejectment). See also, *School Dist. No. 16 v. Howard*, 5 Nebr. (Unof.) 340, 98 N. W. 666. It is a general principle of law, "that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered as at an end." The above is a quotation from an insurance case in which it was contended that if the policy of insurance was attached the right to the premium became absolute. *Odlin v. Insurance Co.*, 2 Wash. C. C. 312, Fed. Cas. No. 10433. See also, *Gray v. Sims*, 3 Wash. C. C. 276, Fed. Cas. No. 5729; *Tait v. New York L. Ins. Co.*, 1 Flipp. (U. S.) 288, Fed. Cas. No. 13726. See however, *Rose v. Macleod*, 2 Bay (S. Car.) 108 (contract for delivery of new negroes. Statute was passed prohibiting importation of negroes. It was held that specific performance was dispensed with but that defendant was liable for value of negroes).

excused from allowing the building to proceed where a subsequent ordinance appropriates the land for a street.⁶⁷ Where a deed of land provided that the land conveyed should be used as a cemetery and for no other purpose, and a subsequent act of the legislature prohibited its further use as a cemetery and declared it a nuisance, it was held that, conceding the above provision to have been a condition subsequent, it was destroyed by this act and title vested absolutely in the grantee.⁶⁸ Where the further prosecution of work in the alteration of a building is forbidden by the superintendent of buildings, as authorized by law, for a defect not occasioned by the contractor, and he is thus prevented from performing that which, by the terms of the contract, is made a condition precedent to payment, he is discharged from performance.⁶⁹ An absolute contract to move a building from one lot to another was held discharged where the requisite permission could not be obtained from the city officials.⁷⁰ But persons entering into a contract, relying on a decision of the highest court of the state, are bound in the performance thereof by the law as declared by a subsequent decision of the same court overruling the former decision of the

⁶⁷ *Slipper v. Tottenham & Hampstead Junction R. Co.*, L. R. 4 Eq. 112; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Black v. Woodrow*, 39 Md. 194; *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670.

⁶⁸ *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. 350. See also, *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538.

⁶⁹ *Heine v. Meyer*, 61 N. Y. 171. See also, *Pardine v. Jane*, Aleyn, 26; *Mounsey v. Drake*, 10 Johns. (N. Y.) 27; *People v. Bartlett*, 3 Hill (N. Y.) 570.

⁷⁰ *Theobald v. Burleigh*, 66 N. H. 574, 23 Atl. 367. See also, *Melville v. DeWolf*, 4 El. & Bl. 844; *Harvey v. Coffin*, 44 N. H. 563; *Kimball v. Cocheo R. Co.*, 23 N. H. 579; *Blake v. Niles*, 13 N. H. 459, 38 Am. Dec. 506. Injunction restraining a per-

son from performing a contract with school board to remove schoolhouse will excuse him from performing such contract in the absence of any showing that the injunction was dissolved in time to permit the performance. *Burkhardt v. Georgia School Township*, 9 S. Dak. 315, 69 N. W. 16. But one who constructs an elevator according to terms may recover therefor notwithstanding the work when finished does not meet the approval of the public authorities. *Morse v. Maurer*, 35 Pa. Super. Ct. 196. A contract to maintain a hack stand in front of plaintiff's restaurant is not discharged by the fact that such plaintiff's "all night" license was not renewed. *The Abbaye v. United States Motor Cab Co.*, 71 Misc. (N. Y.) 454; 128 N. Y. S. 697. See also, *Grave Switch & Co. v. Lebanon & Co. Tel. Co.*, 139 Ky. 151, 129 S. W. 559.

same court as erroneous.⁷¹ The laying an embargo for an unlimited time does not extinguish a promise to deliver debentures, but operates as a suspension only during the continuance of the law.⁷² A ship was chartered to go from New Bedford to Savannah, there take a cargo of timber and carry the same to England. After the cargo was loaded on board, an embargo took place and it was agreed by the agent for the hirers and the master that she should return to New Bedford and there wait the ending of the embargo. After arriving at New Bedford, war was declared against England, which put a stop to the voyage. In the meantime, the agent had sold the cargo. The purchaser was held entitled to the cargo, notwithstanding the master had signed bills of lading promising to deliver the cargo in England.⁷³ On the same principle, where a contract required the delivery of smooth-bore cannon to the claimants for alteration, and while the work was in progress the government ordered it to be suspended, it was held that no damages could be recovered on a counterclaim for not finishing the work.⁷⁴ It is no bar to a scire facias against bail, that the principal, since the arrest, was duly enlisted as a noncommissioned officer in the service of the United States, and is holden to do duty as such.⁷⁵ A condi-

⁷¹ *Allen v. Allen*, 95 Cal. 184, 27 Pac. 30, where, when the contract was made, the law, as declared by the Supreme Court of California, was that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee, but when the time for performance arrived the court had overruled this and held that a deed absolute in form, intended as a mortgage, did convey the title. It was held that this latter view of the law should have governed in the performance of the contract. *Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302.

⁷² *Baylies v. Fettyplace*, 7 Mass. 325. See also, *School Dist. v. Howard*, 5 Nebr. (Unof.) 340, 98 N. W. 666.

⁷³ *Brown v. Delano*, 12 Mass. 370. See also, *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

⁷⁴ *Nourse v. United States*, 25 Ct. Cl. (U. S.) 7. This case also decides that where a contract contemplates that the government shall decide when suspended work shall be resumed or the original contract be abandoned, unreasonable neglect to decide is equivalent to a decision. See also, *Wadham v. Marlowe*, 8 East 314; *Mills v. Guardians of the Poor of the East London Union*, L. R. 8 C. P. 79; *Doe v. Rugeley Churchwardens*, 6 Q. B. 107; *Davis v. Cary*, 15 Q. B. 418; *Brown v. Mayor*, 9 C. B. (N. S.) 726; *Jones v. Judd*, 4 N. Y. 411.

⁷⁵ *Harrington v. Dennie*, 13 Mass. 93.

tion in a replevin bond, that the obligor shall prosecute his action of replevin to final judgment, is saved by his prosecuting it until the writ is abated by the death of the defendant.⁷⁶ And an obligation conditioned on the surrender of a debtor into custody is discharged by a subsequent act making it unlawful to surrender such debtor.⁷⁷ The same is true of a contract for the collection of debts by a system which includes posting a list of debtors when an act is passed prohibiting the posting of such lists.⁷⁸ A covenant by a lessor that neither he nor his assigns would permit any building upon a piece of land adjoining the devisee's premises was held to be discharged by a railway company's subsequently taking the land under compulsory powers given by statute, to build a railway station on it. The defendant is discharged from his covenant by the subsequent act of parliament, which put it out of his power to perform it, on the principle expressed in the maxim, "*lex non cogit ad impossibilia.*"⁷⁹ But the fact that performance of a contract is rendered more burdensome and expensive by a law enacted after it is entered into does not excuse performance.⁸⁰ Nor does the act of a foreign government discharge the obligation of a contract.⁸¹

§ 1902. **Impossibility—Recovery pro tanto.**—It is held that although by the terms of a contract for work and labor the full price is not to be paid until the work is completed, if a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full prices agreed on.⁸² Thus, where the defendant contracted with the state to construct

⁷⁶ *Badlam v. Tucker*, 1 Pick. (Mass.) 284.

⁷⁷ *Brown v. Dillahunty*, 4 Sm. & M. (Miss.) 713, 43 Am. Dec. 499.

⁷⁸ *American Mercantile Exch. v. Blunt*, 102 Maine 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. 463.

⁷⁹ *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

⁸⁰ *Baker v. Johnson*, 42 N. Y. 126.

⁸¹ *Barker v. Hodgson*, 3 M. & S.

267; *Tweedie Trading Co. v. James P. McDonald Co.*, 114 Fed. 985. See also, *Ashmore v. Cox* (1899), 1 Q. B. 436; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.

⁸² *Heine v. Meyer*, 61 N. Y. 171; *Jones v. Judd*, 4 N. Y. 411. See however, *American Mercantile Exch. v. Blunt*, 102 Maine 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. 463.

a section of a canal, and make a subcontract with the plaintiff for a portion of the work, at so much per yard for excavation and embankment, payable monthly, except ten per cent., which was not to be paid until the final estimate, and before the completion of the plaintiff's job the work was stopped by the state officers, and the original contract terminated by an act of the legislature, it was held that the plaintiffs were entitled to recover the price agreed on for the work actually done by them.⁸³ On a like principle it has been held that a contractor, after having started repairs on a house, is entitled to recover at the contract-price for the work actually done, if, without his fault, the officials of the city stop the work;⁸⁴ and that where one employed to move a building and place it upon a certain lot is prevented by the city officials from fulfilling his contract by withholding the requisite permission, he is nevertheless entitled to recover for the services actually rendered by him in attempting to remove the building.⁸⁵ But after a contractor knows that there is a legal impediment in the way of performance, he must cease at once and can not recover for the services rendered after knowledge of such legal impossibility is brought home to him.⁸⁶ And where the consideration is single and entire and the contract indivisible and inseparable, it is held that there can be no recovery thereon for part of the services until fully performed, although there may be a recovery on the quantum meruit in a proper case.⁸⁷

§ 1903. Contracts of service.—Contracts for personal services, which can only be performed during the lifetime of the party contracting, are usually held subject to the implied condition of his continuing alive and in health to perform them, and such contracts are revoked and nullified by his death or incapacity from illness.⁸⁸ "Thus,

⁸³ Jones v. Judd, 4 N. Y. 411.

⁸⁴ Heine v. Meyer, 61 N. Y. 171; Nourse v. United States, 25 Ct. Cl. (U. S.) 7.

⁸⁵ Theobald v. Burleigh, 66 N. H. 574, 23 Atl. 367.

⁸⁶ Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263.

⁸⁷ Davidson v. Gaskill (Okla.), 121 Pac. 649, and cases cited. Compare however, the following section.

⁸⁸ Taylor v. Caldwell, 3 B. & S.

if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract."⁸⁹ A painter is excused from performing his contract to paint a picture if his eyesight fails him.⁹⁰ The contract of a singer, although absolute in form, is subject to the implied condition that she be in health at the time performance is due, and illness excuses her.⁹¹ If one man contract with another to serve him as an overseer for a year and dies before the expiration of that time, his estate is not liable to respond in damages for a failure to serve for the stipulated period.⁹² An agreement to work as a farm hand has been held revoked by the hand's illness.⁹³ Sickness may also excuse delay in the performance of a personal contract.⁹⁴ While sickness is generally an excuse for the nonperformance of such a personal contract, still the sickness must generally be such as could not have been foreseen and provided against. Thus, where a contract was made for the personal services of a man and his wife for the period of one year at a specified sum, and four months thereafter the wife left the service in anticipation of her confinement, it was held that she could have provided against this contingency, which could have been foreseen, and that the employer was justified in discharging both without pay.⁹⁵ A contract to board a person for a specified time is subject to revocation on account of the death of either party.⁹⁶ An attorney at law is excused from completing his contract to render legal services if

826; *Blakely v. Sousa*, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. 821. Contracts for sale at valuation price, to be fixed by the parties, are impliedly conditioned upon those persons surviving and making the valuation, and are terminated by the death of either before doing so, the valuation stipulated for having thus become impossible. *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688.

⁸⁹ 3 (7th Am. ed.) *Williams on Executors*, 225; *Marshall v. Broadhurst*, 1 Tyr. 348; *Wentworth v. Cock*, 10 Ad. & El. 42.

⁹⁰ *Hall v. Wright*, El. Bl. & El. 746.

⁹¹ *Robinson v. Davison*, L. R. 6 Ex. 269; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7.

⁹² *Givhan v. Dailey's Admx.*, 4 Ala. 336.

⁹³ *Dickey v. Linscott*, 20 Maine 453, 37 Am. Dec. 66.

⁹⁴ *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Green v. Gilbert*, 21 Wis. 395.

⁹⁵ *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57.

⁹⁶ *Wilmington v. West Boylston*, 4 Pick. (Mass.) 101.

he becomes too ill to properly do so.⁹⁷ But the inability of an apprentice to work, caused by sickness without his fault, has been held no breach of his father's covenant in the indenture of apprenticeship, that he should "well and faithfully serve them and give and devote * * * his whole time and labor" to his master; nor is it ground for abatement or diminution of wages, which, in consideration of such a covenant, the master agreed to pay him weekly during the whole term of apprenticeship, the master never having undertaken to terminate the contract.⁹⁸ The sickness of an apprentice, however, discharges the contract on the side of the master, who is no longer bound by the articles.⁹⁹ And generally in all contracts for personal services it is an implied condition that the death of either the employer or the employé dissolves the contract.¹ But it has been held otherwise where the employé has been employed for a specified period of time. The contract of employment is not terminated by the death of the employer when the necessity for the performance of the services continues after the death of the master.² The application of the general rule is strictly limited to contracts for the performance of personal services.³

§ 1904. Recovery on contracts of service.—If a person

⁹⁷ *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618.

⁹⁸ *Caden v. Farwell*, 98 Mass. 137. See also, *Boast v. Firth*, L. R. 4 C. P. 1.

⁹⁹ *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125.

¹ *Farrow v. Wilson* L. R. 4 C. P. 744; *Campbell v. Faxon*, 73 Kan. 675, 85 Pac. 760, 5 L. R. A. (N. S.) 1002 (death of employer); *Harrison v. Conlan*, 10 Allen (Mass.) 85; *Babcock v. Goodrich*, 3 How. Pr. (N. S.) (N. Y.) 52; *Arming v. Steinway*, 35 Misc. (N. Y.) 220, 71 N. Y. S. 810; *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. 806; *Silver v. Gray*, 86 N. Car. 566; *Casto v. Murray*, 47 Ore. 57, 81 Pac. 883; *Yerrington v. Greene*, 7 R. I. 589, 43 Am. Dec.

578. The statute of California provides that notice of the employer's death terminates a contract of hiring by the month unless it is necessary for the employé to continue his services in order to protect the interests of his employer's successor from serious injury. *Weithoff v. Murray*, 76 Cal. 508, 18 Pac. 435. See also, *Whincup v. Hughes*, L. R. 6 C. P. 78.

² *Hill v. Robeson*, 2 Sm. & M. (Miss.) 541; *Pugh v. Baker*, 127 N. Car. 2, 37 S. E. 82. See also, *Toland v. Stevenson*, 59 Ind. 485.

³ See *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707 and note, 38 Am. St. 460; *Chamberlain v. Dunlop*, 126 N. Y. 45; 26 N. E. 966, 22 Am. St. 807, and note on page 811.

renders personal services under an entire contract, which either his own, or his employer's sickness or death, prevents him from fully performing, he can recover in a proper case upon an implied assumpsit what those services are reasonably worth.⁴ Thus, where a man and his wife agreed to live with the wife's aunt and care for her, the death of the wife was held to give cause to the aunt to rescind the contract, but the husband was allowed to recover on a quantum meruit for the services he and his wife rendered before her death.⁵ Where the plaintiff, having contracted to labor for the defendant six months at a specified price for the term, was taken sick, and left the defendant's services, and was so ill for about a month that he was unable to perform the full labor of a man, and then he recovered his health, but did not return to the defendant's employment, it was held that he was entitled to recover for his services, upon a quantum meruit, for the time he labored.⁶ It has been held that a sailor can recover pro tanto on a contract interrupted by his sickness;⁷ and, likewise, a laborer;⁸ and the same rule has been held to obtain in regard to a clerk.⁹ A servant, who, by his contract of hiring, agrees that, if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days there-

⁴Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858, where the court said: "In case of the destruction of the fruits of the service so that neither party has the value of them, the loss must be adjusted according to the scope of the contract and the circumstances of the case, and different courts may come to diverse conclusions in cases which are very similar to each other. But when, as in this case, the defendant has received and retains the benefit of the service, we think that the plaintiff should recover. It is not just that one should benefit by the labor of another and make no return, when the event which ends the service happens without the fault of either party, and is not expressly or im-

pliedly insured against in the agreement which induced the labor. This conclusion seems now to be established by authority, as well as to rest in sound reason." Farrow v. Wilson, L. R. 4 C. P. 744; Cutter v. Powell, 6 T. R. 320; Haynes v. Second Baptist Church, 12 Mo. App. 536; Carpenter v. Gay, 12 R. I. 306; Bream v. Marsh, 4 Leigh (Va.) 21. See also, Limerick v. Lee, 17 Okla. 165, 87 Pac. 859.

⁵Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858.

⁶Seaver v. Morse, 20 Vt. 620.

⁷Gray v. Murray, 3 John. Ch. (N. Y.) 167.

⁸Lakeman v. Pollard, 43 Maine 463, 69 Am. Dec. 77.

⁹Dunlap v. Montgomery, 123 Pa. St. 27, 16 Atl. 41.

after, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled.¹⁰ A father may maintain an action upon a covenant made with him to pay wages to his minor son for services as an apprentice, and unless the master terminates the contract he is liable for wages, although the apprentice is unable to work from sickness.¹¹

§ 1905. Further illustrations of recovery.—A special agreement was made to the effect that if the laborer should be dissatisfied and wish to leave the service, he would give four weeks' notice before quitting, and then receive his pay. After he had begun to work under this agreement, he became sick and unable to work and left without giving the required notice; he was allowed to recover the value of his services.¹² The laborer can recover, although there is an express contract that he is not to be paid until a definite amount of work is done.¹³ And it seems that the recovery for partial performance is upon a quantum meruit, and not on the contract.¹⁴ But the recovery can not exceed the contract-price, or the rate of it for the part of the service performed.¹⁵ The court of appeals of New York has decided that recovery for partial performance of a contract, where sickness prevents complete performance, is not confined to a quantum meruit, but is to be measured by the contract.¹⁶ But the recovery is subject to the damages sustained by the employer in consequence of the employe not being able to complete the full term of service.¹⁷ Where sickness interrupts the performance of a contract, either party may elect to rescind;

¹⁰ *Harrington v. Fall River Works*, 119 Mass. 82.

¹¹ *Caden v. Farwell*, 98 Mass. 137.

¹² *Fuller v. Brown*, 11 Metc. (Mass.) 440.

¹³ *Fenton v. Clark*, 11 Vt. 557.

¹⁴ *Fahy v. North*, 19 Barb. (N. Y.) 341; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Green v. Gilbert*,

21 Wis. 395. See also, *Givhan v. Dailey's Admx.* 4 Ala. 336; *Fulton v. Heffelfinger*, 23 Ind. App. 104, 54 N. E. 1079.

¹⁵ *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618.

¹⁶ *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

¹⁷ *Patrick v. Putnam*, 27 Vt. 759.

the employé then recovers the value of his services without offering to return to work, although subsequently able.¹⁸

§ 1906. **Contracts for personal acts.**—Contracts which have for their object some performance of matter which is strictly personal to the parties are, in general, construed as made upon the implied condition that the parties shall live long enough and continue practically capable to perform the contract. Thus, contracts to marry are determined by the death of either party.¹⁹ Moreover, while it has been decided that the continuance of health, that is, of such a state of health as makes it not improper to marry, is not an implied condition of a contract to marry,²⁰ yet it is held by the decided weight of authority that ill health on the part of either party of such a nature as to render marital relations dangerous to the other makes a contract to marry voidable at the option of the latter, at least when the illness of the one was not known to the other at the time the contract was made.²¹ Consequently, it is a good defense to an action for breach of promise of marriage that the plaintiff is suffering from an illness or physical defect which would make the marriage improper and which defect was unknown to the defendant at the time the contract was made,²² or that the defendant

¹⁸ *Hubbard v. Belden*, 27 Vt. 645. See also, *Dryer v. Lewis*, 57 Ala. 551; *Dickey v. Linscott*, 20 Maine 453, 37 Am. Dec. 66; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388 (holding that it is unnecessary that the plaintiff should set up in his complaint the excuse of illness for not fully performing his contract).

¹⁹ *Chamberlain v. Williamson*, 2 M. & S. 408; *Hovey v. Page*, 55 Maine, 142; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33.

²⁰ *Hall v. Wright*, El. Bl. & El. 746, 29 L. J. Q. B. 43 (defendant not permitted to set up personal defect as bar). See however, *Allen v. Baker*, 86 N. Car. 91, 41 Am. Rep. 444.

²¹ It would seem that even though such illness on the part of one party to a contract to marry was known to the other at the time the contract was made, it should be held voidable on the ground that a bad promise is better broken than kept. See *Grover v. Zook*, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012. See also, *Gulick v. Gulick*, 41 N. J. L. 13.

²² *Atchison v. Baker*, 2 Peake Add. Cas. 103 (abscess in breast); *Kantzler v. Grant*, 2 Ill. App. 236 (venereal disease); *Edmonds v. Hughes*, 115 Ky. 561, 24 Ky. L. 2467, 74 S. W. 283 (After promise and without defendant's consent plaintiff had an unnecessary surgical operation performed which rendered her unable

has himself developed such disease or defect without any fault on his part subsequent to the promise of marriage.²³ If the promisee is able and ready to proceed with his work, where his personal services or acts are bargained for, nothing short of absolute physical impossibility will, ordinarily, excuse the employer. Thus, smallpox will not excuse a school district from liability on a contract with a teacher, the performance of which the district has prevented by closing the school.²⁴ But if a contagious disease is prevalent at the place where the contract is to be performed, and the same can not be performed elsewhere, performance²⁵ is excused. Upon the same principle the death of a partner per se dissolves the firm, whether the partnership was for a fixed period of time or not.²⁶

§ 1907. What are contracts for personal acts.—Whether a contract is one which is strictly personal, that is, to be

to bear children.); *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Gring v. Lerch*, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314 (physical condition such as not to permit intercourse. Surgical operation might have remedied defect.); *Grover v. Zook*, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582n, 120 Am. St. 1012 (pulmonary tuberculosis. Illness known at time contract was made). See also, *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; *Vierling v. Binder*, 113 Iowa. 337, 85 N. W. 621.

²³ *Gardner v. Arnett*, 21 Ky. L. 1, 50 S. W. 840 (Syphilis reappeared. Defendant entertained a good faith belief that he had been cured.); *Shackelford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 14 Ky. L. 11, 15 L. R. A. 531, 40 Am. St. 166 (same facts as above); *Trammel v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302 (venereal disease developed without defendant's fault subsequent to promise); *Allen v. Baker*, 86 N. Car. 91, 41 Am. Rep. 444 (reappearance of syphilis); *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581 (urinary disease). The foregoing cases also lay down the rule that if the defendant knew of his condition at

the time the contract was made or if by the exercise of diligence might have known it he is not excused from his breach of contract to marry but instead such fact amounts to a gross aggravation. See, however, *Gulick v. Gulick*, 41 N. J. L. 13.

²⁴ *Dewey v. Union School District*, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206. See also, *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059. Compare with *School Dist. No. 16 v. Howard*, 5 Nebr. (Unof.) 340, 98 N. W. 666.

²⁵ *Lakeman v. Pollard*, 43 Maine 463, 69 Am. Dec. 77.

²⁶ *Phillips v. Alhambra Palace Co.*, 70 J. L. Q. B. 26, 1 Q. B. 59; *McKinzie v. United States*, 34 Ct. Cl. (U. S.) 278. See also, *Painter's Exrs. v. Painter*, 133 Cal. XIX, 65 Pac. 135; *Bass Dry Goods Co. v. Granite City Mfg. Co.* 116 Ga. 176, 42 S. E. 415; *Mulherin v. Rice*, 106 Ga. 810, 32 S. E. 865; *Douthart v. Logan*, 190 Ill. 243, 60 N. E. 507; *Dexter v. Dexter*, 43 App. Div. (N. Y.) 268, 60 N. Y. S. 371. The partners may expressly agree that the partnership is to continue even though one of the partners die. *Brew v. Hastings*, 196 Pa. St. 222, 46 Atl. 257, 79 Am. St. 706.

performed by the parties themselves and not by agency, depends largely on the nature of the services and the contract itself as properly construed. Where a lumber manufacturer agreed to sell all the lumber to be sawed at his mill during five years, but died before the five years elapsed, it was held that this contract was a personal one and was abrogated by his death.²⁷ A contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition and clothing of a person whom the promisor is not bound to support, is terminated by the death of the promisor, and an action can not be maintained against his executor for anything subsequently furnished, although the executor has not given notice of the death.²⁸ Where adjoining landowners make an agreement relative to the duty of each in maintaining a partition fence, and one of them dies, his administrator is not bound by the contract for any future repairs.²⁹ A ground rent covenant does not survive against executors or administrators except as to the rents which accrued in the lifetime of the decedent; the rents which accrued subsequent to the death of the covenantor are not payable out of his personal estate.³⁰ Contracts to marry,³¹ to write a book,³² to instruct an apprentice,³³ to act as agent,³⁴ are all personal contracts terminated by the death of either party. But if a contract with a deceased party is of an executory nature and his personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract. The exception to this rule is when the contract is of a purely personal character, or requires, in its execution, the exercise of peculiar

²⁷ *Dickinson v. Calahan's Admrs.*, 19 Pa. St. 227.

²⁸ *Browne v. McDonald*, 129 Mass. 66.

²⁹ *Bland's Admr. v. Umstead*, 23 Pa. St. 316.

³⁰ *In re Quain's Appeal*, 22 Pa. St. 510.

³¹ *Chamberlain v. Williamson*, 2 M. & S. 408. See ante § 1906.

³² *Marshall v. Broadhurst*, 1 Tyr. 348.

³³ *Baxter v. Burfield*, 2 Strange 1266; *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522; *Triplett v. Woodward's Admr.*, 98 Va. 187, 35 S. E. 455.

³⁴ *Smout v. Ilbery*, 10 M. & W. 1; *Galt v. Galloway*, 4 Pet. (U. S.) 332, 7 L. ed. 876.

skill or taste.³⁵ And, therefore, as a general rule, the personal representatives of a deceased person can sue and be sued on all contracts of whatever description made with him, whether broken before or after his death.³⁶ Thus, a contract to build a house usually survives the death of either party;³⁷ the personal representatives of the builder are bound to complete his building contracts³⁸ and the personal representatives of the owner are bound to permit the building to be done.³⁹ It is, however, competent for the parties to make any contract a personal one, no matter what the subject-matter. If the intention is manifested by the parties in express terms in the contract itself, it effects the same object as where the law implies the intention from the subject-matter. Accordingly, where by express terms the parties have excluded the idea of a substituted performance, no question upon the subject-matter of the contract can arise. The death of either party in such a case terminates the contract, as it would a contract construed from its subject-matter as a personal one.⁴⁰

§ 1908. Contracts to build becoming impossible.—Where one covenanted to build a bridge and keep it in repair for a certain time, he was held bound to rebuild the bridge, although it was washed away by an extraordinary flood, when the contract contained no provision against the happening of such a contingency.⁴¹ A railroad company con-

³⁵ *Smith v. Wilmington Coal Min. &c. Co.*, 83 Ill. 498.

³⁶ *Dacey on Parties*, 206.

³⁷ *Reicke v. Saunders*, 3 Mo. App. 566. See also, *Quick v. Ludborrow*, 3 Bulst. 29; *Jannin v. Browne*, 59 Cal. 37.

³⁸ *Janin v. Browne*, 59 Cal. 37.

³⁹ *Reicke v. Saunders*, 3 Mo. App. 566. It seems a contract to build a lighthouse is a personal one terminated by death. 3 *Williams on Executors*, 1596n.

⁴⁰ *Shultz v. Johnson's Admr.*, 5 B. Mon. (Ky.) 497; *Hayes v. Gross*, 162 N. Y. 610, 57 N. E. 1112, affg. 9 App. Div. (N. Y.) 12, 75 N. Y. St. 417, 40 N. Y. S. 1098; *Siler v. Gray*, 86 N. Car. 566.

Where buildings are destroyed by fire, without the fault of either party, between the date of a contract of sale of the real estate and the time the conveyance is made, the loss must be borne by the vendee. The vendor holds only the naked legal title for the use of the vendee. *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926. For a discussion as to the effect of the death of one of the parties to a contract, see *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707 and note, 38 Am. St. 460; *Chamberlain v. Dunlop*, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. 807 and note on page 811.

⁴¹ *Brecknock Navigation v. Prit-*

tracted to pay a sum equal to one-third of all expenditures necessarily incurred in, by or through the operation, maintenance, renewal, repairs or protection of a certain bridge. The bridge was blown down by a cyclone. It was held that the company was liable for one-third the amount expended in putting it in repair, notwithstanding its destruction by the cyclone.⁴² Where one contracts to build a house or other structure for another and such building or structure is destroyed by fire, act of God or other accident, without the fault of either party to the agreement, the contractor is not thereby discharged from his obligation to fulfil his contract where no provision is made for any such contingency.⁴³ Even a latent defect in the soil on which the building is to be constructed will not relieve

chard, 6 T. R. 750; Errington v. Aynesly, 2 Bro. Ch. 341; Meriweather v. Lowndes County, 89 Ala. 362, 7 So. 198; Mitchell v. Hancock County, 91 Miss. 414, 45 So. 571; 15 L. R. A. (N. S.) 833n, 124 Am. St. 706. See also, Phoenix Bridge Co. v. United States, 38 Ct. Cl. (U. S.) 492, affd. 211 U. S. 188, 53 L. ed. 141, 29 Sup. Ct. 81 (in which a bridge in process of construction was destroyed by an unexpected thaw and flow of ice). See also, Milske v. Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. 354; People v. Plainfield Ave. Gravel Road Co., 105 Mich. 9, 62 N. W. 998 (bridge washed out by unusual freshet). Compare with Coleman v. Mississippi & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641, 35 L. R. A. (N. S.) 1109 and note.

⁴² Central Trust Co. v. Wabash R. Co., 31 Fed. 440.

⁴³ Cutcliff v. McAnally, 88 Ala. 507, 7 So. 331; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371 (building destroyed by lightning); Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Adams v. Nichols, 19 Pic. (Mass.) 275, 31 Am. Dec. 137; Fildew v. Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; School Trustees of Trenton v. Bennett, 27 N. J. L. 513, 72 Am. Dec.

373; Tompkins v. Dudley, 25 N. Y. 272, 83 Am. Dec. 349 (fire); Lawing v. Rintles, 97 N. Car. 350, 2 S. E. 252 (fire); Board v. Townsend, 8 Ohio C. Dis. 732, 15 Ohio C. C. 674; Board of Education v. Townsend, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868; Galyon v. Ketchen, 85 Tenn. 55; 1 S. W. 508; Burke v. Purifoy, 21 Tex. Civ. App. 202, 50 S. W. 1089; Atlantic & D. R. Co. v. Delaware Construction Co., 98 Va. 503, 37 S. E. 13; Eaton v. Joint School Dist., 23 Wis. 374; Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90 (barn destroyed by storm). But the rule is otherwise where the contract is to repair and remodel an old building. The continued existence of the old building is an implied condition of the contract, and the destruction of such building by lightning relieves the contractor from liability. Moreover, payments made by the owner on the contract and put into the building are treated as an execution of the contract pro tanto leaving the loss to the owner. Krause v. Crothersville, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. 654. See, however, Chapman v. J. W. Beltz & Sons Co., 48 W. Va. 1, 35 S. E. 1013 (which distinguishes the Butterfield case).

the contractor from his obligation. Thus, a contractor engaged to build in accordance with certain plans and specifications; when the building was nearly completed, it fell, owing to the latent defect in the soil. It was held that the defect in the soil did not excuse the contractor from the performance of his contract, and that it was no defense that the building, so far as it was erected, was constructed in accordance with the plans and specifications.⁴⁴ And the same has been held true even though the building falls on account of defective plans furnished by the architect. In the absence of any language in the contract to that effect, the owner of the property does not become a guarantor of the sufficiency of the plans for the erection of a building as a legal consequence of submitting them for bids on the work.⁴⁵

§ 1909. **Same—Who must bear loss sustained.**—The question as to which party the loss actually falls on is not without difficulty and depends on the obligations assumed by each party. When the contract is entire and for a lump sum the loss ordinarily falls upon the builder and not on the owner of the land, even when the contract price is payable in arbitrary instalments as the work progresses, without regard, however, to the value of the work actually done,⁴⁶ and in case of the contractor's refusal to proceed to rebuild, he is liable to refund all money advanced to him and is also liable for damages for nonperformance of his contract.⁴⁷ However, if instalments are to become due

⁴⁴ *Stees v. Leonard*, 20 Gil. (Minn.) 448; *Public Schools v. Bennett*, 3 Dutch. (N. J.) 513, 72 Am. Dec. 373. To the same effect, *Dermott v. Jones*, 2 Wall. (U. S.) 1, 17 L. ed. 762. See, however, *Kinzer Const. Co. v. State*, 125 N. Y. S. 46 (contract for construction of canal. Natural conditions of soil appeared which rendered execution of contract impossible).

⁴⁶ *Loneragan v. San Antonio Loan &c. Co.*, 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. 803. See, however, *Byron v. New York*, 7 N.

Y. St. 17, 54 N. Y. Super. Ct. 411.

⁴⁷ *Public Schools v. Bennett*, 3 Dutch. (N. J.) 513, 72 Am. Dec. 373. See also, *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 8 So. 222, 60 Am. Rep. 162; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Stees v. Leonard*, 20 Gil. (Minn.) 448; *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373; *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. 508; *Stover v. Allen*, 1 Heisk. (Tenn.) 486.

⁴⁸ *Stees v. Leonard*, 20 Gil. (Minn.) 448; *Tompkins v. Dudley*,

and payable absolutely on the performance of a certain proportion or part of the work, each of such instalments is due and payable when such part or proportion specified is completed and the subsequent accidental destruction of the structure does not relieve the owner from his obligation to pay such instalments.⁴⁸ The owner is not, however, liable for the intermediate work, labor and materials.⁴⁹ A second line of cases applies the maxim, "*Res perit domino*," when it appears that the contractor was to build the house or other structure for a specified price, either in a lump sum or so much per piece, the owner of the land to furnish the materials, and permit the contractor to recover for the labor actually performed by him in the construction of a building accidentally destroyed in process of erection.⁵⁰ Thus, where for a certain sum a contractor agreed to contribute certain labor and materials toward the erection of a house on land of another, which, before completion, was destroyed by fire, the contractor was held excused from further performance and recovered the value of his work.⁵¹ When a contractor is to furnish only a part of the work for a building, such work or labor is to be treated as the owner's property and the contractor may recover for the work already performed in case the building or other structure, or a portion thereof, is acci-

25 N. Y. 272, 83 Am. Dec. 349. See also, *Phoenix Bridge Co. v. United States*, 38 Ct. Cl. (U. S.) 492, *affd.* 211 U. S. 188, 53 L. ed. 141, 29 Sup. Ct. 81.

⁴⁸ *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. 354.

⁴⁹ *Richardson v. Shaw*, 1 Mo. App. 234. In the above case one instalment was to be paid when frame work was up, a second when the building was enclosed, and a third when ready for plaster. The building was destroyed by storm when almost enclosed. It was held that contractor was entitled to first instalment but could not recover for

work and materials furnished between the time the frame work was up and the storm. See also, *Lonerger v. San Antonio Loan & Co.*, 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. 803.

⁵⁰ *Butterfield v. Byron*, 153 Mass. 577, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. 654; *Wilson v. Knott*, 3 Humph. (Tenn.) 473; *Clark v. Franklin*, 7 Leigh (Va.) 1; *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765. Compare *Vogt v. Hecker*, 118 Wis. 306, 95 N. W. 90. Contra *Brumby v. Smith*, 3 Ala. 123.

⁵¹ *Butterfield v. Byron*, 153 Mass. 577, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. 654.

dentally destroyed while in process of construction.⁵² Thus, where a carpenter entered into a contract to do the carpenter work and furnish the materials therefor, upon a brick building, but the brick work was to be done by another independent contractor, and after the brick work was nearly completed, and a part of the carpenter work done, the brick walls were blown down, it was held that the carpenter was discharged from further performance, and could recover *pro tanto* for his services.⁵³ Likewise, a contractor who agreed to manufacture and put into a building then in process of construction certain iron work, but was prevented from completing the contract by the building being destroyed by fire without his fault, was permitted to recover *pro tanto* and without performing the balance of the contract.⁵⁴ So, where a carpenter agreed to lath and plaster a building for so much per square yard, and after he had done some work on it the house burned down, he was allowed to recover the value of his services.⁵⁵ And when a contractor agrees to place or build some

⁵² *Rawson v. Clark*, 70 Ill. 656; *Cleary v. Sohler*, 120 Mass. 210; *Atlantic & D. R. Co. v. Delaware Const. Co.*, 98 Va. 503, 37 S. E. 13. See also, *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. 318 (contract to move a house destroyed by fire when work about finished); *Hysell v. Sterling Coal & Mfg. Co.*, 46 W. Va. 158, 33 S. E. 95 (contract to put roof on dwelling destroyed by fire when roof almost completed).

⁵³ *Schwartz v. Saunders*, 46 Ill. 18. See also the case of *Hollis v. Chapman*, 36 Texas 1, in which the facts were similar to those of the above case and in which a similar conclusion was reached. The plaintiff agreed to furnish the material and do the carpenter work necessary to finish a brick building for defendants. The building was destroyed by fire before completion. The court said: "Every joist or sill that was placed in the wall, or piece of lumber nailed to the same, became inseparably connected with the building, and a part of the realty, and therefore the property of

appellees (the defendants); and in case of the destruction by accident, or the act of God, the rule *res perit domino* will apply, and appellees (the defendants) can not look to any one to make good their loss." See also, the case of *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765. This is to the same effect as two preceding cases and the facts were much the same except that in this case it was the contractor who furnished the materials and labor for the brick and mason work who was permitted to recover.

⁵⁴ *Rawson v. Clark*, 70 Ill. 656. See also, *Wolf v. Altmeyer*, 8 Pa. Dist. 408.

⁵⁵ *Cleary v. Sohler*, 120 Mass. 210. The foregoing principles apply to remodeling contracts. *Weis v. Devlin*, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38. See also, *Krause v. Crothersville*, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203. See, however, and compare *Chapman v. J. W. Beltz & Sons Co.*, 48 W. Va. 1; 35 S. E. 1013, and *Shanks v. Griffin*, 14 B. Mon. (Ky.) 153.

structure or fixture in a then existing building, he may recover for the work done and material furnished when the building is accidentally destroyed through no fault of his own before the completion of the work.⁵⁶

§ 1910. Same subject continued—Illustrations.—So, also, where a laborer contracted to varnish clock cases at certain prices per case, the work to be done in his employer's factory, and the factory was burned, together with a large number of cases, upon some of which it appeared that the laborer had performed work, some having been completed but not inspected, it was held that he could recover the contract-price for the work completed; and also could recover upon a quantum meruit for that unfinished.⁵⁷ Upon the same principle, one who had taken stock in a turnpike company was held not to be answerable in an action for the assessments, where the course of the road had been changed.⁵⁸ A contract to work coal mines has been held to be terminated by the exhaustion of the mines.⁵⁹ Where a contractor agreed to manufacture new boilers for a ship, then at sea, and the shipowners advanced the contractor some money on the contract, and after the boilers were nearly completed the ship was lost

⁵⁶ *Siegel &c. Co. v. Eaton &c. Co.* 165 Ill. 550, 46 N. E. 449, affg. 60 Ill. App. 639 (elevator to be put in building); *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413 (church fixtures); *Niblo v. Binsse*, 1 Keyes (N. Y.) 476, 3 Abb. Dec. (N. Y.) 375 (plumbing). See, however, *Appleby v. Meyers*, L. R. 2 C. P. 651. And see *Parker v. Scott*, 82 Iowa 266, 47 N. W. 1073, where a man contracted to erect a church spire which was blown down before completion. It was held that he could not recover, and the court said: "Counsel for Scott claim that recovery may be had for the value of the work and labor and materials upon the ground that when a party performs a contract in part he may recover the reasonable value of his work, with the right of the employer to recoup

by the amount of damages sustained by reason of the failure of the plaintiff to fully perform. This has been the law of this state, as announced by this court, for many years. *Pixler v. Nichols*, 8 Iowa 106. But the principle has no application to the facts in this case. The part performance claimed was of no benefit to Leahy. He never accepted the unfinished spire, and, as it lay upon the ground in ruins, it had no value as a spire." In the above case no injury or damage was done to the building proper by the storm, the spire alone being destroyed.

⁵⁷ *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293.

⁵⁸ *Middlesex Turnpike Corp. v. Locke*, 8 Mass. 268.

⁵⁹ *Walker v. Tucker*, 70 Ill. 527.

at sea, it was held that this terminated the contract and released the parties, but the shipowners could not recover back the money they advanced, nor did the boilers belong to them.⁶⁰ It has also been held that a contract to supply water from a certain spring is terminated and the promisor excused from performance if the spring fails from drought or other natural cause.⁶¹ The decisive question in each case is what duty was assumed by the parties under the contract. The parties are bound to do what it was their self-imposed duty to do or respond in damages for breach of contract. Thus, if a party contracts to build and maintain a structure, its destruction by an act of God does not relieve the contractor from his obligation to rebuild the same.⁶² But while the contractor may be under a duty to restore with reasonable diligence the structure so destroyed, his obligation is not construed as a contract of indemnity. Instead, it merely contemplates the performance of work. Consequently, the contractor is not liable to respond in damages because the structure is destroyed or loss results from an act of God. Thus, where one covenants to build and maintain a boom, he discharges his obligation by rebuilding the same with reasonable diligence after its destruction by an unprecedented flood, and is not liable for damages done by the waters after the destruction of the boom, and before it was possible for him to rebuild it.⁶³

§ 1911. Particular contracts concerning specific things.

—In many of the cases in the preceding section the contractor was held to have been relieved from his obligation to remodel or repair a structure which was accidentally destroyed before the repairs were completed on the ground that the parties must have contemplated the continued existence of the structure to be remodeled or re-

⁶⁰ *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271.

⁶¹ *Ward v. Vance*, 93 Pa. St. 499.

⁶² See ante § 1892 et seq.

⁶³ See also, *Hancock v. McFarland*, 17 Iowa 124; *Coleman v. Mis-*

issippi & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641, 35 L. R. A. (N. S.) 1109n; *Brown v. Susquehanna Boom Co.*, 109 Pa. 57, 1 Atl. 156, 58 Am. Rep. 708.

paired.⁶⁴ And it is well settled that when from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible from the perishing of the thing without the default of the contractor.⁶⁵ Thus, where an agreement was made for giving a series of concerts at a music hall, by which one of the parties was to let the use of the hall for a certain daily payment, and the other party was to provide the performers and to take the money, but before the time arrived the hall was destroyed by fire, it was held that the agreement was impliedly conditional upon the continued existence of the hall, and was put an end to by its destruction, and that no claim could be made under it for not letting the hall.⁶⁶ So, also, where one is employed to do work in a particular building for a series of days, the burning of the building by inevitable accident will terminate the employer's liability for wages.⁶⁷ And it has been held that an agreement that a bull shall serve a cow is de-

⁶⁴ See ante § 1908 et seq. See also, *Appleby v. Meyers*, L. R. 2 C. P. 651; *Butterfield v. Bryon*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. 654; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Gilbert & Barker Mfg. Co. v. Butler*, 146 Mass. 82, 15 N. E. 76; *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 6 N. E. 742.

⁶⁵ *Taylor v. Caldwell*, 3 B. & S. 826; *Siegel v. Eaton & Co.*, 165 Ill. 550, 46 N. E. 449, affg. 60 Ill. App. 639; *Walker v. Tucker*, 70 Ill. 527; *Knight v. Bean*, 22 Maine 531; *Gilbert & Barker Mfg. Co. v. Butler*, 146 Mass. 82, 15 N. E. 76;

Eliot Nat. Bank v. Beal, 141 Mass. 566, 6 N. E. 742; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Powell v. Dayton S. & G. R. Co.*, 12 Ore. 488, 8 Pac. 544; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

⁶⁶ *Taylor v. Caldwell*, 3 B. & S. 826.

⁶⁷ *Hall v. School District*, 24 Mo. App. 213. A school house burned, and it was held to exonerate the district from payment of the teacher after the destruction of the building.

pendent upon the bull's ability, and his death rescinds the bargain.⁶⁸ Where the keeper of a stallion advertises "with the privilege of breeding back again next season should the mare not prove with foal; the money due at the time of service, or before the mare is removed," one putting a mare to the stallion, the mare not proving in foal, is liable for the fee, although he is deprived of the privilege of breeding back the next season by the death of the horse.⁶⁹ Where a contract was to the effect that a certain sum should be paid "for publishing my advertisement in the Fifth Avenue, Union Square and Lyceum Theaters, to occupy one inch on program page for the theater season," it was held that when one of the theaters closed this terminated the contract.⁷⁰ The accidental destruction of a building leased for a term of years does not, however, release the lessee from his obligation to pay rent.⁷¹

§ 1912. Bailment.—Under the early law of bailment a bailee was treated as a debtor and the unpreventable loss of the thing bailed did not excuse him from liability. The early bailee was liable to the same extent as the borrower of money or consumable goods is liable in modern law.⁷² During the thirteenth century there developed a disposition to ameliorate this harsh rule. This disposition developed into a reality and under modern law equitable considerations permit the defense of unpreventable loss to be interposed. The liability of the bailee and the degree of care required of him also depend largely on the nature of the bailment. In case the bailee undertakes a gratuitous bailment for the benefit of the bailor the former is liable only when the thing bailed is lost or perishes by reason of plainly apparent negligence on the part of such bailee.⁷³ This principle also applies to the finder of lost

⁶⁸ *Shear v. Wright*, 60 Mich. 159, 26 N. W. 871.

⁶⁹ *Price v. Pepper*, 13 Bush. (Ky.) 42.

⁷⁰ *Hazzard v. Hoxsie*, 53 Hun (N. Y.) 417, 25 N. Y. St. 50, 6 N. Y. S. 295.

⁷¹ *Baker v. Holtzaffel*, 4 Taunt. 45; *Izon v. Gorton*, 5 Bing. N. Cas. 501; *Fowler v. Bott*, 6 Mass. 63.

⁷² 2 *Street Found. Leg. Liab.* 253, et seq.

⁷³ *In Coggs v. Bernard*, 2 Ld. Raym. 909, 913, Lord Holt said:

goods,⁷⁴ and it seems true generally that when the defendant is a gratuitous bailee for the benefit of the bailor the burden is on the bailor to show negligence.⁷⁵ In case personal property is loaned to one for his accommodation, such bailee is relieved from liability for a loss which results from an inevitable accident which could not have been provided against by human foresight and skill.⁷⁶ Usually questions concerning the law of bailment arise in cases in which the bailment was for the mutual benefit of both parties. It is true generally that in cases of bailment for mutual benefit the bailee "is bound to exercise the degree of care which an ordinarily prudent man usually bestows upon his own property of a like nature under like circumstances; and he is liable for any loss or injury resulting to the pledge from a failure to use such care."⁷⁷ The foregoing principle applies to cases of pledge or pawn.⁷⁸ The burden is on the plaintiff, however, to show negligence on the part of the bailee.⁷⁹ A bailee for hire is also required to exercise only ordinary care.⁸⁰ However, in

"If they are stole without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross neglect." *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. 375. (The bailor by showing the bailment and a refusal to redeliver makes out a prima facie case. But if the bailee is able, in a case of bailment for mutual benefit, to show that the goods were stolen from him, the burden is then on the bailor to show negligence.) To same effect, *Dinsmore v. Abbott*, 89 Maine 373, 36 Atl. 621. See also, *Rex v. Hertford*, 2 Show. 172.

⁷⁴ *Isaack v. Clark*, 2 Bulst. 306.

⁷⁵ *Dinsmore v. Abbott*, 89 Maine 373, 36 Atl. 621.

⁷⁶ *Fortune v. Harris*, 6 Jones L. (N. Car.) 532. "If a man lends another a horse and a house by chance falleth upon the horse, the bailee shall not be liable if the house was well built and fell by reason of a sudden tempest or other casualty. But if the house were like to fall, then it can not be taken as a chance, but as the

default of him that had the horse delivered to him." *St. Germain*, 2 *Dialogue* Ch. 38.

⁷⁷ *Jones Pledges and Col. Sec.*, § 403.

⁷⁸ *Abbott v. Frederick*, 56 How. Pr. (N. Y.) 68 (pledge stolen). If goods are left with the pledgee until they perish from natural causes, the loss falls on the pledgor. *Thomason v. Dill*, 30 Ala. 444. The pledgee is not relieved from liability by the mere fact that he bestowed the same care on the pledge that he gave his own goods but the fact that his own goods are stolen at the time the pledge is stolen may be prima facie evidence of ordinary care. *Petty v. Overall*, 42 Ala. 145, 94 Am. Dec. 634. If the pledgee wrongfully retains the property he is liable in all events. *Coggs v. Bernard*, 2 Ld. Raym. 909.

⁷⁹ *Story Bailments* (9th ed.) §§ 337, 338. See also, *Cass v. Boston & C. R. Co.*, 5 Am. L. Rev. 205.

⁸⁰ *Story Bailments* (9th ed.) §§ 398, 399; 2 *Kent. Com.* (14th ed.) 586, 587; *Standard Brewery v. Bemis &*

case domestic animals are hired, the terms of the bailment must be strictly complied with and if the bailee departs from the terms of the bailment he becomes practically an insurer.⁸¹ The same general principle as to the degree of care to be exercised applies to warehousemen, grain elevators, wharfingers, and the like. Bailees of this character must exercise the diligence of a prudent man, although it is proper for the pledgee to modify his liability by express agreement.⁸² But where there is no special contract limiting the liability of the bailee for hire it seems that the burden is on such bailee to show the exercise of due care.⁸³

§ 1913. "Strikes."—A "strike" of workmen, in the absence of an agreement to the contrary, is no excuse for

Curtis Malting Co., 171 Ill. 602, 49 N. E. 507, affg. 70 Ill. App. 363.

⁸¹ Wheelock v. Wheelright, 5 Mass. 104; Disbrow v. Tenbroeck, 4 E. D. Smith (N. Y.) 397; Evertson v. Frier (Tex. Civ. App.), 45 S. W. 201. Compare Doolittle v. Shaw, 92 Iowa 348, 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. 562. See the case of Masterson v. International &c. Co. (Tex. Civ. App.), 55 S. W. 577 (holding that the bailor can not recover damages from the one who negligently destroyed his property, where the party guilty of such negligent conduct has already settled with the bailee and paid him the value of the property destroyed notwithstanding this settlement was an extrajudicial one). See also, Butler v. Greene, 49 Nebr. 280, 68 N. W. 496 (in which pledgee contracted to keep property in the vault of a designated bank. He was held liable for a loss resulting from his failure to do so even though he failed to keep the goods there for the reason that the bank refused to permit the goods to be kept in its vault).

⁸² Damon v. Waldeufel, 99 Cal. 234, 33 Pac. 903 (bailor consented that piano be stored with friends who might use same as compensation for storage); Hunter v. Baltimore Packing &c. Co., 75 Minn. 408, 78 N. W. 11; Wells v. Porter,

169 Mo. 252, 69 S. W. 282, 92 Am. St. 637; Bank of British Columbia v. Marshall, 8 Sawy. (U. S.) 29, 11 Fed. 19. See also, Butler v. Greene, 49 Nebr. 280, 68 N. W. 496, holding that the terms of the contract must be strictly followed. St. Losky v. Davidson, 6 Cal. 643; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215 (In this case plaintiff contracted with defendant to the effect that defendant was to manufacture cheese and butter from milk delivered at his factory by the plaintiff, to sell the products and distribute the proceeds in the manner stipulated. The factory was thereafter destroyed by fire and a quantity of milk and cheese thereby lost. In an action to recover the amount of the loss it was held that the contract was one of bailment, and defendant only assumed the duty of ordinary care, and that the contract was put an end to by the destruction of the factory, and the defendant was not liable for the loss of the goods).

⁸³ Concord Variety Works v. Beckham, 112 Ga. 242, 37 S. E. 392. Where defendant hired a horse, which died while in his possession, the burden of proof was on him to show that he had exercised proper care with regard to the bailment. Brewster v. Weir, 93 Ill. App. 588.

the failure to perform a contract.⁸⁴ But where the workmen abandon their work, and by violence and intimidation prevent other employes, who are ready and willing to work, from so doing, this is more than an ordinary "strike."⁸⁵ And accordingly a common carrier is not liable for delay in the shipment of goods caused solely by the lawless and irresistible violence of strikers and their confederates.⁸⁶ But if the workmen simply quit work because the employer does not pay, this will not excuse the performance of a contract by the employer.⁸⁷ It is quite common, however, for a contract which is to be performed within a particular time to provide for exemption from liability for loss or delay occasioned by a strike.⁸⁸ A com-

⁸⁴ *Budgett v. Binnington*, L. R. 25 Q. B. Div. 320; *Nightingale v. Eisehan*, 121 N. Y. 288, 24 N. E. 475; *Shelby v. Missouri Pacific R. Co.*, 77 Mo. App. 205 (contract of carriage); *Blackstock v. New York & Erie R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372. See *Read v. St. Louis, Kansas City & N. R. Co.*, 60 Mo. 199; *Sterling v. St. Louis Iron Mountain & C. R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655; *People v. New York Central & H. R. Co.*, 28 Hun (N. Y.) 543, 3 Civ. Proc. 11, 2 McCarty Civ. Proc. 345 (duty to undertake to carry). As to building contracts, see *Serber v. McLaughlin*, 97 Ill. App. 104; *Hexter v. Knox*, 39 Super. Ct. (N. Y.) 109 affd. in 63 N. Y. 561; *Neblett v. McGraw* (Tex. Civ. App.), 103 S. W. 1113. Delay by a building contractor has, however, been held excused by a strike of its employes, where the contractor had been delayed by the owner of the building. *Barnum v. Williams*, 115 App. Div. (N. Y.) 694, 102 N. Y. S. 874, affd. in 190 N. Y. 539, 83 N. E. 1122. See also, article in 16 Harv. Law Rev. 555 (1902-3).

⁸⁵ *Geismer v. Lake Shore & C. R. Co.*, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

⁸⁶ *Empire Transp. Co. v. Philadelphia & C. Coal & Iron Co.*, 70 Fed. 268 affd. 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; *Haas v. Kansas City R. Co.*, 81 Ga. 792,

7 S. E. 629; *Pittsburgh, Ft. Wayne & Chicago R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Pittsburg, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457; *Louisville & N. R. Co. v. Bell*, 13 Ky. L. 393; *Louisville & N. R. Co. v. Thompson*, 13 Ky. L. (abstract) 973; *Little v. Fargo*, 13 Hun (N. Y.) 233, 5 N. Y. St. 462; *Missouri Pac. R. Co. v. Levi* (Tex. Civ. App.), 14 S. W. 1062; *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; *Gulf, C. & S. F. R. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. 45.

⁸⁷ *McLeod v. Genius*, 31 Nebr. 1, 47 N. W. 473.

⁸⁸ See, as to contracts of carriage, *Hagerman v. Norton*, 105 Fed. 996, 46 C. C. A. 1; *New Rupperra Steamship Co. v. Two-Thousand Tons of Coal*, 124 Fed. 937, affd. 142 Fed. 402, 73 C. C. A. 502; *Actieselskabet Barford v. Hilton & Dodge Lumber Co.*, 125 Fed. 137. See also, *Dobell v. Green* (1900), 1 Q. B. 526; *Hulthen v. Stewart*, App. Cas. (1903) 389; *Elswick Steamship Co. v. Montaldi*, 1 K. B. (1907) 626; *Saxon Steamship Co. v. Union Steamship Co.*, 69 L. J. Q. B. 907; *Steel v. Grand Canary Coal-ling Co.*, 90 L. T. 729. See, as to building contracts, *Miller v. Norcross*, 92 App. Div. (N. Y.) 352, 87 N. Y. S. 56. Compare *Morse*

mon carrier may lawfully stipulate by special contract for exemption from liability for loss occurring by reason of delay in the transportation and delivery of goods occasioned by a strike.⁸⁹ Where a "strike clause" is inserted in a contract, exempting liability in case of failure to perform occasioned by a strike, the contractor is not thereby prohibited from conducting his business upon the same general principles which would have governed him had the clause not been inserted, nor is he required to resort to extraordinary or unusual means to prevent strikes, but he has the right to adopt such rules and regulations and pay such wages as are reasonable under the circumstances.⁹⁰ In the absence of any provision in a bill of lading fixing a time for unloading, the consignee's obligation to unload is to use all reasonable diligence under the circumstances; and demurrage will not run during a delay for which he was in no wise responsible, caused by a general strike of lightermen.⁹¹ The duty imposed upon railroad companies by the "interstate commerce act," of receiving freight from connecting roads, is one which it has been held the federal courts will enforce by mandatory injunction, notwithstanding a strike of employés.⁹²

§ 1914. Impossibility caused by the promisee.—It is a well settled principle of law that if by any act of one of the parties the performance of a contract is rendered im-

Dry Dock & Repair Co. v. Seaboard Transp. Co., 154 Fed. 90. As to exemption from liability for demurrage under charter, see *W. K. Niver Coal Co. v. Cheronea Steamship Co.*, 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126. As to contract of sale, see *Consolidated Coal Co. of St. Louis v. Jones*, 232 Ill. 326, 83 N. E. 851. As to the construction of such provisions, see *Cottrell & Son v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187 and note.
⁸⁹ *Gulf, Colorado R. Co. v. Gatewood*, 79 Texas 89.

⁹⁰ *Delaware R. Co. v. Bowns*, 58 N. Y. 573. The meaning of the term "general strike" in a clause

excusing delay caused by a "general strike" is defined in *Weber v. Collins*, 139 Mo. 501, 41 S. W. 249.

⁹¹ *Hick v. Rodocanachi*, 65 L. T. (N. S.) 300, 44 Alb. L. J. 462. See also, *Empire Transp. Co. v. Philadelphia & c. Coal & Iron Co.*, 70 Fed. 268, *affd.* 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623. But see *People v. New York Central & H. R. Co.*, 28 Hun (N. Y.) 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345.

⁹² *Chicago, B. & O. R. Co. v. Burlington & c. R. Co.*, 34 Fed. 481. See also, *Budgett v. Binnington*, 1 Q. B. 35; *McFadden v. Compagnie Generale Transatlantique*, 1 R. and Corp. L. J. 112.

possible, then the other party may rescind the contract.⁹³ And this may be done, although the contract might be performed in some other manner not very different.⁹⁴ "Where the condition of a bond is possible at the time of making it, and, before the same can be performed, becomes impossible by the act of the obligee, there the obligation is saved."⁹⁵ If the impossibility arises directly or even indirectly from the acts of the promisee, it is a sufficient excuse for nonperformance.⁹⁶ Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work contracted for could not be completed until other work to be done by the owner was finished, it was held that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged

⁹³ *Panama & South Pacific Telegraph Co. v. India Rubber &c. Co.*, L. R. 10 Ch. App. 515. G sold an interest in his business under a partnership agreement for \$1000 cash and \$1000 at the end of one year, unless the purchaser desired to terminate the partnership at that time, in which event he was to receive back the money paid. G became a voluntary bankrupt before the expiration of the year. It was held that his trustee in bankruptcy could not recover the second instalment, the partnership being dissolved by a bankruptcy, so that the consideration for payment of the second instalment could not be performed. *Hardy v. Weyer*, 42 Ind. App. 343, 85 N. E. 731. See also, *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 331. One party is released from a contract by the insolvency of the other only when the insolvency of the latter incapacitates him from performance. *Brassel v. Troxel*, 68 Ill. App. 131; *In re Carter*, 21 App. Div. (N. Y.) 118, 47 N. Y. S. 383; *Camp v. Simon*, 23 Utah 56, 63 Pac. 332. Insolvency of contractors does not

relieve them from the obligations of their contract. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436. See also, *Bank Comrs. v. New Hampshire Trust Co.*, 69 N. H. 621, 44 Atl. 130. "Where one party is called upon to perform his part, it is always permissible to show that the other party can not perform his part, that it was never in his power to do so, or that it is at the time incapable of performance." *German-American Security Co.'s Assignee v. McCulloch*, 28 Ky. L. 133, 89 S. W. 5. See also, *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, 47 Atl. 406.

⁹⁴ *Planche v. Colburn*, 8 Bing. 14; *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949; *District of Columbia v. Camden Iron Works*, 15 App. D. C. 198.

⁹⁵ *Co. Lit.* 206. See also, *Morgan v. Tucker*, 78 Vt. 56, 61 Atl. 863 (contract to cut and haul logs).

⁹⁶ *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 94, 48 L. R. A. 685. See also, *Romero v. Newman*, 50 La. Ann. 80, 23 So. 493; *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453.

him from liability for the liquidated damages.⁹⁷ A subcontractor is excused from further performance if the contractor and owner cancel their contract.⁹⁸ Where a party, for a valuable consideration, gives to another an order payable out of a fund not then in existence, such party can not, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defense to an action upon the order; and where an order is drawn upon a fund to be paid upon the happening of a condition, which order is accepted, the acceptor can not, by his own act, defeat the condition and then set it up as a defense in an action upon the acceptance.⁹⁹ Where the obligation of one party to a contract requires of him the expenditure of a large sum in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the other to comply with his agreement.¹ Thus, where the promisor agreed to pack a definite number of hogs and made all his preparations to do so, and was ready to do so, but the promisee refused to furnish the hogs to be packed, this excused performance by the promisor.² But where upon the leasing of an elevator the defendant railroad company covenanted that there would be delivered or brought to said elevator by the railroad company and others at least five million bushels of grain per annum for storage and handling, and if it should fall short of that amount to pay the lessee one cent per bushel on the amount of deficiency, it was held that the railroad company fulfilled its part of the contract by offering at the elevator the stipulated amount of grain, and the inability of the lessee to accept the grain, on account of the storage capacity of the elevators being fully occupied, did not render the railroad company liable to

⁹⁷ See also, *Young v. Wells Glass Co.*, 187 Ill. 626, 58 N. E. 605 (extension of time granted by one authorized to give such extension).

⁹⁸ *Weeks v. McCarty*, 89 N. Y. 566. See also, *Stewart v. Keteltas*, 36 N. Y. 388.

⁹⁹ *Gallagher v. Nichols*, 60 N. Y. 438.

¹ *Risley v. Smith*, 64 N. Y. 576.

² *United States v. Speed*, 8 Wall. (U. S.) 77, 19 L. ed. 449, 7 Ct. Cl. (U. S.) 93.

pay one cent per bushel for any deficiency under five million bushels.³ So, also, where the failure of the promisee to furnish the water required for irrigation as agreed caused the death of vines, for the protection of which the promisor had agreed to build a fence, it was held that the promisor was not liable because of his failure to build the fence.⁴ And again, a contractor, having provided machinery for an elevator, and delivered it on the owner's premises, being wrongfully prevented by the owner from completing the contract, can recover the full value of his labor and materials, though the owner afterwards finished the elevator, not using the contractor's materials.⁵ Where the promisee becomes surety on the bond in a replevin case, by means of which the goods are taken from the promisor, this excuses him from his contract of sale with the promisee.⁶ If one contracting party can show that the other prevented his performance, it is to be taken as *prima facie* true that he would have accomplished it if he had not been stopped.⁷ But one who entered into an agreement for the sale of property on which he had a lien for the payment of a debt is not relieved from liability by the failure of bidders to comply with the terms of the sale.⁸ In a case where a publisher engaged an author to write a treatise for a periodical, but, before he had completed it,

* "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possi-

bility of the particular contingency which afterwards happens." *Chicago, M. & S. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 17 Sup. Ct. 779.

⁴ *Skelsey v. United States*, 23 Ct. Cl. (U. S.) 61.

⁵ *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355.

⁶ *Ellithorpe Air Brake Co. v. Sire*, 41 Fed. 662, *affd.* 137 U. S. 579, 34 L. ed. 801, 11 Sup. Ct. 195.

⁷ *McCreery v. Green*, 38 Mich. 172; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 94, 48 L. R. A. 685; *Olson v. Snake River Val. R. Co.*, 22 Wash. St. 139, 60 Pac. 156; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *Boden v. Maher*, 105 Wis. 539, 81 N. W. 661.

⁸ *Bradshaw v. McCloughlin*, 39 Mich. 480.

the publisher abandoned the publication, it was held that the author could recover compensation without tendering or delivering the treatise.⁹

§ 1915. Impossibility caused by the promisor.—A promise is not excused by an impossibility of performance caused by the promisor. "An act of the promisor which renders performance impossible, while it dispenses with the performance of all conditions precedent on the other part, constitutes at once a breach of contract."¹⁰ Thus, the seizure by the defendant of plaintiffs' tools, thereby depriving them of the opportunity to complete the work they had contracted to do, was a breach of the contract which entitled the plaintiff to sue for damages.¹¹

§ 1916. Impossibility resulting from the acts of third persons.—It is also true, generally, that a promisor is not relieved from responsibility for failure to perform because prevented from performance by the neglect, omission or refusal of a third party to perform some act necessary to the execution of the contract and upon whom he had

⁹ *Planche v. Colburn*, 8 Bing. 14. See also, *Highton v. Dessau*, 46 N. Y. St. 912, 19 N. Y. S. 395, *affd.* 139 N. Y. 607, 35 N. E. 203; *McCartney v. Glassford*, 1 Wash. St. 579, 20 Pac. 423; *Byron v. New York*, 54 N. Y. Super. Ct. 411; *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378; *Home Bank v. Drumgoole*, 109 N. Y. 63, 15 N. E. 747; *Wood v. Malone*, 131 Pa. St. 554, 18 Atl. 984. See also, *Holme v. Guppy*, 3 M. & W. 387; *Thornhill v. Neats*, 8 C. B. (N. S.) 831; *Russell v. Sa Da Bandera*, 13 C. B. (N. S.) 149; *Roberts v. Bury Imp. Commissioners*, L. R. 4 C. P. 755; *Westwood v. Secretary of State for India*, 11 Wkly. R. 261.

¹⁰ *Leake Cont.* 611 (3d ed.), citing: *Beswick v. Swindells*, 3 Al. & El. 868 (a case of a bond); *Clark v. Westrope*, 18 C. B. 765 (Where an incoming tenant agreed to buy the straw upon a farm at a price to be fixed by valuation and then consumed the straw before a valua-

tion could be made, and so rendered it impossible, he was held to pay the value to be estimated by the jury.); *Telegraph Despatch Co. v. McLean*, L. R. 8 Ch. 658 (Where a business sold was to be paid for in instalments dependent upon the profits, and the buyer discontinued the business, it was held a breach.); *Evans v. Woods*, L. R. 5 Eq. 9. See also, *Bell v. Shields*, 18 Idaho, 649, 111 Pac. 1076, in which it is said: "He is as liable for a breach of the contract as though he had deliberately refused to comply with it." This was a case in which defendant sold timber on land and then sold the land without reserving to plaintiff the right to the timber. As a result, a subsequent innocent purchaser enjoined the plaintiff from cutting or removing the timber. *Vaughn v. Digman*, 19 Ky. L. 1340, 43 S. W. 251.

¹¹ *Brucker v. Manistee & C. R. Co.*, 166 Mich. 330, 130 N. W. 822.

depended for such performance.¹² Thus, one who engages accommodations for a party of persons at a hotel and promises that such party will occupy the quarters thus engaged is personally liable for the contract-price when the party for whom the rooms were engaged refuses to accept them and goes elsewhere.¹³ A covenant to construct a canal on certain lands is not excused by inability to obtain from the landowners the right to construct such canal;¹⁴ and an agreement to procure the renewal of or to return certain notes is not excused by the refusal of an endorser to whom they have been delivered to give them up or renew them.¹⁵ Nor does drunkenness on the part of the only available judge relieve the sureties from liability on a bond conditioned for the diligent prosecution by a debtor of his application for a discharge.¹⁶

§ 1917. Alternative promises.—If a party contracts to do one of two things, the fact that one part of this alternative promise is impossible of fulfilment does not relieve him from performing the other.¹⁷ Thus, where the bailee of a chattel promised to return the chattel, or its value in money, he was held bound to pay its value, although it perished without his fault.¹⁸ Two physicians agreed to form a partnership; the articles were to the effect that they should divide the receipts should the partnership con-

¹² *McNeil v. Reid*, 9 Bing. 68 (contract to introduce a stranger into a firm—could not gain consent of the other partners); *Gravel Switch & C. Tel. Co. v. Lebanon & C. Tel. Co.*, 139 Ky. 151, 129 S. W. 559 (In the above case the defendant was maintaining its poles and wires in the streets and alleys of a certain town under a license from such town. It granted to another company a physical connection with its lines. The town revoked the license of the defendant. The defendant was held liable for breach of contract.); *Van Etten v. Newton*, 15 Daly (N. Y.) 538, 8 N. Y. S. 478; *Vale v. Suiter*, 58 W. Va. 353; 52 S. E. 313 (Performance of contract to saw lumber and ties

is not excused by employes quitting work on account of small-pox). See also, *The Abbaye v. United States Motor Cab Co.*, 71 Misc. (N. Y.) 454, 128 N. Y. S. 697.

¹³ *Danenhower v. Hayes*, 35 App. D. C. 65, 33 L. R. A. (N. S.) 698.

¹⁴ *Stone v. Dennis*, 3 Port. (Ala.) 231.

¹⁵ *Wareham Bank v. Burt*, 5 Allen (Mass.) 113.

¹⁶ *Cobb v. Harmon*, 23 N. Y. 148.

¹⁷ *Stevens v. Webb*, 7 Can. & P. N. P. 60; *Drake v. White*, 117 Mass. 10; *Frothingham v. Seymour*, 121 Mass. 409; *State v. Worthington's Exrs.*, 7 Ohio 171. See also, *Stockton v. Jacksonville & C. R. Co.*, 44 Fla. 728, 33 So. 401.

¹⁸ *Drake v. White*, 117 Mass. 10.

tinue, but, if one withdrew from practice, the other should pay him a certain sum. Before anything was done under this contract, one party declined to proceed with the business, and it was held that this act did not prevent the other from recovering the sum agreed on as compensation for withdrawal from practice, he having elected so to do.¹⁹ An alternative contract to pay money or convey land in a certain event is not discharged by the death of the contractor rendering the conveyance of the land impossible.²⁰ In accordance with the same principle, where a party has agreed to do two things, which are entirely distinct, and one of them is prohibited by law and the other is legal, such illegality of the one stipulation can not be set up as a bar to a suit for a breach of the valid one. Thus, where a railroad company agreed to allow an express company to transport cars over its railway, their refusal to so allow the express company to transport trains was a breach of their stipulation, and it was held no defense that another stipulation of this contract was void and impossible because contrary to law.²¹

§ 1918. Alternative promises—Illustrations of doctrine.

—In a leading case, Vice-Chancellor Kindersley said: "It is impossible to lay down any universal proposition either way, but that the principle to be applied in each case is, that it must depend on the intention of the parties to the bond, or covenant, or agreement, such intention to be collected from the nature and circumstances of the transaction and the terms of the instrument. And this, I think, will hardly admit of contradiction, that if the court is satisfied, that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of

¹⁹ Frothingham v. Seymour, 121 Mass. 409.

²⁰ State v. Worthington's Exrs. 7 Ohio 171.

²¹ Erie R. Co. v. Union Locomotive &c. Co., 35 N. J. L. 240. See also, Chesman v. Nainby, 2 Ld. Raym. 1456; Mallan v. May, 11

M. & W. 653; Price v. Green, 16 M. & W. 346; Gaskell v. King, 11 East 165; Nicholls v. Stretton, 10 Ad. & El. (N. S.) 346; Chester v. Freeland, Ley 71; Sheerman v. Thompson, 11 Ad. & El. 1027.

these modes becomes impossible by the act of God, he is bound to perform it in the other mode.”²² Lord Coke, however, laid down the contrary rule, “that, where the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them become impossible by the act of God, the obligor is not bound to perform the other.”²³ But where a man contracted to pay a certain sum for every ton of coal he should obtain from a mine, or, if he ceased to work the mine, he would pay a fixed sum instead, he was held bound to pay this latter sum, although the mine became exhausted.²⁴ And where a bond was given conditional either to pay the obligee a certain sum, or to surrender a person who had been arrested to appear in an action at his suit by an appointed day, and the person to be surrendered died before that day, the bondsman was compelled to pay the bond.²⁵ Somewhat akin to this principle is the law that where, under the terms of a lease, the landlord covenants to insure, and the tenant has the option to purchase for a fixed sum, if, before the time for exercising the option, the buildings demised are burned, and the landlord receives the insurance money, the tenant then exercising his option to purchase has no claim on the insurance money.²⁶

§ 1919. False assumption of impossibility — Provisions excepting impossibility.—A party who becomes involved in difficulties for which he is not responsible, if ultimately able to perform, is not to be deprived of the benefits of his contract because of an assumption by the other party that the difficulties will prove insurmountable. Thus,

²² *Barkworth v. Young*, 4 Drewry 1, 24, 25.

²³ *Laughter's Case*, 5 Coke 22.

²⁴ *Marquis of Bute v. Thompson*, 13 M. & W. 487.

²⁵ *Warner v. White*, T. Jones, 95. But where the condition of the bond has become impossible by act of God the obligation is discharged; as where the defendant was arrested as a fraudulent debtor,

and he gave bond for his further appearance, it was held that this bond was not broken, and the surety not liable, where the defendant failed to appear because he was taken sick. *Scully v. Kirkpatrick*, 79 Pa. St. 324, 21 Am. Rep. 62.

²⁶ *Edwards v. West*, L. R. 7 Ch. Div. 858.

where a contract required a theatrical manager to furnish a hall for a concert, and to pay a certain sum after the entertainment, the fact that a most extraordinary snow storm prevailed in the vicinity, which early on the day of the concert rendered the streets of the village and the roads from the surrounding country practically impassable, and trains on the railroad to the village were suspended, and in consequence the manager thought it impossible for the performers to reach the village—this did not excuse him from his duty to furnish the hall, the performers reaching the village by a special train.²⁷ Of course, the contract may in express terms provide against contingencies interfering with the performance, by excepting certain events from the liability. "Hence, charter-parties and contracts for the carriage of goods by sea, which are peculiarly subject to inevitable accidents, are generally drawn with an express exceptive clause," restricting his liability.²⁸ A provision against liability for nonperformance occasioned by intervening impossibility need not necessarily be set out in express terms. It may be implied from the nature of the subject-matter of the contract and the situation of the parties.²⁹

²⁷ *Hathaway v. Sabin*, 63 Vt. 527, 22 Atl. 633.

²⁸ *Leake Cont.* (3d ed.), 601. As to contract to deliver water until restrained from doing so, see *Fresno Milling Co. v. Fresno Canal & Irrigation Co.*, 126 Cal. 640, 59 Pac. 140. A contract for displaying advertisements in street cars, which provides it shall terminate in case the advertising company lose the right to display advertisements in cars, is terminated by a sale of its interests to another company. *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 42 Atl. 923.

²⁹ See *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Hillyard v. Mutual Ben. Life Ins. Co.*, 35 N. J. L. 415, affd. 37 N. J. L. 444; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Whipple v. Lyons, Beet Sugar Ref. Co.*, 64 Misc. (N. Y.) 363; 118 N. Y. S.

338 (contract for crop to be raised according to instruction. It was held that performance will be excused to the extent that seeds fail to grow on land selected according to instruction). In a contract to dig a well it was said that the contract was subject to the implied condition that both parties should be excused from their obligations in case its actual completion became impossible, and it would have been fulfilled when a sufficient amount of water had been obtained or when it became reasonably certain that further drilling would be useless. *Poland v. Thomaston Face Ornamental Brick Co.*, 100 Maine 133, 60 Atl. 795. See further on this subject of Impossible Contracts in the chapters on Consideration, Mistake, Discharge and Breach of Contracts.

CHAPTER XLIII.

PAYMENT.

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§ 1925. **Generally.**—The most common form of performance, perhaps, is that of payment. This may be said to consist of the performance of a contract by the delivery and receipt of money or something delivered and accepted as its equivalent in discharge of the contract obligation.¹ To constitute payment, it may be stated generally that the money or other thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt and the creditor must receive it for that purpose.² If the

¹In the strict and narrow sense, payment is a discharge in money of a sum due (*Manice v. Hudson River R. Co.*, 3 Duer. (N. Y.) 426), and where something else is received in payment of money due, it is by virtue of some agreement to that effect, and it has been held in Massachusetts that a plea of payment is not good and sufficient to permit a new or subsequent agreement to such effect to be shown in such a case. *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736; *Wheaton v. Nelson*, 11 Gray (Mass.) 15. (See also, as to pleading pay-

ment, generally, the note in *Ann. Cas.* 1912B 488; *Harvey v. Denver &c. R. Co.*, 44 Colo. 258, 99 Pac. 31, 130 Am. St. 120, and note.) But in a broader sense anything that the parties agree upon as payment or that is paid and accepted as the equivalent of money so as to discharge the obligation may be and usually is regarded as payment. *Tuttle v. Armistead*, 53 Conn. 175, 22 Atl. 677.

²*Fremont County v. Fremont County Bank*, 145 Iowa 8, 123 N. W. 782; *Ann. Cas.* 1912A, 1220; *Gal-*

contract prescribes the kind and method of payment, the payment must be made, at least, substantially as prescribed.³ If the prescribed method is followed, the payment may be sufficient even though the creditor does not actually receive the money in time and even though it is lost on the way. Thus, where money in payment is sent by the debtor to the creditor by mail and is lost before it reaches him, it has been held that it will discharge the debt and the loss will fall on the creditor if the remittance was thus made as prescribed.⁴

§ 1926. When to be in money.—The presumption is that payment is to be made in money unless the contrary is shown.⁵ And the burden of proving the acceptance of something else than money as payment has been held to be upon the party alleging it.⁶ So, it has been laid down as a general rule that where a party has not expressly agreed to accept payment in something other than money, he may enforce his just claim by a money judgment, unless he has in some way estopped himself or legally waived his right to demand payment in money.⁷ As said in another case, "It needs no positive agreement to pay in

braith v. Starks, 117 Ky. 915, 79 S. W. 1191; Cushing v. Wyman, 44 Maine 121; Blair v. Carpenter, 75 Mich. 167, 42 N. W. 790; Jameson v. Carpenter, 68 N. H. 62, 36 Atl. 554.

³Ready v. Syracuse, 144 N. Y. 63, 38 N. E. 1006; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; Swift v. New York, 83 N. Y. 528; Crumlish's Admr. v. Central Improvement Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120n, 45 Am. St. 872; Drake v. Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. 717 (unless, of course, there is a waiver or an estoppel, or the like).

⁴Parmer v. Phoenix Mut. &c. Insurance Co., 84 N. Y. 63; Gross v. Criss, 3 Grat. (Va.) 262. See also, Burr v. Sickie, 17 Ark. 428, 65 Am. Dec. 437; Gurney v. Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58; Kenyon v. Knights Templar &c.

Assn., 122 N. Y. 247, 25 N. E. 299. ⁵Fell v. H. Fell Poultry Co., 69 N. J. L. 429, 55 Atl. 236.

⁶Wipperman v. Harty, 17 Ind. App. 142, 46 N. E. 537; Olvey v. Jackson, 106 Ind. 286, 291, 4 N. E. 149; Bradley v. Harwi, 43 Kans. 314, 23 Pac. 566; Collins v. Busch, 191 Pa. St. 549, 43 Atl. 378; Chase v. Brundage, 58 Ohio St. 517, 51 N. E. 31; Baker v. Baker, 2 S. Dak. 261, 49 N. W. 1064, 39 Am. St. 776.

⁷Johnson v. Spencer (Ind. App.), 96 N. E. 1041; Farmers' Loan & Trust Co. v. Canada &c. R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740n; Van Sickle v. Ferguson, 122 Ind. 450, 23 N. E. 858. In other words, an obligation to pay money can only be discharged by the payment of money where there is no valid agreement to the contrary and no waiver or estoppel. Combs v. Rays, 19 Ind. App. 263, 49 N. E. 358.

money to entitle a creditor to demand money, for the law decrees that the payment shall be in money.”⁸ But, as will be herein afterwards shown, in some jurisdictions, the delivery and receipt of a negotiable instrument is presumed, *prima facie* at least, to operate as payment. And the acceptance of payment in a different medium may, of course, discharge the indebtedness.

§ 1927. When in something other than money.—If something other than money is delivered by the debtor to the creditor, it does not ordinarily operate as payment unless it is so accepted or agreed, but if it is so agreed or taken in payment, it will have that effect.⁹ But, on the other hand, it may operate only as conditional payment, or it may be understood between the parties that it is to be mere collateral security.¹⁰ The question as to whether it shall operate as absolute payment or as conditional payment or as collateral security is usually one of fact, dependent largely upon the intention of the parties.¹¹

⁸ *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. 396.

⁹ *Reynolds v. Louisville & C. R. Co.*, 143 Ind. 579, 40 N. E. 410; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 50 N. W. 496; *Pasewalk v. Bollman*, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. 399; *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475n; *Sheehy v. Mandeville*, 6 Cranch. (U. S.) 253; *LaFayette County Monument Corporation v. Magoon*, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761. See also, *Fidelity Ins. & Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. 759, 19 Am. St. 858. That it may be shown by circumstances as well as express agreement, see *Whitley v. Dunham Lumber Co.*, 89 Ala. 493, 7 So. 810; *Haines v. Pearce*, 41 Md. 221; *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. 152. And to the effect that where it is alleged that property was taken in payment, evidence of the value of property is admissible as tending to show whether it was so accepted, see *National State Bank v. Delahaye*, 82 Iowa 34, 47 N. W. 999.

¹⁰ *Granite National Bank v. Fitch*, 145 Mass. 567, 14 N. E. 650, 1 Am. St. 484. See also, *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434. And it has been held that the presumption where specific property is delivered is that the transaction is not a payment but a pledge or security. *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 Am. St. 32; *Grant v. School Town of Monticello*, 71 Ind. 58; *Cook v. Cook*, 24 S. Car. 204. See also, *Little v. Caie*, 16 N. Bruns. 386; *McPherson v. Foust*, 81 Ala. 295, 8 So. 193; *Danaher v. Hodgkins*, 25 App. Div. (N. Y.) 6, 49 N. Y. S. 58; *Covely v. Fox*, 11 Pa. St. 171. See also, as to independent claim in such cases or where services are rendered, *Hart v. Hudson*, 2 Marv. (Del.) 283, 43 Atl. 172; *Corbett v. Hughes*, 75 Iowa 281, 39 N. W. 500; *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496.

¹¹ *Cheltenham Stone & C. Co. v. Gates Iron Co.*, 124 Ill. 623, 16 N. E. 923; *Quimby v. Durgen*, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. 644; *Goodall v. Norton*,

§ 1928. **By whom payment may be made.**—It is not essential that the payment should be made by the debtor himself.¹² Even though it is made by one who is not a party to the contract and not even in privity with the debtor, if accepted in satisfaction of the obligation of the contract, the weight of authority is to the effect that it will operate as a discharge of such obligation.¹³ Thus, even where payment was a condition precedent, as in a case where the premium on an insurance policy was required to be paid before the policy could take effect, it was held sufficient that the agent paid the premium out of his own pocket.¹⁴ But where A agreed with B and C severally to construct a building for each, one building adjoining the other, and B agreed to pay A one-half the cost of the party wall, and C agreed to pay A the entire cost of such wall, it was held that B's payment of his proportion did not discharge C from paying the entire amount.¹⁵ And where the payment by a third person was not intended by the payor and creditor to operate as a discharge, the debtor can not, ordinarily at least, take advantage of it as such.¹⁶

88 Minn. 1, 92 N. W. 445; *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. 363, 35 Am. St. 815; *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 34 L. ed. 1019, 11 Sup. Ct. 360; *Lyman v. Bank of United States*, 12 How. (U. S.) 225, 13 L. ed. 965; *Rogers-Ruger Co. v. McCord*, 115 Wis. 261, 91 N. W. 685.

¹² *Mary Lee Coal &c. Co. v. Knox*, 110 Ala. 632, 19 So. 67; *Usher v. Waddingham*, 62 Conn. 412, 26 Atl. 538; *O'Grady v. Knight of Columbus*, 62 Conn. 223, 25 Atl. 111; *Snyder v. Pharo*, 25 Fed. 398; *Tuckerman v. Sleeper*, 9 Cush. (Mass.) 177.

¹³ *Crumlish's Admr. v. Central Improvement Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. 872, and additional authorities there cited and reviewed; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691. See also, *Ritenour v. Ma-*

thews, 42 Ind. 7; *Porter v. Chicago &c. R. Co.*, 99 Iowa 351, 68 N. W. 724. But compare *Grymes v. Blofield*, Cro. Eliz. 541; *Edgecombe v. Rodd*, 5 East 294; *Stark's Admr. v. Thompson's Exrs.*, 3 T. B. Mon. (Ky.) 296; *King v. Barnes*, 109 N. Y. 267; *Null v. Moore*, 10 Ired. L. (32 N. Car.) 324. In the first two cases cited it is also held that the debtor was under no obligation to reimburse the third party not in privity with him.

¹⁴ *Lehman v. Gunn*, 124 Ala. 213, 27 So. 475, 51 L. R. A. 112, 82 Am. St. 159.

¹⁵ *Meyer v. Stadler*, 23 Tex. Civ. App. 432, 56 S. W. 108.

¹⁶ *Merryman v. State*, 5 Har. & J. (Md.) 423; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Smilie v. Walton*, 41 Vt. 174. See also, *Casco Nat. Bank v. Shaw*, 79 Maine 376, 10 Atl. 67, 1 Am. St. 319.

§ 1929. **To whom it may be made.**—Payment must be made to the proper person.¹⁷ But this, of course, does not mean that it must be paid to the creditor in person. He may direct that the payment be made to a certain person.¹⁸ And he may have an agent authorized to receive it to whom it may be made.¹⁹ It may be stated as a general rule, however, that in order to discharge an indebtedness, the payment must be made to the creditor or to a person authorized by him to receive it.²⁰ And, although an agent is authorized to receive payment, the general rule is that he has no authority to accept payment in anything but money.²¹ And it has also been held that authority to receive payment of the principal will not be implied from power to receive the interest.²² But the possession of the

¹⁷ See *People v. Smith*, 43 Ill. 219, 92 Am. Dec. 109; *Maynard v. Black*, 41 Ind. 310; *Harrison v. Moran*, 163 Mass. 495, 40 N. E. 850; *Mackay v. Church*, 15 R. I. 121, 23 Atl. 108, 2 Am. St. 881; *Long v. Thayer*, 150 U. S. 520, 37 L. ed. 1167, 14 Sup. Ct. 189; *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801. See also, *Smith v. First National Bank of Cadiz, Ohio*, 23 Okla. 411, 104 Pac. 1080, 29 L. R. A. (N. S.) 576 and note. *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. 849.

¹⁸ *Brooks v. Hildreth*, 22 Ala. 469; *Hyatt v. Clements*, 65 Ind. 12; *Early v. Patterson*, 4 Blackf. (Ind.) 449; *Saline Bank v. Wingfield*, 88 Mo. App. 335; *Statler v. Kirkendell*, 100 Pa. St. 311; *Exchange Bank v. Cook*, 1 W. Va. 69; *Sailer v. Barnousky*, 60 Wis. 169, 18 N. W. 763.

¹⁹ *Renard v. Turner*, 42 Ala. 117; *Ambrose v. Barrett*, 121 Cal. 297, 53 Pac. 805, 54 Pac. 264; *Exchange National Bank v. Johnson*, 30 Fed. 588; *National Bank v. Burt*, 98 Ga. 380, 25 S. E. 502; *Bicknell v. Buck*, 58 Ind. 354; *Smith v. Atlas Steam Cordage Co.*, 41 La. Ann. 1, 5 So. 413; *Walker v. Crosby*, 38 Minn. 34, 35 N. W. 475.

²⁰ *Bagnell v. Walker*, 65 Ark. 325, 46 S. W. 126, 53 S. W. 570; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Tulley v. Citizens State Bank*, 18 Ind. App., 240, 47 N. E. 850; *Bedford Belt R. Co. v. Burke*, 13 Ind. App.

35, 41 N. E. 70; *Artley v. Morrison*, 73 Iowa 132, 34 N. W. 779; *Havens v. Church*, 104 Mich. 135, 62 N. W. 149; *Balcom v. O'Brien*, 13 S. Dak. 425, 83 N. W. 562; *Norwood v. Sanger (Tex.)*, 19 S. W. 1115; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

²¹ *Bank of Commerce v. Hart*, 37 Nebr. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. 479; *Roberts & Co. v. Shoe Co. v. McKim (Nev.)*, 117 Pac. 13; *Fellows v. Northrup*, 39 N. Y. 117; *McCulloch v. McKee*, 16 Pa. St. 289; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132; *Rodgers v. Bass*, 46 Tex. 505; *Ward v. Smith*, 7 Wall. (U. S.) 447, 19 L. ed. 207 (depreciated bank notes). See also, *Powell's Admr. v. Henry*, 27 Ala. 612; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265 (note); *Antigo Bank v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611 (check); *McCormick v. Wood*, 72 Ind. 518; *Gradon v. Patterson*, 13 Iowa 256, 81 Am. Dec. 432; *Franklin Sav. Bank v. Colby*, 105 Iowa 424, 75 N. W. 346 (notes); *Midland State Bank v. Byrne*, 97 Mich. 178, 56 N. W. 355, 21 L. R. A. 753, 37 Am. St. 332 (check); *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61, and *Jackson v. National Bank*, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663 and note, 36 Am. St. 81.

²² *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323. And that one has collected interest does not raise a

evidence of indebtedness or securities may authorize a debtor to infer that the agent having such possession is authorized to receive payment.²³ And there may be other circumstances on which there is a right to rely as giving him ostensible authority to bind his principal even though he does not have possession of the securities.²⁴ On the other hand, it has been held that the fact that a note is made payable at a bank does not of itself make the bank an agent of the creditor to receive payment and that a deposit in such bank by the debtor is not of itself payment.²⁵ In the case of negotiable paper, the general rule is that if payment is made to one not actually authorized, it does not discharge the indebtedness unless induced by direction from the owner or justified by actual possession of the note or evidence of indebtedness.²⁶ And according

presumption of his right to collect the principal where he does not have possession of the securities. *United States Bank v. Burson*, 90 Iowa 191, 57 N. W. 705; *Walter v. Logan*, 63 Kans. 193, 65 Pac. 225; *Terry v. Durand Land Co.*, 112 Mich. 665, 71 N. W. 525; *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642; *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. 598; *Campbell v. O'Connor*, 55 Nebr. 638, 76 N. W. 167.

²³ *Whitlock v. Waltham*, 1 Salk. 157; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. 643, affd. 24 N. E. 1103; *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612. This is true where they are properly indorsed, or it occurs where a note is payable to bearer (*Loomis v. Downs*, 26 Ill. App. 257; *Thornton v. Lawther*, 169 Ill. 228, 48 N. E. 412; *Chinberg v. Gale Sulky & Harrow Mfg. Co.*, 38 Kans. 228, 16 Pac. 462; *Smith v. Essex County Bank*, 22 Barb. (N. Y.) 627; *Greve v. Schweitzer*, 36 Wis. 554), but not where the note is not indorsed, nor, perhaps, in other cases (*Herbert v. Woods*, 3 La. Ann. 254; *Kingman v. Pierce*, 17 Mass. 247; *Lawson v. Nicholson*, 52 N. J. Eq. 821, 31 Atl. 386; *Brown v. Taylor's Committee*, 32 Grat. (Va.) 135).

²⁴ *Quinn v. Dresbach*, 75 Cal. 159,

16 Pac. 762, 7 Am. St. 138; *Union Trust Co. v. McKeon*, 76 Conn. 508, 57 Atl. 109; *General Convention v. Torkelson*, 73 Minn. 401, 76 N. W. 215; *May v. Jarvis-Conklin Trust Co.*, 138 Mo. 275, 39 S. W. 782; *Thomson v. Shelton*, 49 Nebr. 644, 68 N. W. 1055; *Reid v. Kellogg*, 8 S. Dak. 596, 67 N. W. 687. See also, *International Harvester Co. v. Smith*, 51 Fla. 220, 40 So. 840; *Pennypacker v. Latimere*, 10 Idaho 618, 81 Pac. 55; *Harrison v. Legore*, 109 Iowa 618, 80 N. W. 670; *Doyle v. Corey*, 170 Mass. 337, 49 N. E. 651; *Wright v. Dickinson*, 67 Mich. 590, 42 N. W. 849; *Harrison Nat. Bank v. Austin*, 65 Nebr. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. 639. So, there may be a ratification or an estoppel. *Voss v. Mut. Ben. L. Ins. Co.*, 81 Fed. 24.

²⁵ *St. Paul National Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526, 24 Am. St. 189; *Kohl v. Beach*, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600. See also, *Hill v. Arnold*, 116 Ga. 45, 42 S. E. 475.

²⁶ *Marling v. Nommensen*, 127 Wis. 363, 106 N. W. 844, 5 L. R. A. (N. S.) 412, 115 Am. St. 1017. See *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. 340, 38 N. E. 29; *Bromley v. Lathrop*, 105 Mich. 492, 63 N. W. 510; *Church Assn. v.*

to the weight of authority, payment of a negotiable note secured by mortgage to the mortgagee when not in possession, is not binding upon an assignee thereof before maturity who was in possession of the papers at the time of payment, unless expressly or impliedly authorized by him.²⁷ Even where the place of payment is designated in the contract, but the person to whom it shall be made is not designated, it has been held that there is no presumption therefrom of the authority of one at such place to receive payment where he does not have possession of the securities evidencing the debt.²⁸ The question as to whether or not a particular agent has authority depends upon principles of agency elsewhere considered. But it may be observed here that the mere presentation of a bill by an employé of a creditor does not necessarily warrant the debtor in making payment to such employé,²⁹ and

Walton, 114 Mich. 677, 72 N. W. 998; Hollinshead v. John Stewart & Co., 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659; Williams v. Jackson, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. 814 and other cases. The court also distinguishes Van Keuren v. Corkins, 66 N. Y. 77 and Barnes v. Long Island &c. Co., 88 App. Div. (N. Y.) 83, 84 N. Y. S. 951 (as not dealing with negotiable instruments).

²⁷First National Bank v. Baird, 141 Fed. 862, 73 C. C. A. 96; Brayley v. Ellis, 71 Iowa 155, 32 N. W. 254; Burhans v. Hutcheson, 25 Kans. 625, 37 Am. Rep. 274; Murphy v. Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. 340; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. 438; Morrison v. Roehl, 215 Mo. 545, 114 S. W. 981; Dodge v. Birkenfeld, 20 Mont. 115, 49 Pac. 590; Snell v. Magritz, 64 Nebr. 6, 91 N. W. 274; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313; New Orleans Canal &c. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346; Bautz v. Adams, 131 Wis. 152, 120 Am. St. 1030, 111 N. W. 69. See also, Smith v. First National Bank, 23 Okla. 411, 104 Pac. 1080, 29 L. R. A. (N. S.) 576, and note to the same effect. But compare McAuliffe v. Reuter, 166 Ill. 491, 46 N. E. 1087; Barthoff v. Bensley, 234 Ill.

336, 84 N. E. 928; Hilliard v. Taylor, 114 La. 883, 38 So. 594; Olson v. N. W. Guaranty Land &c. Co., 65 Minn. 475, 68 N. W. 100.

²⁸Hoffmaster v. Black, 78 Ohio St. 1, 84 N. E. 423, 21 L. R. A. (N. S.) 52 and note, 125 Am. St. 679. And see to same effect State Nat. Bank v. Hyatt, 75 Ark. 170, 86 S. W. 1002, 5 Am. & Eng. Cas. 296, 112 Am. St. 50; Lester v. Snyder, 12 Colo. App. 351, 55 Pac. 613; Schultz v. Sroelowitz, 191 Ill. 249, 61 N. E. 92; Glatt v. Fortman, 120 Ind. 384, 22 N. E. 300; Dillingham v. Parks, 30 Ind. App. 61, 65 N. E. 300; Engler v. White, 92 Iowa 97, 60 N. W. 224; Bloomer v. Dau, 122 Mich. 522, 81 N. W. 331; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; Powers v. Woolfolk, 132 Mo. App. 354, 111 S. W. 1187; Gilbert v. Garber, 62 Nebr. 464, 87 N. W. 179; Stolzman v. Wyman, 8 N. Dak. 108, 77 N. W. 285; Bank of Charleston &c. Assn. v. Zorn, 14 S. Car. 444, 37 Am. Rep. 733; Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. 498. But see Fowle v. Outcalt, 64 Kans. 352, 67 Pac. 889.

²⁹Hirshfield v. Waldron, 54 Mich. 649, 20 N. W. 628. See also, Dutcher v. Beckwith, 45 Ill. 460, 92 Am. Dec. 232. But compare, Luckie v. Johnston, 89 Ga. 321, 15 S. E. 459.

authority to receive payment under a contract is not implied from the mere fact that the agent was employed to negotiate or make the contract.³⁰ Thus, it has even been held that a clerk or a traveling salesman or drummer employed to solicit orders for goods has no implied authority to receive payment.³¹ But it is held in a recent case that a sales agent, with express authority to collect the purchase-price at the time of sale, has authority to make the collection when he returns, by agreement, to show the purchaser how to use the machine sold, and that this is true, notwithstanding the notice on the statement of account rendered to the purchaser to pay no money to agents.³²

§ 1930. How made—When complete—Conditional payment.—The time, place and mode or manner of payment are usually fixed by the contract, though when not so fixed the law, or even custom or the course of dealing between the parties and like circumstances, may determine it.³³ It may be made in any lawful method agreed upon by the parties and fully executed, and the intention of the parties, when apparent, is given effect, so long as it does not contravene any principle of the law.³⁴ To make a payment complete, the money or other thing must pass from the debtor to the creditor for the purpose of extinguishing

³⁰ *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Thompson v. Elliott*, 73 Ill. 221; *Austin v. Thorp*, 30 Iowa 376; *Tew v. Labiche*, 4 La. Ann. 526; *Heflin v. Campbell*, 5 Tex. Civ. App. 106, 23 S. W. 595.

³¹ *Puttock v. Warr*, 3 H. & N. 979; *Park v. Smith*, 88 Ill. 298; *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308; *Kane v. Barstow*, 42 Kans. 465, 22 Pac. 588, 16 Am. St. 490.

³² *American Sales Book Co. v. Cowdry* (Ark.), 140 S. W. 134, 38 L. R. A. (N. S.) 700. See also, *Trainer v. Morison*, 78 Maine 160, 3 Atl. 185, 57 Am. Rep. 790. And to the effect that the failure of one to have the securities in his possession is not conclusive that he does not have authority to receive payment, see *Campbell v. Gowans*, 35 Utah 268, 100 Pac

397, 23 L. R. A. (N. S.) 414, and other authorities cited in the note.

³³ See 3 Elliott Ev. § 2579; *Roberts v. Wilcoxon*, 36 Ark. 355; *Morton v. Morris*, 31 Ga. 378; *Robinson v. Marney*, 5 Blackf. (Ind.) 329; *Devoll v. McIntosh*, 23 Ind. 529; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Columbia Bank v. Hagner*, 1 Pet. (U. S.) 455, 6 L. ed. 661. But compare *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437; and *Pennington v. Crossley*, 77 L. T. (N. S.) 43, to the effect that prior remittance by mail received by the creditor does not authorize a subsequent remittance in the same manner at the risk of the creditor.

³⁴ 2 Greenl. Ev. § 519; *Besley v. Dumas*, 6 Ill. App. 291; *Mason v. Warner*, 43 Mich. 439, 5 N. W. 429.

the debt and must be received by the creditor for such purpose, or, in other words, it is usually essential that the money or property should be accepted as well as delivered in discharge of the debt and not for some other purpose.³⁵ But where a lease provided that the rentals might be deposited in a bank to the lessor's credit and the lessee made a deposit accompanied by a blank receipt for the lessor to sign, but without any requirement that he should sign it as a condition precedent to the money's going to the absolute credit of the lessor, such deposit was held to constitute an effectual payment by the lessee.³⁶ So, a conditional payment may be good and discharge the debtor's obligation if received and retained by the creditor. Thus, where the debtor transmits money to his creditor as a payment in full, the creditor can not ordinarily receive and retain the money as a credit upon a larger sum claimed by him, without discharging the whole debt.³⁷ But it has been held

³⁵ *Fremont County v. Fremont County Bank*, 145 Iowa 8, 123 N. W. 782, Ann. Cas. 1912A, 1220; *Cushing v. Wyman*, 44 Maine 121. See also, *Dawson v. Wilson*, 55 Ind. 216; *McInerney v. Lindsay*, 97 Mich. 238, 56 N. W. 603; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Kingston Bank v. Gay*, 19 Barb. (N. Y.) 459; *Cushman v. Hall's Estate*, 28 Vt. 656. But a payment is usually complete as soon as the money or property is delivered to and accepted by the creditor as payment. *Thompson v. Kellogg*, 23 Mo. 281. See also, *Root v. Ross*, 29 Vt. 488. And "wherever the hand which is to pay is the hand which is to receive" there is a payment without the ceremony of "taking his money out of one pocket and putting it in the other." *Ryder v. Alton & c. R. Co.*, 13 Ill. 516; *Flickinger v. Hull*, 5 Gill. (Md.) 60; *White v. Morris* (Md.), 30 Atl. 642; *Highland Turnp. Co. v. McKean*, 11 Johns. (N. Y.) 98; *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125; *Linsenbiller v. Gourley*, 56 Pa. St. 166, 94 Am. Dec. 51; *Johnson v. Johnson*, 2 Hill. Eq. (S. Car.) 277, 29 Am. Dec. 72. This principle is usually applied where a person is debtor in one capacity and creditor in another, as

where the debtor is administrator or executor of the creditor, or vice versa, or the like. *Davis v. Milligan*, 88 Ala. 523, 6 So. 908; *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124; *Finch v. Finch*, 28 S. Car. 164, 5 S. E. 348, 13 Am. St. 665, and cases above cited.

³⁶ *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360 (holding, also, that the requirement by the bank that the lessor should sign the receipt did not defeat the payment). But a special deposit does not operate as a payment from the depositor to the bank. *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066; *Low v. Coleman* (Miss.), 14 So. 267; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132.

³⁷ *Berdell v. Bissell*, 6 Colo. 162; *Bull v. Bull*, 43 Conn. 455; *Detroit, H. & S. W. R. Co. v. Smith*, 50 Mich. 112, 15 N. W. 39; *Lyman v. Rasmusser*, 27 Minn. 384, 7 N. W. 687n; *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. 695; *Washington Gas Co. v. Johnson*, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. 553n; *Libby v. Hopkins*, 104 U. S. 303, 26 L. ed. 769. See also, *Bickle v. Beseke*, 23 Ind. 18; *Adams' Exp. Co. v. Black*, 62 Ind. 128; *Eylar v.*

that a party can not impose conditions upon the payment of a liquidated demand admitted to be due, and that even if the debtor transmits money to the creditor with a condition attached, the creditor may keep the money and apply it to his claim in disregard of the condition.³⁸ The medium of payment will be considered in a subsequent section.

§ 1931. Presumption of payment.—After twenty years, in the absence of anything to the contrary, a presumption of payment arises.³⁹ And a jury may infer payment from circumstances though the time is much shorter.⁴⁰ So, the presumption of payment may also arise from the possession by the debtor of the evidence of indebtedness or the like.⁴¹ It has also been held that where payment is shown, the presumption is that it was made at the time it fell due,⁴² and that it is presumed that payment is to be made in money unless an intent to the contrary is shown.⁴³ There are also presumptions concerning the question as to whether the delivery of something of value to the debtor is to be regarded as absolute payment, conditional payment or collateral security, and there is some difference of opinion as to various phases of this subject, especially where the ar-

Read, 60 Tex. 387. But compare *Talbott v. English*, 156 Ind. 299, 59 N. E. 857.

³⁸ *Hamill v. German Nat. Bank*, 13 Colo. 203, 22 Pac. 428. See also, *Jennings v. Durlinger*, 23 Ind. App. 673, 55 N. E. 979; *Meyer v. Green*, 21 Ind. App. 138, 51 N. E. 942; *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. 315; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986. And see generally the note in 11 L. R. A. (N. S.) 1018.

³⁹ 1 *Elliott Ev.* § 119; *Colsell v. Budd*, 1 Camp. 27; *O'Brien v. Colter*, 2 Blackf. (Ind.) 421; *Kingsland v. Roberts*, 2 Paige (N. Y.) 193; *Lash v. Von Neida*, 109 Pa. St. 207; *McKinlay v. Gaddy*, 26 S. Car. 573, 2 S. E. 497; *Dunlop v. Ball*, 2 Cranch. (U. S.) 180, 2 L. ed. 246; *Gaines v.*

Miller, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. 426; note in 18 Am. St. 879.

⁴⁰ 3 *Elliott on Evidence*, § 2577; *Rector v. Moorehous*, 17 Ark. 131; *Long v. Straus*, 124 Ind. 84, 24 N. E. 664; *Rules v. Sale*, 170 Pa. St. 48, 32 Atl. 649.

⁴¹ *Hollenburg v. Lane*, 47 Ark. 394, 1 S. W. 687; *Grimes v. Hilliary*, 150 Ill. 141, 36 N. E. 977; *Callahan v. First National Bank*, 78 Ky. 604, 39 Am. Rep. 262. See also, 1 *Elliott on Evidence*, § 119; 3 *Elliott on Evidence*, § 2577; *Waldreth v. Black*, 74 Cal. 409, 16 Pac. 226; *Ward v. Munson*, 105 Mich. 647, 63 N. W. 498; *Bergen v. Urbahn*, 83 N. Y. 49.

⁴² *Andrews v. Bond*, 16 Barb. (N. Y.) 633.

⁴³ *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429, 55 Atl. 236.

ticle is commercial paper. This subject will be considered in the following section.

§ 1932. **Transfer of negotiable instrument.**—The rule in force in most jurisdictions is that where a negotiable instrument is taken, such as a promissory note, whether of the debtor or of a third person, it is presumed *prima facie* to be merely a conditional payment and not an absolute payment.⁴⁴ But in a few states it is held that taking a negotiable instrument is *prima facie* an absolute discharge.⁴⁵ Even in jurisdictions in which a negotiable note is considered as *prima facie* an absolute payment, it is held that this presumption does not arise where a nonnegotiable note is given for a pre-existing indebtedness.⁴⁶ And, on the other hand, it seems that a negotiable instrument of a third

⁴⁴The *Kimball*, 3 Wall. (U. S.) 37, 18 L. ed. 50; *Segrist v. Crabtree*, 131 U. S. 287, 33 L. ed. 125, 9 Sup. Ct. 687; *London & S. F. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. 64; *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727; *Brill v. Porter*, 9 Conn. 23; *A. Leschen & Sons Rope Co. v. Mayflower Mining & Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) and note; *Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850; *Wilhelm v. Schmidt*, 84 Ill. 183; *Kruse v. Seifert & Co. Lumber Co.*, 108 Iowa 352, 79 N. W. 118; *Carlin v. Heller*, 34 Iowa 256; *Marinette Iron & Co. v. Cody*, 108 Mich. 381, 66 N. W. 334; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Baumgardner v. Henry*, 131 Mich. 240, 91 N. W. 169; *Washington Slate Co. v. Burdick*, 60 Minn. 270, 60 N. W. 285; *Miller v. McCarty*, 47 Minn. 321, 50 N. W. 225, 28 Am. St. 375; *Johnson-Brinkham Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. 615; *Chamberlain Banking House Co. v. Woolsey*, 60 Nebr. 516, 83 N. W. 729; *Nason v. Fowler*, 70 N. H. 491, 47 Atl. 263; *American Brick & Tile Co. v. Drinkhouse*, 59 N. J. L. 462, 36 Atl. 1034; *Board of Education v. Fonda*, 77 N. Y. 350; *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43; *Merrick v. Boury*, 4 Ohio St. 60; *Matte-*

son v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766; *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 78 N. W. 762. See also, *Webb v. National Bank of the Republic*, 67 Kans. 62, 72 Pac. 520; *Loken v. Miller*, 9 N. Dak. 512, 84 N. W. 368; *Collins v. Busch*, 191 Pa. St. 549, 43 Atl. 378; *Grissel v. Bank of Woonsocket*, 12 S. Dak. 93, 80 N. W. 161; *Cushwa v. Improvement & Co. Bldg. Assn.*, 45 W. Va. 490, 32 S. E. 259. See *Atlas Steamship Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398.

⁴⁵*Scott v. Edgar*, 159 Ind. 38, 60 N. E. 468, 63 N. E. 452; *Dick v. Flanagan*, 122 Ind. 277, 23 N. E. 765, 7 L. R. A. 590; *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Paine v. Dwinel*, 53 Maine 52, 87 Am. Dec. 533; *Bryant v. Grady*, 98 Maine 389, 57 Atl. 92; *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Paddock v. Simmons*, 186 Mass. 152, 71 N. E. 298; *Wait v. Brewster*, 31 Vt. 516; *Hadley v. Boro*, 62 Vt. 285, 19 Atl. 476.

⁴⁶*Alford v. Baker*, 53 Ind. 279; *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434; *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283; *Bartlett v. Mayo*, 33 Maine 518; *Howland v. Coffin*, 9 Pick (Mass.) 52; *Amos v. Bennett*, 125 Mass. 120.

person is good without guaranty or endorsement for the price of goods sold or a debt contracted at the time. The presumption is *prima facie* that the transaction is a barter or exchange of the note for the goods and that the note is taken *prima facie* as payment, so as to discharge the purchaser from further liability for the price.⁴⁷

§ 1933. Payment by check or other commercial paper.—

Much the same conflict of authority is found in regard to the question of payment by check or the like. The prevailing rule is that the giving of a draft or check, in the absence of anything to the contrary, is presumed to be conditional and not an absolute payment and in case the check is not honored upon presentation the original indebtedness for which it is given is not discharged and the creditor may recover on such indebtedness without resorting to liability on the check.⁴⁸ But in some cases a draft has been treated as *prima facie* payment of an antecedent debt,⁴⁹ and also a *prima facie* payment of a contemporaneous debt.⁵⁰ Certification of a check before delivery does not alter the pre-

⁴⁷ *Devlin v. Chamblin*, 6 Gill. (Minn.) 325; *Wright v. Crockery & Co.*, 1 N. H. 281, 8 Am. Dec. 68; *Youngs v. Stahelin*, 34 N. Y. 258; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. 694, 91 Wis. 27, 64 N. W. 422; *Gallagher v. Huffing*, 118 Wis. 284, 95 N. W. 117.

⁴⁸ *Born v. First National Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. 312; *Cox v. Hayes*, 18 Ind. App. 220, 47 N. E. 844; *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542; *First National Bank of Belle Plaine v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616n, 123 Am. St. 336; *Johnson-Brinkman Comm. Co. v. Central Bank & Co.*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. 615; *National Life Ins. Co. v. Goble*, 51 Nebr. 5, 70 N. W. 503; *Bradford v. Fox*, 38 N. Y. 289; *Holdsworth v. De Belaunzaran*, 106 N. Y. 119, 12 N. E. 615; *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. 763,

13 L. R. A. 43; *Fleig v. Sleet*, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800; *Holmes v. Briggs*, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. 804; *Estey v. Birnbaum*, 9 S. Dak. 174, 68 N. W. 290; *Finney v. Edwards*, 75 Va. 44. See also, *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 25 So. 499, 82 Am. St. 103; *Steiner v. Jeffries*, 118 Ala. 573, 24 So. 37; *Steinhart v. National Bank of D. O. Mills & Co.*, 94 Cal. 362, 29 Pac. 717, 28 Am. Rep. 132; *Angus v. Chicago Trust & Savings Bank*, 170 Ill. 298, 48 N. E. 946; *Strong v. King*, 35 Ill. 9; *People's Saving Bank v. Gifford*, 108 Iowa 277, 79 N. W. 63; *Wilkinson v. Blount Co.*, 169 Mass. 374, 47 N. E. 1020; *Dennie v. Hark*, 2 Pick. (Mass.) 204.

⁴⁹ *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Bangor v. Warren*, 34 Maine 324, 56 Am. Dec. 657; *Arnold v. Sprague*, 34 Vt. 402; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724, 50 Hall v. Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802.

sumption that it was not received in absolute payment.⁵¹ But if the creditor, after receiving the check, instead of presenting it for payment, causes it to be certified by the bank, he thereby in effect makes the check his own and renders it operative as a payment, so that the debt will be discharged the same as if he had drawn the money and delivered it back to the bank in exchange for a certificate of deposit.⁵² And in the absence of fraud the deposit of a check in the bank on which it is drawn and the charging of the drawee with the amount of the check may be effective as a payment of the amount for which the check is given.⁵³ And where one gives to another in payment a check upon a bank at which he has on deposit sufficient money to meet the check and the payee deposits the check for collection in another bank, which immediately forwards it to the drawee bank for payment, an entry on its books charging the account of its depositor with the amount of the check has been held equivalent to a payment of the check and of the debt.⁵⁴ It has been held that a cashier's check is not *prima facie* payment,⁵⁵ and that a certificate

⁵¹ *Bickford v. Chicago First National Bank*, 42 Ill. 238, 89 Am. Rep. 436; *Born v. First National Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. 312; *Cincinnati Oyster &c. Co. v. La Fayette Nat. Bank*, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. 560. See also, *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Good v. Singleton*, 39 Minn. 340, 40 N. W. 359; *Andrews v. German National Bank*, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300.

⁵² *Born v. First National Bank*, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. 312; *Meridian Bank v. First Nat. Bank*, 17 Ind. App. 322, 33 N. E. 247, 34 N. E. 608; 52 Am. St. 450; and see also, *Boyd v. Nasmith*, 17 Ont. 40; *Metropolitan National Bank v. Jones*, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. 403; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708. So, also, where he deposited the check to his own credit, *Board of Education v. Robinson*, 81 Minn. 305, 84 N. W. 105, 83 Am. St. 374.

⁵³ *O'Leary Bros. v. Abeles*, 68 Ark. 259, 57 S. W. 791, 82 Am. St. 291; *Smith Roofing &c. Co. v. Mitchell*, 117 Ga. 772, 45 S. E. 47, 97 Am. St. 217; *Pratt v. Foot*, 9 N. Y. 599; *Mayer v. Heidelberg*, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441n; *Hubbard v. Petty*, 37 Tex. Civ. App. 453, 85 S. W. 509. See also, *Montgomery County v. Cochran*, 126 Fed. 456, 62 C. C. A. 70; *Second National Bank v. Gibboney*, 43 Ind. App. 492, 87 N. E. 1064; *Bartley v. State*, 53 Nebr. 310, 73 N. W. 744.

⁵⁴ *O'Leary v. Abeles*, 68 Ark. 259, 57 S. W. 791, 82 Am. St. 291; *Smith Roofing &c. Co. v. Mitchell*, 117 Ga. 772, 45 S. E. 47, 91 Am. St. 217. See also, *Pollak Bros. v. Niall-Herlin Co.*, 137 Ga. 23, 72 S. E. 415, 35 L. R. A. (N. S.) 13.

⁵⁵ *Holmes v. Briggs*, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. 804.

of deposit, endorsed by the debtor to the creditor, is not prima facie payment.⁵⁶ So, a nonnegotiable order on a third person is not absolute payment, and its acceptance is presumed to be only as conditional payment.⁵⁷ But, as in case of other instruments heretofore referred to, if the order is paid, the debt will be extinguished, or if the order is given and accepted in absolute payment it will ordinarily operate as such so as to prevent the creditor from suing the debtor upon the original obligation.⁵⁸

§ 1934. Payment in worthless bank notes.—There is a sharp conflict of authority as to the validity and effect of payment in genuine bank notes, which, however, are worthless because of the insolvency of the bank at the time the payment was made, or the like, where such insolvency was unknown to both parties at the time. In a number of cases it is held that the transferrer in effect warrants the solvency of the bank and that such payment is a nullity if made after the bank has stopped payment.⁵⁹ But it is held that the creditor must make a demand or give notice to the debtor of such fact within a reasonable time.⁶⁰ Almost an equal number of courts hold that a payment in such notes, under such circumstances, is valid and that the loss must fall on

⁵⁶ *Leake v. Brown*, 43 Ill. 372; *Duquette v. Richar*, 102 Mich. 483, 60 N. W. 974; *Gallagher v. Ruffing*, 118 Wis. 284, 95 N. W. 117. See also, *Chase v. Brundage*, 58 Ohio St. 517, 51 N. E. 31.

⁵⁷ *McWilliams v. Phillips*, 71 Ala. 80 (no matter whether the order is for money or goods); *Landis v. Standard Life & Co. Ins. Co.*, 6 Ind. App. 502, 33 N. E. 989; *Jose v. Baker*, 37 Maine 465; *Tucker v. Maxwell*, 11 Mass. 143; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Bond v. McMahon*, 94 Mich. 557, 54 N. W. 281; *Hoar v. Clute*, 15 Johns. (N. Y.) 224; *Iron River Bank v. Board of School Directors*, 91 Wis. 596, 65 N. W. 368.

⁵⁸ *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638; *Farwell v. Salpaugh*, 32 Iowa 582; *Rice v. Dudley*, 34 Mo. App. 383; *Knott v. Whit-*

field, 99 N. Car. 76, 5 S. E. 664; *Holmes v. Laraway*, 64 Vt. 175, 23 Atl. 762. See also, *Smith v. Ferrard*, 7 B. & C. 19, 9 Dowl. & R. 803; *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 594.

⁵⁹ *Frontier Bank v. Morse*, 22 Maine 88, 38 Am. Dec. 284; *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; *Westfall v. Braley*, 10 Ohio St. 188, 75 Am. Dec. 509; *Wainwright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707. See also, *Fogg v. Sawyer*, 9 N. H. 365; *Townsend v. Bank of Racine*, 7 Wis. 185.

⁶⁰ *Corbitt v. Smyrna Bank*, 2 Harr. (Del.) 235, 30 Am. Dec. 635; *Magee v. Carmack*, 13 Ill. 289; *Simms v. Clark*, 11 Ill. 137. See also, *Camidge v. Allenby*, 6 B. & C. 373; *Pickard v. Bankes*, 13 East. 20; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Thomas v. Todd*, 6 Hill (N. Y.) 340.

the creditor.⁶¹ If the debtor knows that the bank is insolvent and the creditor is ignorant of that fact, the payment is not good and the loss must fall on the debtor.⁶²

§ 1935. **Counterfeit money.**—There is no such conflict of authority where payment is made in counterfeit money. Payment in counterfeit money is not good and will not discharge the indebtedness, even if both parties were ignorant that the money was counterfeit and the payment was made in good faith.⁶³ But it is said that a bank is bound to know its own notes and in case it receives counterfeit notes purporting to be of its own issue in payment it must bear the loss on account of its negligence where the debtor acted innocently, making payment in good faith.⁶⁴ And when a creditor receives counterfeit money from one who acted innocently and in good faith, he should give notice within a reasonable time that the money was counterfeit, where otherwise he may be and usually will be concluded by the payment.⁶⁵

⁶¹ *Lowrey v. Murrell*, 2 Port. (Ala.) 280, 27 Am. Dec. 651; *Bayard v. Shunk*, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; *Ware v. Street*, 2 Head. (Tenn.) 609, 75 Am. Dec. 755; *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175, 29 Am. Dec. 114. See also, *Corbit v. Smyrna Bank*, 2 Harr. (Del.) 235, 30 Am. Dec. 635; *Young v. Adams*, 6 Mass. 182; *Edmonds v. Digges*, 1 Grat. (Va.) 359, 42 Am. Dec. 561.

⁶² *Camidge v. Allenby*, 6 B. & C. 373; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43; *Hellings v. Hamilton*, 4 Watts & S. (Pa.) 462. See also, *Chalmers v. Harris*, 22 Tex. 265.

⁶³ *Jones v. Ryde*, 5 Taunt. 488; *Wingate v. Neidlinger*, 50 Ind. 520; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; *Atwood v. Cornwall*, 25 Mich. 142, 28 Mich. 336, 15 Am. Rep. 219; *Markle v. Hatfield*, 2 Johns (N. Y.) 255, 3 Am. Dec. 446; *Ware v. Street*, 2 Head. (Tenn.) 609, 75 Am. Dec. 755; *Simms v. Wilson*, 5 Cranch. (U. S.) 285; *United States v. Morgan*, 11 How.

(U. S.) 154, 13 L. ed. 643. See also, *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *Simms v. Clark*, 11 Ill. 137; *Young v. Adams*, 6 Mass. 182; *Bank v. Buchanan*, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199n, 10 Am. St. 617. Even in an agreement to receive an endorsed note as payment, the delivery of a forged note is no payment. *West Philadelphia National Bank v. Field*, 143 Pa. St. 473, 22 Atl. 829, 24 Am. St. 562; *Bank v. Buchanan*, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199n, 10 Am. St. 617.

⁶⁴ *United States Bank v. Georgia Bank*, 10 Wheat. (U. S.) 333, 6 L. ed. 334. See also, *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111.

⁶⁵ *Lawrenceburgh National Bank v. Stevenson*, 51 Ind. 594; *Raymond v. Baar*, 13 Serg & R. (Pa.) 318, 15 Am. Dec. 603; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446. See also, *Cocks v. Masterman*, 9 B. & C. 902; *Keene v. Thompson*, 4 Gill & J. (Md.) 463; *Pindall v. Northwestern Bank*, 7 Leigh (Va.) 617.

§ 1936. **Evidence as to payment.**—Presumptions as to payment have already been considered. Payment may be proved not only by direct evidence, but also by circumstantial evidence,⁶⁶ and by parol as well as written evidence.⁶⁷ The question is generally one of intent and it is therefore a question of fact, or a mixed question of law and fact.⁶⁸ A receipt showing the payment in question is in the nature of an admission and is, of course, evidence thereof;⁶⁹ but it is not conclusive and may be contradicted by parol evidence.⁷⁰ And a receipt in full of all demands is admissible

⁶⁶ Cuthbert v. Newell, 7 Ala. 457; Wolcott v. Ensign, 53 Ind. 70; Braden v. Lemmon, 127 Ind. 9, 26 N. E. 476; Estes v. Fry, 22 Mo. App. 53; Waydell v. Velie, 1 Bradf. Sur. (N. Y.) 277; Hughes v. Walker, 14 Ore. 481, 13 Pac. 450; Murphy v. Richardson, 33 Pa. St. 235; Walls v. Walls, 170 Pa. St. 48, 32 Atl. 649; Lindsay v. McCormick, 82 Va. 479, 5 S. E. 534.

⁶⁷ Greenfield v. Wright, 16 Ark. 186; Davis v. Hare, 32 Ark. 386; Fisher v. George S. Jones Co., 93 Ga. 717, 21 S. E. 152; Denham v. Walker, 93 Ga. 497, 21 S. E. 102; Smith v. Boruff, 75 Ind. 412; Ketcham v. Hill, 42 Ind. 64; Wolf v. Foster, 13 Kans. 116; Holden v. Parker, 110 Mass. 324; Riley v. Pettis County, 96 Mo. 318, 9 S. W. 906. See also, Shaffer v. McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. 465; Whiteside v. Hoskins, 20 Mont. 361, 51 Pac. 739; Keene v. Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581.

⁶⁸ Ewing v. Peck, 26 Ala. 413; Braden v. Lemmon, 127 Ind. 9, 26 N. E. 476; Dean v. Toppin, 130 Mass. 517; In re Smith's Appeal, 52 Mich. 415, 18 N. W. 195; Rosenstock v. Desjar, 85 App. Div. (N. Y.) 501, 83 N. Y. S. 334; Barnes v. Brown, 69 N. Car. 439; Benton v. Toler, 109 N. Car. 238, 13 S. E. 763; Hess v. Frankenfield, 106 Pa. St. 440; German Ins. Co. v. Davenport (Pa.), 9 Atl. 517; Briggs v. Holmes, 118 Pa. St. 283, 12 Atl. 355, 4 Am. St. 597; Wood v. Guarantee Trust & Co., 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. 131. See also, Huntington County Loan & Co. v. Cast, 160 Ind. 701, 67 N. E. 921; Craddock v.

Dwight, 85 Mich. 587, 48 N. W. 644; Yerkes v. Norris, 90 Mich. 234, 51 N. W. 366; Blair v. Lynch, 105 N. Y. 636, 11 N. E. 947, 1 Silvernail (N. Y.) 439.

⁶⁹ See, generally, Caldwell v. Gillis, 2 Port. (Ala.) 526; Northrop v. Knott, 114 Cal. 612, 46 Pac. 599; Ennis v. Pullman Palace Car Co., 165 Ill. 161, 46 N. E. 439; Ramsdell v. Clark, 20 Mont. 103, 49 Pac. 591; Danziger v. Hoyt, 120 N. Y. 190, 24 N. E. 294; Crawford v. Forest Oil Co., 189 Pa. St. 415, 42 Atl. 39. So, other admissions or declarations of a creditor or his authorized agent, whether verbal or in writing, to the effect that the debt has been paid may likewise be shown. Applegate v. Baxley, 93 Ind. 147; Martin v. Shannon, 92 Iowa 374, 60 N. W. 645; Atwood v. Scott, 99 Mass. 177, 96 Am. Dec. 728; First Nat. Bank v. Ballou, 49 N. Y. 155; Benjamin v. Northwestern Elevator Co., 6 N. Dak. 254, 69 N. W. 296; Morse v. Bruce, 70 Vt. 378, 40 Atl. 1034. Acknowledgment on receipt of smaller sum as evidence, see Henderson v. Moore, 5 Cranch. (U. S.) 11, 3 L. ed. 22.

⁷⁰ Cowan v. Sapp, 74 Ala. 44; Conway v. State Bank, 13 Ark. 48; Koth v. Roth, 150 Ill. 212, 37 N. E. 317; Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132; St. Louis, Ft. S. & Co. v. Davis, 35 Kans. 464, 11 Pac. 421; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Johnson v. Valido Marble Co., 64 Vt. 337, 25 Atl. 441. See also, ante, Chapter 37, Parol Evidence; 1 Elliott's Ev., § 617. This is too well settled to need further citation

to prove payment, but may likewise be explained or rebutted.⁷¹ So, a receipt given for payment on the acceptance of a note from the debtor is admissible, but not conclusive evidence,⁷² and in some jurisdictions it is not even prima facie evidence in such a case of absolute and unconditional payment.⁷³ Entries in account books of the creditor showing that he received the payment are admissible against him;⁷⁴ and it has also been held that it may be shown as against the debtor that the books in which he was accustomed to regularly make an entry of all payments made by him contain no entry of the alleged payment in question,⁷⁵ but the weight of authority is to the effect that the creditors' books are not ordinarily admissible as negative evidence in his favor to show that they contain no entry of the receipt of the alleged payment.⁷⁶ Indorsements of credits or payments on the evidence of indebtedness may usually be shown as evidence of such payments.⁷⁷ And returned checks of the debtor endorsed by the creditor are also evidence that the amount of the check was paid to the creditor;⁷⁸ but check stubs have been held inadmis-

of the numerous authorities. But see where a person has been induced to alter his position by the receipt. *Graves v. Key*, 3 B. & Ad. 313; *Wyatt v. Marquis of Hertford*, 3 East. 147.

⁷² 2 Greenl. Ev. (16th ed.) § 517; *Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132.

⁷³ *New England &c. Security Co. v. Hirsch*, 96 Ala. 232, 11 So. 63; *De-Paris v. Dresbach*, 78 Cal. 15; *Hall's Self-Feeding Cotton Gin Co. v. Black*, 71 Ga. 450; *H. F. Cady Lumber Co. v. Greater America Exposition Co.*, 4 Nebr. (Unof.) 268, 93 N. W. 961; *Joslin v. Giese*, 59 N. J. L. 130, 36 Atl. 680; *Collins v. Busch*, 191 Pa. St. 549, 43 Atl. 378; *Seltzer v. Coleman*, 32 Pa. St. 493; *Feamster v. Withrow*, 12 W. Va. 611. See also, *Mosley v. Floyd*, 31 Ga. 564; *Lafayette County Monument Corp. v. Magoon*, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761.

⁷⁴ See *Pueblo First Nat. Bank v. Newton*, 10 Colo. 161, 14 Pac. 428; *Berry v. Griffin*, 10 Md. 27, 69 Am.

Dec. 123; *Colby v. Maw*, 1 Nebr. (Unof.) 478, 95 N. W. 677; *Muldon v. Whitlock*, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533.

⁷⁵ *Guert v. Burlington R. Co.*, 74 Iowa 457, 38 N. W. 158; *Jermain v. Denniston (Worth)*, 6 N. Y. 276.

⁷⁶ *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524.

⁷⁷ See 1 Elliott Ev. § 467.

⁷⁸ *Conyers v. Postal Tel. &c. Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. 100; *Brown v. Gooden*, 16 Ind. 444; *Mayer's Exrs. v. Schlamp*, 17 Ky. L. 691, 32 S. W. 399; *Mims v. Morrison*, 5 La. Ann. 650; *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355. But see as to showing handwriting authentic where instrument has remained in debtor's hand, *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. 444; *Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188.

⁷⁹ *Miller v. Brown*, 82 Iowa 79, 47 N. W. 895; *Richards v. Hatfield*, 40 Nebr. 879, 59 N. W. 777; *Brown v. Burr*, 160 Pa. St. 458, 28 Atl. 828; *Stevens v. Gainesville Nat. Bank*, 62

sible on the part of the debtor.⁷⁹ Collateral evidence that is too remote is not admissible,⁸⁰ but there are many cases in which facts rendering it probable that payment was or was not made may be shown in evidence. Thus, it has been held that the fact that the debtor received a sum of money sufficient to discharge the debt about the time he claims to have paid it is admissible to corroborate his testimony that he paid it out of the money so received;⁸¹ and, on the other hand, the fact that he was in financial straits at and long before such time, or the like, may, according to the weight of authority, be shown as tending to prove that he did not make such payment.⁸²

§ 1937. Application of payments—Generally.—Application or appropriation of payment is the application or appropriation of the payment to some particular debt, or the determination as to which of several items a general payment made by a debtor to his creditor shall be applied. The question usually arises where a creditor receives a payment which is insufficient to entirely discharge the obligation of his debtor, and especially where the indebtedness

Tex. 499. But see when payable to the creditor or bearer and not endorsed by him, *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. 900; *Patton's Admrs. v. Ash*, 7 S. & R. (Pa.) 116; *Lowe v. McClery*, 3 Cranch. (U. S.) 254, Fed. Cas. No. 8566.

⁷⁹ *Wilson v. Goodin*, *Wright* (Ohio) 219; *Watts v. Shewell*, 31 Ohio St. 331. But see *Fulkerson v. Long*, 63 Mo. App. 268.

⁸⁰ *Parker v. Parker*, 52 Ill. App. 333; *Martin v. Shannon*, 92 Iowa 374, 60 N. W. 645; *Strong v. Slicer*, 35 Vt. 40. See also, *Abercrombie v. Sheldon*, 8 Allen (Mass.) 532; *Rosen- crance v. Johnson*, 191 Pa. St. 520, 43 Atl. 360; *Young v. Doherty*, 183 Pa. St. 179, 38 Atl. 587. See also, *Shockley v. Van Eaton*, 81 Iowa 417, 46 N. W. 1097; *Reed v. Pierson*, 3 N. J. L. 256; *Filer v. Peebles*, 8 N. H. 226; *Clemmons v. Clemmons*, 68 Vt. 77, 34 Atl. 34; *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557. But compare

Orr v. Jason, 1 Ill. App. 439; *Waugh v. Riley*, 8 Metc. (Mass.) 290.

⁸¹ *Morgan v. Weir*, 119 Ind. 178, 21 N. E. 656; *Whisler v. Drake*, 35 Iowa 103; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550. See also, 1 Elliott Ev. § 178; *Koltze v. Messen- brink*, 74 Iowa 242, 37 N. W. 179. But compare *Xenia First Nat. Bank v. Stewart*, 114 U. S. 224, 5 Sup. Ct. 845, 29 L. ed. 101.

⁸² See *Hedge v. Talbott*, 8 Ind. App. 597, 36 N. E. 437; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; *Mor- rison v. Collins*, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. 827; *Stone v. Tupper*, 58 Vt. 409, 5 Atl. 387. So financial embarrassment of the creditor rendering it necessary for him to collect the indebtedness in question has been held admissible as tending to show payment. See New York and Pennsylvania cases above cited; also *Matter of Looram*, 73 Hun (N. Y.) 177, 25 N. Y. S. 877, 56 N. Y. St. 137; *Strong v. Slicer*, 35 Vt. 40.

consists of two or more different claims. It may happen that the debtor prescribes the application and directs how it shall be made, or the creditor may undertake to make the application, and it may happen that neither party makes the appropriation. In the latter case the law determines it.

§ 1938. Debtor's right to determine application.—The general rule is well settled that where a payment is voluntarily made by a debtor out of his own funds, he has the right to prescribe and direct the application of such payment.⁸³ It has been held that a debtor may direct the application of the entire payment to one of several items;^{83a} that he may require its application to a secured rather than an unsecured claim,⁸⁴ and that he may even direct the payment to be applied to an illegal claim in preference to a legal one.⁸⁵ The creditor has no choice, but must follow the debtor's directions.⁸⁶ Where the debtor has regularly

⁸³ *Pierce v. Walker*, 103 Ala. 250, 15 So. 568; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 201; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *McCartney v. Buck*, 8 Houst. (Del.) 34, 12 Atl. 717; *McCauley v. Holtz*, 62 Ind. 205; *Barrett v. Sipp* (Ind. App.), 98 N. E. 310; *First National Bank v. Hollingsworth*, 78 Iowa 575, 43 N. W. 536, 6 L. R. A. 92; *Flower v. O'Bannon*, 43 La. Ann. 1042, 10 So. 376; *Richardson v. Woodbury*, 12 Cush. (Mass.) 279; *Grasser & Brand Brewing Co. v. Rogers*, 112 Mich. 112, 70 N. W. 445, 67 Am. St. 389; *Leed v. Gifford*, 41 N. J. Eq. 464, 5 Atl. 795, affd. 45 N. J. Eq. 245, 19 Atl. 621; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Stewart v. Hopkins*, 30 Ohio St. 50, affd. 104 U. S. 303, 26 L. ed. 769; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857, 22 Am. St. 59; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337, 83 N. W. 641. See also, *Taylor v. Sandiford*, 7 Wheat. (U. S.) 13, 5 L. ed. 384; *National Bank v. Mechanic's Nat. Bank*, 94 U. S. 437, 24 L. ed. 176. Even if the law did not otherwise favor the debtor, a sufficient reason for the rule is that up to the time

of payment the money is the property of the debtor and being such may be applied as he sees fit and directs. *Baum v. Trantham*, 42 S. Car. 104, 19 S. E. 973, 46 Am. St. 697.

^{83a} *Blackman v. Leonard*, 15 La. Ann. 59; *Mayor & Co. of Alexandria v. Paten*, 4 Cranch. (U. S.) 317, 2 L. ed. 633, 1 Am. Lead. Cas. 268 and note.

⁸⁴ *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *Massengale v. Pounds*, 108 Ga. 762, 33 S. E. 72; *Plain v. Roth*, 107 Ill. 588; *First National Bank v. Prior*, 10 N. Dak. 146, 86 N. W. 362; *Stewart v. Hopkins*, 30 Ohio St. 502, affd. 104 U. S. 303, 26 L. ed. 769; *Patterson v. Van Loon*, 186 Pa. St. 367, 40 Atl. 495. See also, *Huntington County Loan & Co. Assn. v. Cast*, 160 Ind. 701, 67 N. E. 921.

⁸⁵ *Smith v. Coopers*, 9 Iowa 376; *Brown v. Burns*, 67 Maine 535; *Richardson v. Woodbury*, 12 Cush. (Mass.) 279; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857, 22 Am. St. 59. See also, *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268; *Dickey v. Permanent Land Co. of Baltimore*, 63 Md. 170; *Caldwell v. Wentworth*, 14 N. H. 431.

⁸⁶ *Atkinson v. Cox*, 54 Ark. 444, 16 S. W. 124; *Durrell v. Todd*, 31 Nebr.

directed the appropriation, it is regarded by law as having been so made, no matter whether the creditor has in fact so applied it or attempted to apply it in some other way.⁸⁷ Mere equitable considerations are not sufficient to allow the creditor to apply it to another debt.⁸⁸ If the debtor directs the application to a debt not yet due, the creditor may refuse to receive the payment, but if he does do so, he is bound to appropriate it according to the direction of the debtor;⁸⁹ but the debtor should notify the creditor of his intention as to appropriation of his payment.⁹⁰

§ 1939. Loss of right by debtor to make appropriation.

—The debtor may lose his right to make the application if he makes a payment without any direction as to its application,⁹¹ especially if the creditor makes the application thereafter before the debtor in any way undertakes to do so.⁹² And it has been so held where suit is brought before the debtor makes the application, even though the creditor has not made any application.⁹³ But it is not absolutely necessary that the debtor should expressly direct the application in so many words if his intention may be inferred from the circumstances of the case.⁹⁴

256, 47 N. W. 862; *Moorehead v. West Branch Bank*, 3 Watts & S. (Pa.) 550. See also, *The Mecca* (1897), App. Cas. 286.

⁸⁷ *Reid v. Wells*, 56 S. Car. 435, 34 S. E. 401.

⁸⁸ *Lincoln v. Lincoln St. Ry. Co.*, 67 Nebr. 469, 93 N. W. 766.

⁸⁹ *Wetherell v. Joy*, 40 Maine 325. See also, *Haynes v. Wilson*, 21 Ky. L. 852, 55 S. W. 209; *Pearl v. Clark*, 2 Pa. St. 350; *National Cash Register Co. v. Bonneville*, 119 Wis. 222, 96 N. W. 558.

⁹⁰ *Long v. Miller*, 93 N. Car. 233; *Brice v. Hamilton*, 12 S. Car. 32; *Hill v. Southerland's Exrs.*, 1 Wash. (Va.) 128. See also, *Terhune v. Colton*, 12 N. J. Eq. 232. But notice to his agent may be sufficient. *Kinnear v. Dilley*, 3 Willson Cr. Cas. Ct. App. (Tex. Civ. Cas.). § 406. See also, *Stewart v. Keith*, 12 Pa. St. 238. And see post § 1939, note 94, to the effect that the debtor's intention may be

inferred from circumstances and that an express direction on his part is not always necessary.

⁹¹ *California Bank v. Webb*, 94 N. Y. 467; *Moss v. Adams*, 4 Reed Eq. (N. Car.) 42; *Long v. Miller*, 93 N. Car. 233; *First National Bank of Fargo v. Roberts*, 2 N. Dak. 195, 49 N. W. 722.

⁹² *Dent v. State Bank*, 12 Ala. 275; *Risher v. Risher*, 194 Pa. St. 164, 45 Atl. 71.

⁹³ *Raymond v. Newman*, 122 N. Car. 52, 29 S. E. 353.

⁹⁴ *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Holley v. Hardeman*, 76 Ga. 328; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Lazarus v. Henrietta National Bank*, 72 Tex. 354, 10 S. W. 252; *Taylor v. Sandifer*, 7 Wheat. (U. S.) 13, 5 L. ed. 384; *Corliss v. Grow*, 58 Vt. 702, 2 Atl. 388. See also, *Hanson v. Cordano*, 96 Cal. 441, 34 Pac. 457; *Moorehead v. West Branch Bank*, 3 Watts

§ 1940. **When creditor may determine.**—If the debtor fails to make any application of the payment or to direct in what manner it shall be applied, the right to determine its application then passes to the creditor.⁹⁵ According to the common-law rule in force in most of the states the creditor may in general apply such payment so as best to serve his own interests.⁹⁶ Thus, he may apply it to an unsecured debt in preference to one that is secured,⁹⁷ or to an open account in preference to one evidenced by a note constituting a lien.⁹⁸ So he may apply it to the newest debt or to the oldest, even so as to prevent it from being afterwards barred by the statute of limitations;⁹⁹ and he may appropriate or divide one payment among two or more debts not barred by the statute of limitations.¹ It has also been held that he may apply a payment to a debt unenforceable under the statute of frauds, or the like,² or a debt barred by the statute of limitations.³ There is, however,

& S. (Pa.) 550. Compare, however, *Pearce v. Walker*, 103 Ala. 250, 15 So. 568; *Brice v. Hamilton*, 12 S. Car. 32.

⁹⁵ *Pearce v. Walker*, 103 Ala. 250, 15 So. 568; *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *Nichols v. Culver*, 51 Conn. 177; *Lodge v. Ainscow*, 1 Penne. (Del.) 327, 41 Atl. 187; *Wellman v. Miner*, 179 Ill. 226, 53 N. E. 609; *Kearines v. Durst*, 110 Iowa 114, 81 N. W. 238; *First Presbyterian Church v. Santy*, 52 Kans. 462, 34 Pac. 974; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. 635; *Wood v. Genett*, 120 Mich. 222, 79 N. W. 199; *Coney v. Laird*, 153 Mo. 408, 55 S. W. 96; *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137; *Burnett v. Sledge*, 129 N. Car. 114, 39 S. E. 775; *Pelzer v. Staedman*, 22 S. Car. 279; *Fargo v. Jennings*, 8 S. Dak. 99, 65 N. W. 433; *Jeffers v. Pease*, 74 Vt. 215, 54 Atl. 422; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561.

⁹⁶ See authorities cited in note 95. Also, *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115; *Bell v. Bell*, 20 S. Car. 34; *Johnston v. Northwestern Live Stock Insurance Co.*, 107 Wis. 337, 83 N. W. 641.

⁹⁷ *M. A. Sweeney Co. v. Fry*, 151 Ind. 178, 51 N. E. 234; *Cain v. Vogt*, 138 Iowa 631, 116 N. W. 786, 128 Am. St. 216; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. 635; *Bird v. Davis*, 14 N. J. Eq. 467; *Wadlinger v. Washington German Bldg. & c. Assn.*, 153 Pa. St. 622, 26 Atl. 647; *Thatcher v. Tillory*, 30 Tex. Civ. App. 327, 70 S. W. 782; *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561.

⁹⁸ *Soluble Pac. Guano Co. v. Harris*, 78 Ga. 20; *Fargo v. Jennings*, 8 S. Dak. 99, 65 N. W. 433; *North v. LaFlesh*, 73 Wis. 520, 41 N. W. 633. See also, *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115; *Brownlee v. Goldthait*, 73 Ind. 481.

⁹⁹ *Blair v. Carpenter*, 75 Mich. 167, 42 N. W. 790. See also, *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Hansen v. Rouensavell*, 74 Ill. 238.

¹ *Beck v. Haas*, 11 Mo. 264, 20 S. W. 19, 33 Am. St. 516; *Young v. Alford*, 118 N. Car. 215, 23 S. E. 973. See *Ayer v. Hawkins*, 19 Vt. 26; *Wheeler v. House*, 27 Vt. 735.

² *Haynes v. Nice*, 100 Mass. 327. See also, *Biggs v. Dwight*, 1 M. & R. 308; *Thurlow v. Gilmore*, 40 Maine 378 (unenforceable because contracted when debtor was an infant).

³ *Williams v. Griffith*, 5 M. & W.

a limitation or qualification of this rule where the particular application would be inequitable and unfair and would enable the creditor to inflict an injustice on the debtor.⁴ Thus, it has been held that a creditor can not apply the payment to a disputed claim in preference to one that is conceded to be correct,⁵ nor to an illegal claim instead of a legal one.⁶ So the debt must be an existing one,⁷ and it must be due at the time.⁸ The civil law which is followed in a few states favors the debtor, and where that law prevails, the rule is that the creditor must apply payments so as to discharge the debtor or apply them to the debt which is most burdensome and to which it is to the debtor's interest to have the application made.⁹

§ 1941. Loss of right by creditor.—The creditor must exercise his right to make the application in due time or he will lose it.¹⁰ Under the common-law rule he is not required to make it immediately,¹¹ but he must, in nearly all jurisdictions, make it at least before suit is brought.¹²

300; *Armistead v. Brooke*, 18 Ark. 521; *Ramsay v. Warner*, 97 Mass. 8; *Moore v. Kiff*, 78 Pa. St. 96; *Hopper v. Hopper*, 61 S. Car. 124, 39 S. E. 366.

⁴*Arnold v. Johnson*, 1 Scam. (Ill.) 196; *Bray v. Crane*, 59 Tex. 649; *Lyon v. Witters*, 65 Vt. 396, 26 Atl. 588.

⁵*Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Stone v. Talbott*, 4 Wis. 442.

⁶*Rohan v. Hanson*, 11 Cush. (Mass.) 44; *South Bend First National Bank v. Miltonberger*, 33 Nebr. 847, 51 N. W. 232; *Dunbar v. Garritty*, 58 N. H. 575; *Adams v. Mahnken*, 41 N. J. Eq. 332, 7 Atl. 435; *Greene v. Tyler*, 39 Pa. St. 361; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187; *Fay v. Lovejoy*, 20 Wis. 403.

⁷*Bank of Niagara v. Rosevelt*, 9 Cow. (N. Y.) 409; *Lyon v. Witters*, 65 Vt. 396, 26 Atl. 588; *Donally v. Wilson*, 5 Leigh (Va.) 329; *Stone v. Talbot*, 4 Wis. 442.

⁸*Heard v. Pulaski*, 80 Ala. 503, 2 So. 343; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Bacon v. Brown*,

1 Bibb. (Ky.) 334, 4 Am. Dec. 640; *Law v. Sutherland*, 5 Grat. (Va.) 357.

⁹*Sleet v. Sleet*, 109 La. 302, 33 So. 322; *Forstall v. Blanchard*, 12 La. 1; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402, 3 Am. Dec. 557; *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926; *Bain v. Williams*, 10 Smedes & M. (Miss.) 113; *Neal v. Allison*, 50 Miss. 175. See also, *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

¹⁰*Applegate v. Koons*, 74 Ind. 247; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *United States v. Kirpatrick*, 9 Wheat. (U. S.) 720, 6 L. ed. 199. See also, *Sleet v. Sleet*, 109 La. 302, 33 So. 322; *Miller v. Womble*, 122 N. Car. 135, 29 S. E. 102; *Baum v. Trantham*, 42 S. Car. 104, 19 S. E. 973, 46 Am. St. 697; *Taylor v. Coleman*, 20 Tex. 772.

¹¹*Hughes v. Johnston*, 38 Ark. 285; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Jones v. United States*, 7 How. (U. S.) 681, 12 L. ed. 870.

¹²*Haynes v. Waite*, 14 Cal. 446; *Plummer v. Erskine*, 58 Maine 59; *People v. Grant*, 139 Mich. 26, 102

In some jurisdictions it is held that he can not make the application after a controversy has arisen.¹³

§ 1942. When neither party appropriates law determines in accordance with intention.—When neither party makes the application or appropriation, the law will make the application in accordance with certain general rules that are supposed to be just and equitable.¹⁴ The general subject is considered in a very recent case in Indiana and the following rules are laid down: A debtor making a payment to one to whom he owes several accounts may direct upon which account the payment may be applied, but if the debtor omits to make direction as to where a payment should be applied, the creditor may choose where to apply it. And if neither party makes the application, the law will apply it as equity requires, having regard for the debtor's intent if ascertainable.¹⁵ In a recent case in North Carolina the subject is also considered, and in that case it is said that the debtor may direct the application at the time of payment, but if he does not do so, the right passes to the creditor, and where neither debtor nor creditor makes the application to a particular debt, the law will apply it to the unsecured debt, or to one for which the creditor's security is most precarious, or according to its

N. W. 226; *Richards v. Columbia*, 55 N. H. 96; *Jenkins v. Beal*, 70 N. Car. 440; *Moss v. Adams*, 4 Ired. Eq. (N. Car.) 42; *Thatcher v. Tillory*, 30 Tex. Civ. App. 327, 70 S. W. 782; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427. See also, *Alexandria v. Patten*, 4 Cranch (U. S.) 317, 2 L. ed. 633. But compare *Brice v. Hamilton*, 12 S. Car. 32; *Baum v. Trantnam*, 42 S. Car. 104, 19 S. E. 973, 46 Am. St. 697; and *The Mecca* (1897), App. Cas. 286; and *Seymour v. Pickett* (1905), 1 K. B. 715, 74 L. J. K. B. 413. According to these English cases, the rule there seems to give the creditor the right "up to the last moment," even upon the trial. See and compare *Bank of California v. Webb*, 94 N. Y. 467.

¹³ *Johnson v. Thomas*, 77 Ala. 367. But see *Pearce v. Walker*, 103 Ala.

250, 15 So. 568; *Austin v. Southern Home B. Assn.*, 122 Ga. 439, 50 S. E. 382; *Russell v. Metzgar*, 2 Ind. 345; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Benson v. Reinschagen*, 75 N. J. Eq. 358, 72 Atl. 954; *Chapman v. Commonwealth*, 25 Grat. (Va.) 721; *Norris v. Beaty*, 6 W. Va. 477. See also, *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; *Milliken v. Tufts*, 31 Maine 497; *Lee v. Manley*, 154 N. Car. 244, 70 S. E. 385.

¹⁴ See *McWhorter v. Bluthenthal*, 136 Ala. 568, 33 So. 552, 96 Am. St. 43n; *Jacobs v. Ballenger*, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169; *Blake v. Sawyer*, 83 Maine 129, 21 Atl. 834, 12 L. R. A. 712 and note, 23 Am. St. 762.

¹⁵ *Barrett v. Sipp* (Ind. App.), 98 N. E. 310.

own views of the intrinsic justice and equity of the case.¹⁶ The general rule is that if the intention of the parties appears, the court will ordinarily make the application in accordance with such intention and it may be implied or inferred from circumstances.¹⁷ The question as to what the parties intended is generally a question of fact.¹⁸ But the manner in which the application should be made when no intention of the parties appears or can be ascertained would seem to be a question of law for the court.¹⁹ And certain rules or principles are generally followed by the court in making the application in accordance with the presumed intention of the parties, or the justice of the case.

§ 1943. Application by law.—Interests of parties and others.—When the law makes the application, the interest of the parties is usually considered, but in most instances such interests are conflicting and the question arises as to whether the interests of the debtor or those of the creditor should have preference. In some jurisdictions the rule of the civil law, giving the interest of the debtor preference, is followed.²⁰ In such jurisdictions, and in those deeming the civil law to have been adopted or become to this extent part of the common law, the application is usually made to a secured debt in preference to an unsecured debt,²¹ and

¹⁶ *Stone v. Rich* (N. Car.), 75 S. E. 1077.

¹⁷ *Harrison v. Johnston*, 27 Ala. 445; *Price v. Dowdy*, 34 Ark. 285; *London & S. F. Bank v. Barrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. 64; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Houghton v. Campbell*, 40 Fed. 906; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Pardee v. Markle*, 111 Pa. St. 548, 5 Atl. 36, 56 Am. Rep. 299; *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 13, 5 L. ed. 384; *Emery v. Tichout*, 13 Vt. 15.

¹⁸ *Killorin v. Bacon*, 57 Ga. 497; *Cox v. Wall*, 84 Ga. 456, 11 S. E. 137; *Oliver v. Phelps*, 20 N. J. L. 180; *Alexandria v. Patten*, 4 Cranch. (U. S.) 317, 2 L. ed. 633. See also, *Elliott Ev.* § 2586.

¹⁹ See *Nutall's Admr. v. Brannin's Exrs.*, 5 Bush (68 Ky.) 111.

²⁰ *Gillard v. Huval*, 22 La. Ann. 426; *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926; *McLaughlin v. Green*, 48 Miss. 175; *Bussey v. Gant's Admr.*, 10 Humph. (Tenn.) 238; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229; *Phillips v. Hernon*, 78 Tex. 378, 14 S. W. 857, 22 Am. St. 59; *Robinson v. Doolittle*, 12 Vt. 246. See also, *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691.

²¹ *Gillard v. Huval*, 22 La. Ann. 426; *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926; *Frazier v. Lanahan*, 71 Md. 131, 17 Atl. 940, 17 Am. St. 516; *Windsor v. Kennedy*, 52 Miss. 164; *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229.

to one bearing interest or a higher rate of interest in preference to one not bearing interest or bearing a lower rate.²² In other jurisdictions, constituting probably a majority, the interests of the creditor are favored.²³ And in such jurisdictions the application is usually made to the unsecured or more precarious debt.²⁴ In still other jurisdictions, the rules seem to be that neither is favored, but that the application will be made so as to best serve the end of justice.²⁵ So, even in jurisdictions in which the inclination is to favor the debtor, or in others in which it is to favor the creditor, neither rule seems to be arbitrarily applied in all cases, and where third persons are interested, their rights and interests may in some instances override those of the debtor and creditor.²⁶ This most frequently happens in cases in which such third person is a surety or otherwise interested in one of two funds.²⁷ But as a general rule

²² *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Bussey v. Gant's Admr.*, 10 Humph. (Tenn.) 238. See also *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. ed. 628; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109.

²³ *Stickney v. Moore*, 108 Ala. 590, 19 So. 76; *Chicago Title & Co. v. McGlew*, 90 Ill. App. 58, affd. 193 Ill. 457, 61 N. E. 1018; *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 20 Ky. L. 1684, 21 Ky. L. 133, 156, 50 S. W. 1092, 51 S. W. 180; *Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137; *Lester v. Houston*, 101 N. Car. 605, 8 S. E. 366; *Pierce v. Sweet*, 33 Pa. St. 151; *In re Johnson's Appeal*, 37 Pa. St. 268; *Sager v. Warley*, Rice Eq. (S. Car.) 26; *First National Bank v. Johnson*, 65 Vt. 382, 26 Atl. 634; *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500, 39 Pac. 965. See also *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Coons v. Tome*, 9 Fed. 532; *The Katie O'Neil*, 65 Fed. 111; *White v. Beem*, 80 Ind. 239; *McCauley v. Holtz*, 62 Ind. 205.

²⁴ *McCurdy v. Middleton*, 82 Ala. 131, 2 So. 721; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Monson v. Meyer*, 93 Ill. App. 94, affd. 195 Ill. 142, 62 N. E. 827; *First Nat. Bank v. Hollingsworth*, 78 Iowa

575, 43 N. W. 536, 6 L. R. A. 92; *Hanson v. Manley*, 72 Iowa 48, 33 N. W. 357; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am. St. 597; *Lester v. Houston*, 101 N. Car. 605, 8 S. E. 366. See also, *Sanborn v. Stark*, 31 Fed. 18.

²⁵ *Smith v. Lloyd*, 11 Leigh (Va.) 512, 37 Am. Dec. 621; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109. See also, *Stamford Bank v. Benedict*, 15 Conn. 437; *Thorne v. Allen*, 72 Minn. 461, 75 N. W. 706; *Pierce v. Knight*, 31 Vt. 701.

²⁶ *United States v. Eckford's Exrs.*, 1 How. (U. S.) 250, 11 L. ed. 120; *United States v. January*, 7 Cranch. (U. S.) 572, 3 L. ed. 443; *Green Bay Lumber Co. v. Thomas*, 106 Iowa 420, 76 N. W. 749; *Colerain v. Bell*, 9 Metc. (Mass.) 499; *Merchants Ins. Co. v. Herber*, 65 Minn. 420, 71 N. W. 624; *McGown v. Westbury*, 52 S. Car. 421, 29 S. E. 663, 30 S. E. 142; *Memphis City Bank v. Smith*, 102 Tenn. 467, 52 S. W. 149. See also, *Compound Lumber Co. v. Murphy*, 169 Ill. 343, 48 N. E. 472.

²⁷ *United States v. January*, 7 Cranch (U. S.) 572, 3 L. ed. 443. See also, *Drake v. Sherman*, 179 Ill. 362, 53 N. E. 628; *Bond v. Armstrong*, 88 Ind. 65; *Crossley v. Stanley*, 112 Iowa 24, 83 N. W. 806, 84 Am. St. 321; *Burbank v. Buhler*, 108

the parties alone are to be considered and third persons can not insist upon a particular application for their benefit of a payment voluntarily made by the debtor directly to his creditor from a fund belonging to the debtor.²⁸

§ 1944. **Application in case of accounts.**—The general rule in cases of running accounts consisting of numerous items of debit and credit, where neither of the parties has made any application and there is nothing to show a different intention, is that payments shall be applied in the order of time to the charges in the order in which they accrued, that is, the earliest credits to extinguish the earliest charges.²⁹ But there is another rule in most jurisdictions in which the civil law is not followed, that in the absence of any application by the parties the law will apply payments to the unsecured or least secured debts, and it is held in a recent case that the rule that the first debit items are extinguished by the first credit items in running accounts is subject to the rule that the law will apply the payment to the unsecured debts.³⁰ In a number of other jurisdictions, however, it is held that the payment should be applied to the oldest item, regardless of the fact that it is secured and the later items are not.³¹

La. 39, 32 So. 201; Colerain v. Bell, 9 Metc. (Mass.) 499; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Blackmore v. Granbery, 98 Tenn. 277, 39 S. W. 229.

²⁸ Stamford Bank v. Benedict, 15 Conn. 437; Hansen v. Rounsavell, 74 Ill. 238; Frazier v. Lanahan, 71 Md. 131, 17 Atl. 940, 17 Am. St. 516; Wells v. Hughes's Exrs., 89 Va. 543, 16 S. E. 689; Pope v. Transparent Ice Co., 91 Va. 79, 20 S. E. 940. See also, Case v. Fant, 53 Fed. 41, 3 C. C. A. 418; Trentman v. Fletcher, 100 Ind. 105. But see certain cases of agency: Steele v. Taylor, 4 Dana (Ky.) 445; Stebbins v. Lardner, 2 S. Dak. 127, 48 N. W. 847; Morse v. Woods, 5 Vt. 297.

²⁹ Golden v. Conner, 89 Ala. 598, 8 So. 148; Rogers v. Yarnell, 51 Ark. 198, 10 S. W. 622; First National Bank v. Hollingsworth, 78 Iowa 575, 43 N. W. 536, 6 L. R. A.

92; Grasser &c. Co. v. Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. 389; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36; National &c. Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. 612; Patterson v. Bank of British Columbia, 26 Ore. 509, 38 Pac. 817; Briggs v. Titus, 7 R. I. 441; Willis v. McIntyre, 70 Tex. 34, 7 S. W. 594, 8 Am. St. 574; Pierce v. Knight, 31 Vt. 701; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

³⁰ State v. United States Fidelity &c. Bank, 81 Kans. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865. See also, Stickney v. Moore, 108 Ala. 590, 19 So. 76; Dunnington v. Kirk, 57 Ark. 595, 22 S. W. 430; Price v. Merritt, 55 Mo. App. 640; Pardee v. Markle, 111 Pa. St. 548, 5 Atl. 36, 56 Am. Rep. 299; Langdon v. Bowen, 46 Vt. 512.

³¹ Tapper v. New Home Machine

§ 1945. Other rules of law as to application of payments.

—The law, of course, prefers a valid claim to an invalid one, and where neither party has directed the application the law will make the application to the valid claim.³² But it has been held, where the demand is merely unenforceable by reason of the statute of limitations, or the like, that the law will apply the payments to the first items, even though barred by the statute of limitations while the latter are not.³³ And there are other cases in which, when equity seemed to require it, the court made the application to a debt barred by the statute.³⁴ Another general rule is that in case of a partial payment on a single debt, it will be applied first to the interest due and the residue, if any, to the principal.³⁵ So, ordinarily, the law will apply a payment to a fixed rather than a contingent liability.³⁶ It is also the general rule that where an application has been once made by a party it can not be changed,³⁷ unless by

&c. Co., 22 Ind. App. 313, 53 N. E. 202; Miller v. Miller, 23 Maine 22, 39 Am. Dec. 597; Worthley v. Emerson, 116 Mass. 374; Hersey v. Bennett, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271; Dey v. Anderson, 39 N. J. L. 199; Phipps v. Willis, 11 Tex. Civ. App. 186, 32 S. W. 801. See also, Moses v. Noble, 86 Ala. 407, 5 So. 181, and compare it with the Alabama case cited in the last preceding note.

³² Quigley v. Duffey, 52 Iowa 610, 3 N. W. 659; Treadwell v. Moore, 34 Maine 112; Solomon v. Dreschler, 4 Minn. 278; McCusland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Huffstater v. Hayes, 64 Barb. (N. Y.) 573; Kuker v. McIntyre, 43 S. Car. 117, 20 S. E. 976; Wingate v. People's Building &c. Assn., 15 Tex. Civ. App. 416, 39 S. W. 999. This rule applies to items of an account as well as in other cases. Dunbar v. Garrity, 58 N. H. 575; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187.

³³ Fletcher v. Gillan, 62 Miss. 8.

³⁴ Phipps v. Willis, 11 Tex. Civ. App. 186, 32 S. W. 801. But see Estes v. Fry, 166 Mo. 70, 65 S. W. 741; Livermore v. Rand, 26 N. H. 85.

³⁵ Coleman v. Smith, 55 Ala. 368;

London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. 64; Donaldson v. Cothran, 60 Ga. 603; Jacobs v. Ballenger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169; Fay v. Bradley, 1 Pick. (Mass.) 194; Weide v. St. Paul, 62 Minn. 67, 64 N. W. 65; Anderson v. Perkins, 10 Mont. 154, 25 Pac. 92; Armijo v. Henry, 14 N. Mex. 181, 89 Pac. 305, 25 L. R. A. (N. S.) 275; Merchant's Bank v. Freeman, 15 Hun (N. Y.) 359; Moore v. Kiff, 98 Pa. St. 96. But see as to interest not due, Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514; Ross v. Rees, 19 Ky. L. 1215, 43 S. W. 215; Jencks v. Alexander, 11 Paige (N. Y.) 619; Mendel v. Paepke, 69 Wis. 527, 34 N. W. 912.

³⁶ Missouri Cent. Lumber Co. v. Stewart Bros., 78 Mo. App. 456; Thomas v. Kelsey, 30 Barb. (N. Y.) 268. See also, Snyder v. Robinson, 35 Ind. 311, 9 Am. Rep. 738 (personal debt given preference); Bank of Portland v. Brown, 22 Maine 295 (absolute debt rather than one transferred to creditor as collateral security).

³⁷ Wendt v. Ross, 33 Cal. 650; United States v. Massachusetts, Bond, &c. Co., 198 Fed. 923; Black v. Shooler, 2 McCord (S. Car.) 293;

agreement of both parties,³⁸ and it is held that the parties can not even by mutual agreement change it to the prejudice of a third person without his consent.³⁹

§ 1946. Involuntary payments.—The general rules as to the right of debtor or creditor to make the application of payment apply only to voluntary payments and not to involuntary payments coerced by law.⁴⁰ As to the application by law of involuntary payments there is some difference in different jurisdictions and much depends in some instances upon the circumstances of the particular case. In some jurisdictions such payments have been applied to unsecured rather than secured debts or claims.⁴¹ But it has been held that a payment by an assignee for the benefit of creditors should be applied to a debt secured by mortgage in preference to one not so secured.⁴² And in other cases the payment has been prorated among several debts irrespective of the collateral security held for each.⁴³ The proceeds of a specific property encumbered by a mortgage or other lien should ordinarily be applied to the payment of a debt so secured.⁴⁴ Where real estate is mortgaged to secure different debts it has been held that the proceeds should be applied pro rata to the different debts

Chapman v. Commonwealth, 25 Grat. (Va.) 721. See also, *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325; *Grasser & Co. v. Rogers*, 112 Mich. 112, 70 N. W. 445, 67 Am. St. 389.

³⁸ *Rundlett v. Small*, 25 Maine 29; *Flarsheim v. Brestrup*, 43 Minn. 298, 45 N. W. 438.

³⁹ *Pinney v. French*, 67 Kans. 473, 73 Pac. 94; *Boagin v. Wartelle*, 50 La. Ann. 128, 23 So. 206; *Terhune v. Colton*, 12 N. J. Eq. 232, 312; *Berghaus v. Alter*, 5 Watts. (Pa.) 386.

⁴⁰ *Barrett v. Sipp*, (Ind. App.) 98 N. E. 310; *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129; *Cage v. Iler*, 5 Sm. & M. (Miss.) 410, 43 Am. Dec. 521; *Orleans County National Bank v. Moore*, 112 N. Y. 543, 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. 775.

⁴¹ *California National Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Small v.*

Older, 57 Iowa 326, 10 N. W. 734; *Smith v. Moore*, 112 Iowa 60, 83 N. W. 813 (conceding, however, that the general rule in most jurisdictions is that the application should be made to all ratably); *Wilson v. Allen*, 11 Ore. 154, 2 Pac. 91.

⁴² *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 20 Ky. L. 1684, 21 Ky. L. 133, 156, 50 S. W. 1092, 51 S. W. 180.

⁴³ *Cohen v. L'Engle*, 29 Fla. 655, 11 So. 44; *Browning v. Carson*, 163 Mass. 255, 39 N. E. 1037; *Sheldon v. Bennett*, 44 Mich. 634, 7 N. W. 223; *Orleans County Bank v. Moore*, 112 N. Y. 543, 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. 775.

⁴⁴ *Clement v. Draper*, 108 Ala. 211, 19 So. 25; *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912; *Summer v. Kelly*, 38 S. Car. 507, 17 S. E. 364. See also, *Sherman v. Foster*, 158 N. Y. 587, 53 N. E. 504.

so secured irrespective of the order of their maturity or assignment.⁴⁵ But in some jurisdictions such proceeds would be applied to the debts in the order of their maturity. There are some cases in which a third party has been allowed to make the application. Thus, it has been held that in case of foreclosure of a mortgage securing several debts, the mortgagee could apply the proceeds to such of the debts as were not otherwise secured,⁴⁶ and that mortgagees in possession claiming under several mortgages may apply the rents and profits to the different mortgage debts as they please.⁴⁷ So where personal property was pledged to secure certain debts, some not otherwise secured, and some secured also by personal security, it was held that the creditor might apply the proceeds of the pledge to the debts otherwise unsecured.⁴⁸

⁴⁵ Maddox v. Teague, 18 Mont. 593,
47 Pac. 209.

⁴⁶ Smith v. Moore, 112 Iowa 60,
83 N. E. 813.

⁴⁷ Leach v. Curtin, 123 N. Car. 85,
31 S. E. 269.

⁴⁸ Wilcox v. Fairhaven Bank, 7
Allen (Mass.) 270.

CHAPTER XLIV.

TENDER.

- § 1955. Generally.
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§ 1955. **Generally.**—Tender, in a comprehensive sense, is an offer or attempt to perform. The term is applied not only to an offer or attempted performance of a promise to pay money, but also to an offer to do something promised.¹ In the former case, the offer to pay and its refusal by the promisee do not discharge the debt, but it usually stops interest and costs, at least where it is properly made and kept good. In the latter case the tender and its refusal will generally discharge the promisor from the contract.

The creditor usually has a reasonable time in which to decide whether he will accept the tender or not.² If he

¹ It has been well defined as "an offer by a debtor or other person who is under an obligation, to pay such debt or perform such obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same." 28 Am. & Eng. Encyc. Law (2d ed.), 4. As will hereinafter be shown, the term as ap-

plied to cases of mutual concurrent promises does not mean the same kind of offer or strict tender as when used with reference to cases involving the payment of money. See post, § 1968.

² Root v. Bradley, 49 Mich. 27, 12 N. W. 896; Moore v. Norman, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. 247.

accepts it in full performance, he is ordinarily bound by such acceptance, and can not afterwards successfully claim that there has not been full performance.³ But the acceptance of a smaller sum than is legally due will not of itself and in the absence of an agreement or circumstance showing that it is an acceptance in full performance, bar a recovery for the balance.⁴

§ 1956. By whom it may be made.—The tender must be made by the debtor or person whose duty it is to perform or by his agent or legal representative, and not by a mere stranger or intermeddler.⁵ But a person financially interested in the discharge of a debt, such as a surety or the like, may make a valid tender.⁶ And it has been held that a tender, even by a stranger, may be effective if afterwards ratified by the debtor.⁷

§ 1957. To whom it may be made.—The tender must also be made to the party entitled to receive it or to a duly authorized agent.⁸ Thus, it has been held that tender

³ *Jonathan Turner's Sons v. Lee Gin & Machine Co.*, 98 Tenn. 604, 41 S. W. 57, 38 L. R. A. 549. See also, *Hanson v. Todd*, 95 Ala. 328, 10 So. 354; *Gardner v. Black*, 98 Ala. 638, 12 So. 813.

⁴ *Bowen v. Owen*, 11 Q. B. 130; *Higgins v. Halligan*, 46 Ill. 173; *Myers v. Byington*, 34 Iowa 205; *Preston v. Grant*, 34 Vt. 201.

⁵ *McDougald v. Daugherty*, 11 Ga. 570; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *Sharp v. Garcesche*, 90 Mo. App. 233; *Johnson v. Smock*, 1 N. J. L. 106; *Brown v. Dysinger*, 1 Rawle (Pa.) 408; *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. 129. See also, *Eslow v. Mitchell*, 26 Mich. 500. But compare *Read v. Goldring*, 2 M. & S. 86 (agent furnished part of money); *Brown v. Dysinger*, 1 Rawle (Pa.) 408 (tender by relative on behalf of infant). See *Lamplsey v. Weed*, 27 Ala. 621; *Mahler v. Newbauer*, 32 Cal. 168, 91 Am. Dec. 571.

⁶ *Hampshire Manufacturers' Bank v. Billings*, 17 Pick. (Mass.) 87; *Neldon v. Roof*, 55 N. J. Eq. 608, 38 Atl. 429 (tender by owner of mortgaged premises); *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158 (tender by owner of realty on which the debt is a lien). See also, *Kincaid v. School Dist.*, 11 Maine 188.

⁷ *Harding v. Davies*, 2 Car. & P. 77; *Kincaid v. School Dist.*, 11 Maine, 188.

⁸ *King v. Finch*, 60 Ind. 420; *Hoyt v. Byrnes*, 11 Maine 475; *McIniffe v. Wheelock*, 1 Gray (Mass.) 600; *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688, revd. 39 Hun (N. Y.) 88; *Conrad v. Grand Grove & Co.*, Order of Druids, 64 Wis. 258, 25 N. W. 24. See also, as to trustee or latter's personal representative being proper person to whom to make tender, *Chahoon v. Hollenback*, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587.

should be made to the creditor.⁹ But tender to one of two or more joint creditors may be sufficient.¹⁰ And tender may be made to an agent authorized to receive it, or held out by the creditor as having such authority.¹¹ Tender to the secretary of a building and loan association has been held sufficient.¹² And so has tender to an attorney at law in whose hands the claim was placed for collection.¹³ And a tender made after a bona fide unsuccessful attempt to find the creditor to the creditor's son, who was authorized to reject the tender unless a receipt in full for all demands was given, has likewise been held sufficient.¹⁴ But where a creditor sent his son to the debtor to demand a specific sum, an offer of a smaller sum by the debtor to the creditor's son was held not a legal tender to the father.¹⁵ And a tender made to executors named in a will not yet probated has also been held insufficient.¹⁶

§ 1958. In what it may be made.—Where the contract calls for payment in money, the tender must be made in money, which is legal tender,¹⁷ unless there is a waiver

⁹ *King v. Finch*, 60 Ind. 420; *Fletcher v. Daugherty*, 13 Nebr. 224, 13 N. W. 207.

¹⁰ *Oatman v. Walker*, 33 Maine 67; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115; *Carman v. Pultz*, 21 N. Y. 547. See also, *Southard v. Pope's Exr.*, 9 B. Mon. (Ky.) 261; *Beebe v. Knapp*, 28 Mich. 53; *Dawson v. Ewing*, 16 Serg. & R. (Pa.) 371.

¹¹ *Goodland v. Blewith*, 1 Camp. 477; *Smith v. Goodwin*, 4 B. & Ad. 413; *Moffat v. Parsons*, 5 Taunt. 307 (clerk in store, even though privately instructed not to receive); *Hoyt v. Byrnes*, 11 Maine 475 (clerk in store); *Cook v. Kelly*, 9 Bosw. (N. Y.) 358. See also, *Wilmot v. Smith*, 3 Car. & P. 453; *Watson v. Hetherington*, 1 Car. & K. 36; *Anonymous*, 1 Esp. 349 (tender to servant); *Kirton v. Braithwaite*, 1 M. & W. 310.

¹² *Smith v. Old Dominion Building & Loan Assn.*, 119 N. Car. 257, 26 S. E. 40.

¹³ *McIniffe v. Wheelock*, 1 Gray

(Mass.) 600; *Salter v. Shove*, 60 Minn. 483, 62 N. W. 1126. See also, *Billiot v. Robinson*, 13 La. Ann. 529. But compare *Thurston v. Blaisdell*, 8 N. H. 367.

¹⁴ *Crawford v. Osmun*, 94 Mich. 533, 54 N. W. 284.

¹⁵ *Chipman v. Bates*, 5 Vt. 143.

¹⁶ *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249. As to when bank is authorized agent and as to effect where deposit, to pay obligation payable there, see *Carley v. Vance*, 17 Mass. 389; *Hill v. Place*, 5 Abb. Pr. (N. S.) (N. Y.) 18, 36 How. Pr. (N. Y.) 26, 30 N. Y. Super. Ct. 389; *Miller v. Bank of New Orleans*, 5 Whart. (Pa.) 503, 34 Am. Dec. 571; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Wallace v. McConnell*, 13 Pet. (U. S.) 136. But compare *King v. Finch*, 60 Ind. 420; *Baline v. Wambaugh*, 16 Minn. 116.

¹⁷ *Lang v. Waters' Admr.*, 47 Ala. 624; *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151;

express or implied. Thus, a tender in bank notes has been held insufficient.¹⁸ So it has been held that a tender in city or county orders is not good.¹⁹ So, ordinarily, a tender by a check is insufficient.²⁰ And it has been so held even where the check was certified.^{20a} And, of course, in the absence of waiver, or the like, tender of a time-check to an employé is not a good tender of payment or money.²¹

§ 1959. Money must actually be produced.—Unless the requirement is waived, either expressly or impliedly, the money must be actually produced.²² A mere readiness and

Hollowell &c. Bank v. Howard, 13 Mass. 235; Wade's Case, 5 Coke 114a; Gordon v. Strange, 1 Exch. 477. Tender made in coin is a legal tender, notwithstanding it is considerably worn. Mobile St. R. Co. v. Waters, 136 Ala. 227, 33 So. 42; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Jersey City & B. R. v. Morgan, 52 N. Y. S. 60, 18 Atl. 904.

¹⁸ Grigby v. Oakes, 2 Bos. & P. 526; Hollowell &c. Bank v. Howard, 13 Mass. 235; Donaldson v. Benton, 4 Dev. & B. (20 N. Car.) 435. See also, Cox v. State Bank, 8 N. J. L. 172, 14 Am. Dec. 417; Warren v. Mains, 7 Johns. (N. Y.) 476; Lowry v. McGhee, 8 Yerg. (Tenn.) 242. But it has been held that a bank must accept its own notes as payment and a tender of such notes to a bank by which they were issued is good as against it. Northampton Bank v. Balliett, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297. See also, Keyes v. Jasper, 4 Scam. (Ill.) 305; Blount v. Windley, 68 N. Car. 1, 12 Am. Rep. 616, affd. 95 U. S. 173, 24 L. ed. 424. But compare the Massachusetts and New Jersey cases cited in the preceding note 17.

¹⁹ Helena v. Turner, 36 Ark. 577; Perry v. Colquitt, 63 Ga. 311; Comstock v. Gage, 91 Ill. 328; Benson v. Carmel, 8 Greenl. (Maine) 110. But compare Howell v. Hoggins, 37 Ark. 110, as to tender of county orders in payment of taxes. As to this last, however, see Commonwealth v. Rodes, 5 T. B. Mon. (Ky.) 318.

²⁰ Harding v. Commercial Loan Co., 84 Ill. 251; Collier v. White, 67 Miss. 133, 6 So. 618; TePoel v. Shutt, 57 Nebr. 592, 78 N. W. 288; Poague v. Greenlee's Admr., 22 Grat. (Va.) 724; Kady v. Case, 11 Wash. 124, 39 Pac. 375. See also, Grussy v. Schneider, 50 How. Pr. (N. Y.) 134; Lewis v. Larson, 45 Wis. 353. But it is generally held that a tender by check is sufficient where the parties have been in the habit of so dealing and no objection is made on that ground. McGrath v. Gegener, 77 Md. 331, 26 Atl. 502, 39 Am. St. 415; Gunby v. Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232. In the note to this last case in 36 L. R. A. (N. S.) 232, the general rule is stated as in the text and the exceptional cases are reviewed.

^{20a} Thorne v. San Francisco, 4 Cal. 127; Larsen v. Breene, 12 Colo. 480, 21 Pac. 498; Holland v. Mutual Fertilizer Co., 8 Ga. App. 714, 70 S. E. 151; Barbour v. Hickey, 2 App. D. C. 207, 24 L. R. A. 763. And so as to a certificate of deposit, see Dougherty v. Hughes, 3 G. Greene (Iowa) 92. But where no objection was made to a tender of certificate of deposit upon that ground, it was held that such objection was waived. Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

²¹ Burlington Voluntary Relief Department v. White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. 701.

²² Angier v. Equitable &c. Loan Assn., 109 Ga. 625, 35 S. E. 64; Storey v. Krewson, 55 Ind. 397, 23 Am. Rep. 668; Holt v. Brown, 63

willingness to pay, even though expressed, is not sufficient,²³ and it is not enough that the debtor has the money in his pocket.²⁴ Even the production of money is not always conclusive tender, and it was so held where the debtor produced money and laid it on the table before the creditor without counting it or letting him count it and asked an extension of the debt, which was granted.²⁵ But as a general rule, if there is an actual production of the proper amount and there is nothing to prevent its being taken and counted, the mere fact that the debtor does not count it in the presence of the creditor would seem not to render the tender insufficient or ineffective.²⁶

§ 1960. Tender of less than due.—Tender of a smaller sum than the amount due is ineffective, as the creditor is not bound to accept less than the whole amount of his

Iowa 319, 19 N. W. 235; Irvin v. Gregory, 13 Gray (Mass.) 215; Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 N. W. 44; Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469. See also, Kinaird v. Trollope, 42 Ch. Div. 610, 58 L. J. Ch. 556; Thomas v. Evans, 10 East 101; Ryder v. Townsend (Lord), 7 Dowl. & R. 119. It is held that there can be no good tender if the person offering had not the ability to make it good, and that there is no waiver in such a case. Fuller v. Little, 7 N. H. 535; Champion v. Joslyn, 44 N. Y. 653; Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362. In some states, a written tender is authorized or made the equivalent of an actual tender in money. See Herberger v. Husman, 90 Cal. 583, 27 Pac. 428; Casady v. Bosler, 11 Iowa 242. But even under such a statute, it is held that it is insufficient if the offerer has neither intent nor ability to perform. McCourt v. Johns, 33 Ore. 561, 53 Pac. 601.

²³ Liebrandt v. Myron Lodge, 61 Ill. 81; Schrader v. Wolfkin, 21 Ind. 238; Bacon v. Smith, 2 La. Ann. 441, 46 Am. Dec. 549; Bakeman v. Pooler, 15 Wend. (N. Y.) 637; Wheeler v. Knaggs, 8 Ohio 169; McIntyre v. Carver, 2 Watts & S.

(Pa.) 392, 37 Am. Dec. 519; Rogers v. Peoples' Building &c. Assn. (Tex.), 55 S. W. 383. See also, Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362.

²⁴ Thomas v. Evans, 10 East 101; Douglas v. Patrick, 3 T. R. 683; Finch v. Brock, 1 Bing. N. Cas. 253; Sucklings v. Coney, Noy 74; Bakeman v. Pooler, 15 Wend. (N. Y.) 637; Strong v. Blake, 46 Barb. (N. Y.) 227 (even shaking envelope containing the money at creditor). But tender of money in bags or purses which are given to creditor to open is good. Wade's Case, 5 Coke 114a; Conway v. Case, 22 Ill. 127; Davis v. Stonestreet, 4 Ind. 101 (in handkerchief); Behaly v. Hatch, Walk. (Miss.) 369, 12 Am. Dec. 570.

²⁵ McInerney v. Lindsay, 97 Mich. 238, 56 N. W. 603.

²⁶ Breed v. Hurd, 6 Pick. (Mass.) 356; Behaly v. Hatch, Walk. (Miss.) 369, 12 Am. Dec. 570; Wheeler v. Knaggs, 8 Ohio 169; King v. King, 90 Va. 177, 17 S. E. 894. See also, Sands v. Lyon, 18 Conn. 18; State v. Spicer, 4 Houst. (Del.) 100; Hartsock v. Mort, 76 Md. 281, 25 Atl. 303, and Read v. Goldring, 2 M. & S. 86; Alexander v. Brown, 1 Car. & P. 288.

demand.²⁷ And it is immaterial that the insufficiency in amount arises from a mistake on the part of the debtor.²⁸ In one case a tender lacking only forty cents of being enough was held insufficient.²⁹ But in a more recent case in another jurisdiction it was held that where the tender lacked only the amount of interest on forty dollars for three days, it was not rendered bad on that account.³⁰ Tender made after interest has begun to run should include the interest.³¹ And if made after an action has been instituted, it should include the costs.³² But if a debtor owes several separate and distinct claims, he may usually elect or choose for himself as to which one he will make the payment upon, and duly tendered payments upon that one, even though it is less than he owes the creditor upon all of them, are good.³³ The debtor should, however, notify the creditor in such a case that the tender is made for the particular debt, as the general rule is that the tender of one sum for the whole without specifying or appropriating it or any portion of it to the particular debt is not good if the sum tendered is not sufficient to cover all.³⁴

²⁷ *McCalley v. Otey*, 103 Ala. 469, 15 So. 945; *Colton v. Oakland Bank of Savings*, 137 Cal. 376, 70 Pac. 225; *Rose v. Duncan*, 49 Ind. 269; *McLaughlin v. Royce*, 108 Iowa 254, 78 N. W. 1105; *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; *Emerson v. Kinne*, 110 Mich. 678, 68 N. W. 982; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 106; *Tuthill v. Morris*, 81 N. Y. 94; *Rand v. Harris*, 83 N. Car. 486; *McKibbin v. Peters*, 185 Pa. St. 518, 40 Atl. 288.

²⁸ *Helphrey v. Chicago & C. Ry. Co.*, 29 Iowa 480; *Baker v. Gasque*, 3 Strob. (S. Car.) 25; *Patnote v. Sanders*, 466 Vt. 66, 98 Am. Dec. 564.

²⁹ *Boyden v. Moore*, 5 Mass. 365.

³⁰ *Matzger v. Page*, 62 Wash. 170, 113 Pac. 254.

³¹ *Chicago & S. E. R. Co. v. Woodard*, 159 Ind. 541, 65 N. E. 577; *Louisiana Molasses Co. v. Le-Sassier*, 52 La. Ann. 2070, 28 So.

217; *Weld v. Eliot Five Cents Sav. Bank*, 158 Mass. 339, 33 N. E. 519.

³² *Martin v. Whisler*, 62 Iowa, 416, 17 N. W. 593; *Samuels v. Simmons*, 22 Ky. L. 1586, 60 S. W. 937; *Seeger v. Smith*, 74 Minn. 279, 77 N. W. 3; *Burt v. Dodge*, 13 Ohio 131; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978, 19 Am. St. 748. And where there is a right in the creditor to an attorney's fee and such right has accrued, this should be included. *Chicago & S. E. R. Co. v. Woodard*, 159 Ind. 541, 65 N. E. 577. See also, *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202.

³³ *North Chicago S. R. Co. v. Le-Grand Co.*, 95 Ill. App. 435; *Duvall v. Perkins*, 77 Md. 582, 26 Atl. 1085; *Carleton v. Whitcher*, 5 N. H. 289. See also, *East Tennessee, Virginia & Georgia R. Co. v. Wright*, 76 Ga. 532.

³⁴ *Hardingham v. Allen*, 5 C. B. 793; *Shuck v. Chicago, R. I. & P. R. Co.*, 73 Iowa 333, 35 N. W. 429.

§ 1961. **Tender of too much—Making change.**—A party can not well complain of an unconditional tender to him of a larger sum than the amount due. The greater includes the less and he is benefited rather than injured by such a tender.³⁵ But if the creditor is required to make change, as where the tender is coupled with the demand for the excess, the tender is not ordinarily good, if the creditor objects to it on that account.³⁶ It has been held, however, that a common carrier of passengers, such as a street railway company, should be prepared to furnish change for fare tendered to a reasonable amount.³⁷

§ 1962. **Where it may be made.**—If the contract fixes the place of payment or performance, the person to whom the tender is to be made should be in attendance at that place, and it is held that the tender may be made there if the creditor is absent.³⁸ But if no place is fixed by the contract the debtor should seek the person to whom the payment is to be made at the time appointed and make the tender to him,³⁹ although, as a general rule at least, the

³⁵ *Wade's Case*, 5 Coke 114a; *Dean v. James*, 4 B. & Ad. 547; *Patterson v. Cox*, 25 Ind. 261. See also, *North Chicago S. R. Co. v. LeGrand Co.*, 95 Ill. App. 435; *Hubbard v. Bank of Chenango*, 8 Cow. (N. Y.) 88; *Houston, E. & W. T. R. Co. v. Campbell* (Tex. Civ. App.), 40 S. W. 431, revd. 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

³⁶ *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365, 12 E. C. L. 365; *Perkins v. Beck*, 4 Cranch C. C. (U. S.) 68, Fed. Cas. No. 10984. Compare, however, cases in which there has been an attempt to redeem mortgaged property or the like. *Downing v. Plate*, 90 Ill. 268; *Nesbit v. Hanway*, 87 Ind. 400.

³⁷ *Barrett v. Market St. R. Co.*, 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. 61. A regulation that change should be required only to a reasonable amount has been held valid and a tender of a larger amount has been held insufficient.

Barker v. Central Park & Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489n, 56 Am. St. 626. See also, *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428; *Knoxville Traction Co. v. Wilkerson*, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579.

³⁸ *Aldrich v. Albee*, 1 Greenl. (Maine) 120, 10 Am. Dec. 45; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Roberts v. Beatty*, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410; *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236. See also, *Smith v. Loomis*, 7 Conn. 110; *Price v. Cochran*, 1 Bibb. (Ky.) 570; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Adams v. Rutherford*, 13 Ore. 78, 8 Pac. 896. See also, *Startup v. Macdonald*, 6 Man. & G. 593.

³⁹ *Crawford v. Paine*, 19 Iowa 172; *Galloway v. Smith*, Litt. Sel. Cas. (Ky.) 132; *McNair v. Moore*, 55 S. Car. 435, 33 S. E. 491, 74 Am. St. 760. See also, *Haldane v. Johnson*, 8 Exch. 689; *Francis v. Deming*, 59 Conn. 108, 21 Atl. 1006;

debtor is not bound to go out of the state to seek his creditor.⁴⁰ So, if the contract is for the delivery of goods or chattels and they are portable, tender should be made to the creditor at his residence or place of business.⁴¹ But where the articles are not portable and no place is designated, either expressly or impliedly, it seems that the debtor should call upon the creditor a reasonable time before the date of delivery to indicate where the articles are to be delivered and should deliver the articles accordingly at the place appointed, if it is reasonable.⁴² If the creditor can not be found, or if he refuses or neglects to name a reasonable place, it seems that the debtor may himself appoint a suitable place and deliver the articles there with due notice to the creditor if he can be found.⁴³ Much, however, may depend upon the intention of the parties, which usually governs and may be inferred from the nature of the contract and of the articles to be delivered and from the situation of the parties and the like. And it has been said that where a commercial contract requires personal property, such as certificates of stock or the like, to be delivered to several parties at the same time that it requires them to pay a certain sum to the holder of the stock, and no place of delivery is named in the contract, a deposit of the property in a convenient business institution in the state in which the contract was made and in which

King v. Finch, 60 Ind. 420; *Sage v. Ranney*, 2 Wend. (N. Y.) 532; *Judd v. Ensign*, 6 Barb. (N. Y.) 258. But see, *Smith v. Smith*, 25 Wend. (N. Y.) 405.

⁴⁰ *Trimble v. Williamson*, 49 Ala. 525; *Young v. Daniels*, 2 Iowa 126, 63 Am. Dec. 477; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Angell v. Loomis*, 97 Mich. 5, 55 N. W. 1008; *Gill v. Bradley*, 21 Minn. 15; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168.

⁴¹ *Miles v. Roberts*, 34 N. H. 245; *Santee v. Santee*, 64 Pa. St. 473. See also, *Grant v. Groshon*, Hard. (Ky.) 85, 3 Am. Dec. 725; *Bronson v. Gleason*, 7 Barb. (N. Y.) 472; *Barr v. Myers*, 3 Watts & S. (Pa.)

295; *Hall v. Whittier*, 10 R. I. 530.

⁴² *Mason v. Briggs*, 16 Mass. 453; *Flanders v. Lamphear*, 9 N. H. 201; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; *LaFarge v. Rickert*, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209. See also, *Musselman v. Stoner*, 31 Pa. St. 265; *Mallory v. Lyman*, 3 Pin. (Wis.) 443, 4 Chand. (Wis.) 143.

⁴³ *Trammell v. Mallory*, 115 Ga. 748, 42 S. E. 62; *Howard v. Minor*, 20 Maine 325; *Miles v. Roberts*, 34 N. H. 245; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *Peck's Admr. v. Hubbard*, 11 Vt. 612.

its subject-matter is situated and the contract is to be performed, with timely notice that it has been so deposited, is a sufficient tender or offer of delivery by the holder of the property.⁴⁴ So, if neither the time nor the place for the delivery of specific articles is fixed and they are deliverable upon demand, the general rule seems to be that they are deliverable at the place where they were at the time of the contract and a tender duly made at that place will be sufficient.⁴⁵

§ 1963. When it may be made.—Under the strict common-law rule a tender must be made on the very day the performance is due. A premature tender before that time, over the objection of the creditor, is usually of no effect.⁴⁶ Thus, it is held that a creditor can not be compelled to receive payment before the maturity of a debt and that legal tender of the amount of the debt can not be made before maturity.⁴⁷ Where the contract calls for the payment of money, a tender of the money made after the date fixed for payment is not a bar to the action, but may go in reduction

⁴⁴ *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247. See also, *Miles v. Roberts*, 34 N. H. 245.

⁴⁵ *Bosworth v. Frankberger*, 15 Ill. 508; *Dunn v. Marston*, 34 Maine 379; *Miles v. Roberts*, 34 N. H. 245; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Barr v. Myers*, 3 Watts & S. (Pa.) 295.

⁴⁶ *Brown v. Cole*, 14 Sim. 427; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685; *Quynn v. Whetcroft*, 3 Har. & McH. (Md.) 136, 1 Am. Dec. 375. See also, *Jouett v. Waggon*, 2 Bibb (Ky.) 269, 5 Am. Dec. 602; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Moore v. Kime*, 43 Nebr. 517, 61 N. W. 736; *Tillou v. Britton*, 9 N. J. L. 120; *Wyckoff v. Anthony*, 90 Daly (N. Y.) 442. Compare, however, *Sanders v. Burk* (Va.), 22 S. E. 516.

⁴⁷ See *Pyross v. Fraser*, 82 S. Car. 498, 64 S. E. 407, 129 Am. St. 901, where, in the course of the

opinion, the court says: "Few adjudications of the question here made as to the right of a debtor to pay his debt before maturity are to be found, for the reason that a creditor rarely refuses to accept a premature tender of his debt when it includes interest to the date of maturity. In all the cases, however, where the question has been decided under the common law, it has been held that a creditor can not be compelled to give up his investment before maturity. . . . To hold otherwise would be to change the contract of the parties. The creditor may, however, waive his right to insist on a strict compliance with the contract." If specific articles are to be delivered, they must ordinarily be tendered when delivery is due and not afterwards. *Powe v. Powe*, 42 Ala. 113; *Day v. Lafferty*, 4 Ark. 450; *Bowen v. Julius*, 141 Ind. 310, 40 N. E. 700; *Hamilton v. Chicago & C. R. Co.*, 103 Iowa 325, 72 N. W. 536.

of damages or costs.⁴⁸ So, under the common-law rule a valid tender can not ordinarily be made after an action is brought.⁴⁹ But in a number of states some of these rules have been changed by statute, and it is ordinarily provided that a tender after suit is brought may relieve the defendant from costs subsequently accruing, or the like.⁵⁰ When no time is fixed for performance or tender of performance, the general rule is that it may be made within a reasonable time.⁵¹ As to the time of day when a tender should be made, much depends upon the circumstances. It has been held that where the act may be done anywhere, a tender at a convenient time before midnight is sufficient.⁵² But if the act is to be done at a particular place, so that the duty rests upon either party to be at that place, the tender should be made by daylight and at a convenient time before sunset to count the money or examine the goods.⁵³ The parties may, however, meet at any hour of the day at the place appointed, and a special agreement,⁵⁴ or even the usage of business, may control.⁵⁵

§ 1964. Conditional tender.—It is frequently said that a tender must be absolute and without condition.⁵⁶ In a

⁴⁸ *Richardson v. Harris*, 22 Q. B. Div. 268; *Dixon v. Clarke*, 5 C. B. 365; *Day v. Lafferty*, 4 Ark. 450; *Huston's Exr. v. Noble*, 4 J. J. Marsh (Ky.) 130; *Frazier v. Cushman*, 12 Mass. 277; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106.

⁴⁹ *Smith v. Woodleaf*, 21 Kans. 717; *Murray v. Windley*, 29 N. Car. 201, 47 Am. Dec. 324; *McIntyre v. Carver*, 2 Watts & S. (Pa.) 392, 37 Am. Dec. 519. See also, *Johnson v. Clay*, 7 Taunt. 486, 2 E. C. L. 486.

⁵⁰ See *Thomson v. Way*, 172 Mass. 423, 52 N. E. 525; *Snyder v. Quarton*, 47 Mich. 211, 10 N. W. 204; *Rand v. Harris*, 83 N. Car. 486; *Hay v. Ousterout*, 3 Ohio 384; *Willey v. Laraway*, 64 Vt. 566, 25 Atl. 435.

⁵¹ *Adams v. Adams*, 26 Ala. 272; *Maurer v. King*, 127 Cal. 114, 59 Pac. 290; *Fisk v. Williams*, 75 Maine 217.

⁵² *Startup v. Macdonald*, 6 Man. & G. 593; *McClartey v. Gokey*, 31 Iowa 505. See also, *Leftly v. Mills*, 4 T. R. 172; *Smith v. Walton*, 5 Houst. (Del.) 141. But compare, *Wing v. Davis*, 7 Greenl. (Maine) 31.

⁵³ *Startup v. Macdonald*, 6 Man. & G. 593; *Larimore v. Hornbaker*, 21 Ind. 430; *Duckham v. Smith*, 5 T. B. Mon. (Ky.) 372; *Aldrich v. Albee*, 1 Greenl. (Maine) 120, 10 Am. Dec. 45; *Croninger v. Croker*, 62 N. Y. 151; *Tierman v. Napier*, 5 Yerg. (Tenn.) 400; *Savary v. Goe*, 7 Wash. (U. S.) 140.

⁵⁴ *Wade's Case*, 5 Coke 114; *Tinckler v. Prentice*, 4 Taunt. 549; *Sweet v. Harding*, 19 Vt. 587.

⁵⁵ *Lancashire v. Killingworth*, 12 Mod. 530, 1 Ld. Raym. 686; *Thompson v. Hodgson*, 2 Str. 777; *Hill v. Grange*, 1 Plowd. 172.

⁵⁶ *Odum v. Rutledge &c. R. Co.*, 94 Ala. 488, 10 So. 222; *Storey v.*

general way this is no doubt true in most instances, at least where it is required to be made independent of any precedent or concurrent act of the other party.⁵⁷ A tender should not be accompanied by any condition to which the other party has a right to object.⁵⁸ Thus, a tender conditioned upon an acknowledgment or giving of a receipt for a larger sum than the amount tendered is not good.⁵⁹ This has often been held where a tender of part of a debt is conditioned upon the giving of a receipt in full.⁶⁰ But it would seem that merely requesting or even demanding a receipt for the amount paid ought not to invalidate the tender.⁶¹ And there are many instances in which a tender ought not to be held insufficient because it is coupled with a demand for the performance of a reciprocal duty on the part of the person to whom the tender is made.⁶² And it

Krewson, 55 Ind. 397, 23 Am. Rep. 668; *Henderson v. Cass County*, 107 Mo. 50, 18 S. W. 992; *McEldon v. Patton*, 4 Nebr. (Unof.) 259, 93 N. W. 938; *Buffum v. Buffum*, 11 N. H. 451; *Currie v. White*, 45 N. Y. 822; *Bevans v. Reese*, 5 M. & W. 306. See also, *Robinson v. Cook*, 6 Taunt. 336; *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538.

⁵⁷ *Cornell v. Hayden*, 114 N. Y. 271, 21 N. E. 417; *Mann v. Roberts*, 126 Wis. 142, 105 N. W. 785.

⁵⁸ See cases cited in note 56. Also *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Rose v. Duncan*, 49 Ind. 269; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 55, 38 Am. St. 526.

⁵⁹ *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 127 Am. St. 123. Thus, in *Pittsburg Plate Glass Co. v. Leary*, 25 S. Dak. 256, 126 N. W. 271, Ann. Cas. 1912B 928, 31 L. R. A. (N. S.) 746, 760, it is said: "When one party is honestly claiming a greater amount to be due than the other party concedes, he can not be put in position of running the risk of losing his lien, not only upon the disputed claim, but also upon the undisputed part, by failing to receive the smaller amount in full; but he has the right to test the va-

lidity of his further claim, and the condition attached to the tender must be such as to leave him free to contest such right."

⁶⁰ *Laing v. Meader*, 1 Car. & P. 257; *Boulton v. Moore*, 14 Fed. 922; *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N. W. 523; *Crawford's Heirs v. Thomas*, 114 Ky. 197, 21 Ky. L. 1100, 54 S. W. 197; *Brown v. Gilmore*, 8 Greenl. (Maine) 107, 22 Am. Dec. 223; *Thayer v. Brackett*, 12 Mass. 450; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47. See also, *Jacoway v. Hall*, 67 Ark. 340, 55 S. W. 12; *Chapin v. Chapin* (Mass.), 36 N. E. 746; *Ruppel v. Missouri Guarantee & Bldg. Assn.*, 158 Mo. 613, 59 S. W. 1000; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158. See also, *Cheminant v. Thornton*, 2 Car. & P. 50; *Bowen v. Owen*, 11 Q. B. 130.

⁶¹ See *Fields v. Danehower*, 65 Ark. 392, 46 S. W. 938, 43 L. R. A. 519; *People v. Edwards*, 56 Hun (N. Y.) 377; *Brock v. Jones' Exr.*, 16 Tex. 461; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912 B 360 (where the court says: "The demand of a receipt would not be unreasonable. The company would have a right to it as evidence of payment."). *Jones v. Arthur*, 8 D. P. C. 442.

⁶² *Halpin v. Phenix Ins. Co.*, 118

may sometimes be important to make a conditional tender, because if accepted it may settle a disputed matter or become binding as a matter of contract.⁶³

§1965.—Conditional tender—Conditions imposed by law.—As already stated, there are cases in which a tender may be good, although it is coupled with a demand for the performance of a reciprocal duty on the part of the person to whom the tender is made. Thus, it is a general rule that the debtor may make a tender upon condition that the creditor perform some act that he would in any event be bound to perform under the law.⁶⁴ Under this rule it has been held that the debtor may require the surrender of property pledged to secure the debt and held by the creditor as such security,⁶⁵ or the release of a mortgage given to secure such debt,⁶⁶ or the reconveyance of property by a deed absolute on its face but intended as a mortgage.⁶⁷

§ 1966. Conditional tender—Examples of conditions held to vitiate.—But as already shown, the debtor can not ordi-

N. Y. 165, 23 N. E. 482; *Salinas v. Ellis*, 26 S. Car. 337; *Menkel v. Belscamper*, 84 Wis. 218, 54 N. W. 500. See also, *Dent v. Dunn*, 3 Camp. 296; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Johnson v. Cranage*, 45 Mich. 14, 7 N. W. 188; *Strafford v. Welch*, 59 N. H. 46. See generally *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. 435; *Harding v. Giddings*, 73 Fed. 335, 19 C. C. A. 508; *Kennedy v. Moore*, 91 Iowa 39, 58 N. W. 1066 (offer to pay assignee by parol on proof of power to collect and satisfy mortgage or execute release held good); *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Wheelock v. Tanner*, 39 N. Y. 481.

⁶³ *Bickle v. Bescke*, 23 Ind. 18. See also, as to waiver, *Richardson v. Jackson*, 8 M. & W. 298; *Moy-nahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Clark v. Colfax County*, 2 Nebr. (Unof.) 133, 96 N. W. 607. It is held that the creditor can not accept the tender and reject the

condition, and if he accepts he must be regarded as accepting condition as well. *Bahrenburg v. Conrad Schopp Fruit Co.*, 128 Mo. App. 526, 107 S. W. 440; *Bull v. Parker*, 2 D. (N. S.) 345, 12 L. J. Q. B. 93.

⁶⁴ *Johnson v. Cranage*, 45 Mich. 14, 7 N. W. 188; *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482.

⁶⁵ *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. 435; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Johnson v. Cranage*, 45 Mich. 14, 7 N. W. 188.

⁶⁶ *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482. See also, *Kennedy v. Moore*, 91 Iowa 39, 58 N. W. 1066. But see, *Fields v. Danehower*, 65 Ark. 392, 46 S. W. 938, 43 L. R. A. 519; *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

⁶⁷ *Mankel v. Belscamper*, 84 Wis. 218, 54 N. W. 500.

narily impose any conditions not required by law, such as a receipt or release in full, or the like.⁶⁸ Nor can he make the tender on condition that a right of appeal be waived,⁶⁹ or that it should be taken in settlement, also, of other claims between the same parties.⁷⁰ So, the tender of a conditional lease under a contract to give a bond of indemnity is not sufficient.⁷¹ So, a tender made on condition that collateral given to secure the payment of other debts as well as the debt in question shall be surrendered is insufficient.⁷²

§ 1967. Conditional tender—Demand for surrender of note paid.—There is a conflict of authority as to whether a tender of the amount due on a note or other negotiable instrument conditioned on the surrender of such instrument is good. The better rule, and that which seems to be sustained by the weight of authority, is that the holder of the instrument ought ordinarily to surrender it on payment thereof and that a proper tender demanding such surrender is good.⁷³ Under some circumstances, however, it may be otherwise, and some authorities seem to hold that a condition requiring such surrender makes the tender bad.⁷⁴

§ 1968. Conditional tender—Mutual and concurrent acts

⁶⁸ In addition to authorities cited in § 1964, see also, *Pulsifer v. Shepard*, 36 Ill. 513; *Schrandt v. Young*, 62 Nebr. 254, 86 N. W. 1085; *Pershing v. Feinberg*, 203 Pa. St. 144, 52 Atl. 22.

⁶⁹ *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538.

⁷⁰ *Greenhill v. Hunton* (Tex. Civ. App.), 69 S. W. 440.

⁷¹ *National Bank v. Levanseler*, 115 Mich. 372, 73 N. W. 399.

⁷² *Schmittiel v. Moore*, 100 Mich. 590, 60 N. W. 279; *Fidelity Loan & Co. v. Engleby*, 99 Va. 168, 37 S. E. 957. And there are many other cases illustrating the rule that a tender must be in accordance with the terms of the contract and that a tender imposing some condition not contemplated by the contract is insufficient. *Breja v. Pryne*, 94 Iowa 755, 64 N.

W. 669; *Cochran v. Jackman*, 21 Ky. L. 1830, 56 S. W. 507; *Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289; *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.

⁷³ *Dent v. Dunn*, 3 Camp. 296; *Strafford v. Welch*, 59 N. H. 46; *Heywood v. Hartshorn*, 55 N. H. 476; *Bailey v. Buchanan County*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562. See also, *Hansard v. Robinson*, 7 B. & C. 90, 9 D. & R. 860, 14 E. C. L. 50.

⁷⁴ *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148. See also, *Fales v. Russell*, 16 Pick. (Mass.) 315; *Balme v. Wambaugh*, 16 Gil. (Minn.) 106; *Bank of Benson v. Hove*, 45 Minn. 40, 47 N. W. 449; *Malone v. Wright*, 90 Tex. 49, 36 S. W. 420.

or promises.—A distinction should also be noted in this connection. Where the contract does not call for the payment of money, as on an ordinary debt, or the performance required is not independent of any precedent or concurrent act of the other party, but the case is one of mutual and concurrent promises, the word “tender” does not mean the same kind of offer as when used with reference to the payment or offer to pay an ordinary debt due in money, in cases where the money is offered to a creditor entitled to receive it and nothing further remains to be done, the transaction thereby being completed and ended; but it then means a readiness and willingness, accompanied by an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such purpose. Such readiness, ability and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to agreements generally. It is not an absolute unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement.⁷⁵

§ 1969. **Tender in equity.**—So, in equity a rule applies somewhat different from the rule at law requiring a strict tender, and what is known as an equitable tender has often been held sufficient. Such a tender consists of an offer of payment or to perform and do equity, made in the pleadings, and this will usually constitute a sufficient tender in such

⁷⁵Smith v. Lewis, 26 Conn. 110; Taylor v. Mathews, 53 Fla. 776, 44 So. 146; Cook v. Doggett, 2 Allen (Mass.) 439; Irvin v. Gregory, 13 Gray (Mass.) 215; Browning v. Owen County, 44 Ind. 11; Lynch v. Jennings, 43 Ind. 276. See also, Morton v. Lamb, 7 T. R. 125; Rawson v. Johnson, 1 East 203; Water-

house v. Skinner, 2 Bos. & P. 447; Ferry v. Williams, 8 Taunt. 62; Norwood v. Read, 1 Plowd. 180. See Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490, 32 N. E. 449; Comstock v. Lager, 78 Mo. App. 390; Mount v. Lyon, 49 N. Y. 552.

cases, so far, at least, as the same is a condition of equitable relief, without the necessity of making an actual strict tender.⁷⁶ But such an offer of payment when required is ineffective if it appears that the party making the offer has not the ability to make it good and that it can not be carried out, and in a recent case it is said: "A tender of payment, to be the equivalent of an actual production and tender of the money, must be made by one who has the present ability to make the tender good, and the burden of proof is upon the plaintiff to show that he has such ability."⁷⁷ "He who asks equity must do equity," and there are cases in which, even in equity, a strict tender or offer must be made. It is difficult to formulate any exact and accurate general rule upon this subject, but the following may be stated as showing the distinction and furnishing a general and useful test in many cases: First, where the duty to pay or perform is a clear one, the duty imperative and the sum due admitted or clearly evident, there must be a strict tender of payment or performance.⁷⁸ Second, where the sum is not admitted or clearly evident, but remains to be ascertained upon the hearing, an offer of performance accompanied by a statement of ability, readiness and willingness to perform is sufficient.⁷⁹ Another test is often found in the nature of the covenants, that is, whether

⁷⁶ *Hodges v. Verner*, 100 Ala. 612, 13 So. 679; *Caesar v. Capell*, 83 Fed. 403; *Atkins v. Kattman* (Ind. App.), 97 N. E. 174; *Crawford v. Liddle*, 101 Iowa 148, 70 N. W. 97; *Haydon v. St. Louis & C. R. Co.*, 222 Mo. 126, 121 S. W. 15; *Peak v. Peak*, 228 Mo. 536, 128 S. W. 981, 137 Am. St. 638; *Zebbley v. Farmers' Loan & Trust Co.*, 63 Hun (N. Y.) 541, 45 N. Y. St. 425, 18 N. Y. S. 526, revd. 139 N. W. 461, 34 N. E. 1067.

⁷⁷ *Eastern Oregon Land Co. v. Moody*, 198 Fed. 7. As to whether such a tender be sufficient in case of mutual and concurrent promises, provided the party making it is ready, able and willing to perform, see *Smoot v. Rea*, 19 Md. 398.

⁷⁸ *Daughdrill v. Sweeney*, 41 Ala.

310; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546; *Montgomery v. Trumbo*, 136 Ind. 331, 26 N. E. 54; *Hagaman v. Commissioners of Cloud County*, 19 Kans. 394; *Taylor's Admrs. v. Reed*, 5 T. B. Mon. (Ky.) 36; *Werner v. Tuck*, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. 443; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

⁷⁹ *Winton v. Sherman*, 20 Iowa 295; *St. Paul Division No. 1 Sons of Temperance v. Brown*, 9 Gil. (Minn.) 44; *Morriss v. Hoyt*, 11 Mich. 9; *Freeson v. Bissell*, 63 N. Y. 168; *Bruce v. Tilson*, 25 N. Y. 194; *Tracey v. Irwin*, 18 Wall. (U. S.) 549, 21 L. ed. 786; *Hills v. National Exchange Bank*, 105 U. S. 319, 26 L. ed. 1052; *Seeley v. Howard*, 13 Wis. 336.

they are independent or dependent and concurrent.⁸⁰ Where the defendant has abandoned and repudiated the contract, or placed it out of his power to perform, a tender before suit is usually unnecessary, and an offer in the pleadings to perform is all that equity requires.⁸¹

§ 1970. Waiver—Generally.—Objections on account of the failure of the party to comply with some of the requisites of a strict legal tender may be waived, either expressly or impliedly, by the other party. If a debtor is ready, able and willing to pay the money, the actual production of it may be waived by the absolute refusal of the creditor to accept it.⁸² So, objections on account of the tender of too much, or too little, or at a time or place other than that at which it may have been required to be made, may be waived in the same way or by the failure to object on the grounds of the insufficiency of the tender for such reasons.⁸³

⁸⁰ *Loud v. Pomona Land & Co.*, 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. 928; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. ed. 1017, 16 Sup. Ct. 808; *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 455, 7 L. ed. 219. See also, *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. 126; *Irvin v. Gregory*, 13 Gray (Mass.) 215. In the case first cited it is said: "If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance, on his part. If, however, the payment of the purchase price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of conveyance, and the allegation of its readiness and willingness to convey, upon payment of the purchase money, was sufficient." See also, ante, § 1968 on Conditional tender—Mutual and Concurrent Acts or Promises, and ante, ch. 36 on Covenants and Conditions; and Vol. III, ch. 51, on Specific Performance.

⁸¹ *Luchetti v. Frost*, 133 Cal. XIX, 65 Pac. 969; *Turner v. Parry*, 27 Ind. 163; *Auxier v. Taylor*, 102 Iowa 673, 72 N. W. 291; *Harshman v. Mitchell*, 117 Ind. 312, 20 N. E. 228; *Tyler v. Ontz*, 93 Ky. 331, 14 Ky. L. 321, 20 S. W. 256; *Wilbourn v. Bishop*, 62 Miss. 341; *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495; *Brock v. Hidy*, 13 Ohio St. 306; *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. 498; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

⁸² *Wood v. Bangs*, 2 Pen. (Del.) 435, 48 Atl. 189; *Blair v. Hamilton*, 48 Ind. 32; *Sonia Cotton Oil Co. v. The Red River*, 106 La. 42, 30 So. 303, 87 Am. St. 293; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Jones v. Preferred Bankers' & Co. Assur. Co.*, 120 Mich. 211, 79 N. W. 204; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773; *McPherson v. Fargo*, 10 S. Dak. 611, 74 N. W. 1057, 66 Am. St. 723; *Rogers v. Tindall*, 99 Tenn. 356, 42 S. W. 86.

⁸³ *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90; *Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *People's Furniture & Co. v. Crosby*, 57 Nebr. 282, 77 N. W. 658, 73 Am. St. 504; *Gould v. Banks*, 8 Wend.

And even though a tender is coupled with a condition which the debtor has no right to impose, the creditor may waive the question of the sufficiency of the tender on that ground by failing to object to such condition.⁸⁴ The refusal of a creditor to accept legal tender notes and the demand of coin,⁸⁵ his refusal to accept anything less than an excessive amount,⁸⁶ or to deal with the debtor and the like,⁸⁷ have each and all been held to waive an actual strict tender. But to excuse the actual production of the money, the debtor must have been willing and able to make the tender and the action of the creditor must have been such as to prevent the tender and actual production of the money which he was about to make.⁸⁸ And it has been held that a refusal to accept, coupled with a demand for the production of the money, does not waive its production.⁸⁹ A public officer is not a general agent of a party and ordinarily authorized to waive the necessary elements of a tender. But where it is required to be brought into court or paid to him, his acceptance of a check, certificate of deposit, or the like, instead of requiring money which is a strict legal tender, will not vitiate the tender that has been properly made or render it insufficient on the ground that it has not been kept good.⁹⁰

(N. Y.) 562, 24 Am. Dec. 90; *Bank of United States v. Bank of State*, 10 Wheat. (U. S.) 333, 6 L. ed. 334.

⁸⁴ *Richardson v. Jackson*, 8 M. & W. 298; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Clark v. Colfax County (Nebr.)*, 96 N. W. 607; *Wilder v. Seelye*, 8 Barb. (N. Y.) 408; *Maloney v. Edwards*, 56 Hun (N. Y.) 377, 10 N. Y. S. 335. See also, *Lockridge v. Lacey*, 30 U. C. Q. B. 494.

⁸⁵ *Hanna v. Ratekin*, 43 Ill. 462.
⁸⁶ *Ashburn v. Poulter*, 35 Conn. 553.

⁸⁷ *Sands v. Lyon*, 18 Conn. 18; *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322, 39 N. E. 1110.

⁸⁸ *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. 87; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

See also, *McWhirter v. Crawford*, 104 Iowa 550, 72 N. W. 505, 73 N. W. 1021.

⁸⁹ *Neiderhauser v. Railway*, 131 Mich. 550, 91 N. W. 1028.

⁹⁰ *Jessup v. Carey*, 61 Ind. 584; *Boyd v. Olvey*, 82 Ind. 294; *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489; *Hooker v. Burr*, 137 Cal. 663, 70 Pac. 778, 99 Am. St. 17, affd. 194 U. S. 415, 24 Sup. Ct. 706, 48 L. ed. 1046. See also, *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958. In *Bowen v. Vangundy*, 133 Ind. 670, 33 N. E. 687, it is held that the officer is liable on his bond if he fails to make good and pay over the proper amount in lawful money. But see, *Smith v. Merchants' & Farmers' Bank*, 14 Ohio C. C. 199, 8 Ohio C. D. 176.

§ 1971. **Waiver—Refusal on specific grounds.**—One of the most common ways in which a waiver will be deemed to have been made is by objecting to the tender on a certain specific ground other than that for which it might otherwise have been held insufficient.⁹¹ Thus, where a tender is refused without objection to the sufficiency of the amount, but on other grounds, objection to the amount of the tender will be considered waived.⁹² So, a refusal of a tender based on the insufficiency of the amount, or some other objection rather than the medium, waives objection that the tender is not made in a proper medium.⁹³ So, objections to the time or place of tender are similarly waived by failing to object on these grounds and specifically objecting on other grounds.⁹⁴

§ 1972. **Unnecessary when vain and fruitless.**—It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not necessary where it appears that if made it would have been vain and fruitless.⁹⁵ The rule

⁹¹ *Montgomery v. De Picot*, 15 Cal. 509, 96 Pac. 305, 126 Am. St. 84; *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Weil v. American Metal Co.*, 80 Ill. App. 406, affd. 182 Ill. 128, 54 N. E. 1050; *Beatty v. Miller*, 47 Ind. App. 494, 94 N. E. 897; *Christenson v. Nelson*, 38 Ore. 473, 63 Pac. 648; *Bradshaw v. Davis*, 12 Tex. 336; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Koon v. Snodgrass*, 18 W. Va. 320; *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

⁹² *Rundy v. Wills*, 88 Nebr. 554, 130 N. W. 273, Ann. Cas. 1912B 900 and note. See also, to the same effect, *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241; *Downing v. Plate*, 90 Ill. 268; *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 446; *Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *Lambert v. Miller*, 38 N. J. Eq. 117; *Jenkins v. Morning*, 38 Wis. 197, and *Cadman v. Lubbock*, 5 Dow. & R. 289.

⁹³ *McGrath v. Gegner*, 77 Md. 331,

26 Atl. 502, 39 Am. St. 415; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Richie v. Ege*, 58 Minn. 291, 59 N. W. 1020; *Walsh v. St. Louis Exposition & Music Hall Assn.*, 101 Mo. 534, 14 S. W. 722; *Henderson v. Cass County*, 107 Mo. 50, 18 S. W. 992; *Beckham v. Puckett*, 88 Mo. App. 636. See also, *Shay v. Callanan*, 124 Iowa 370, 100 N. W. 55; *Neal v. Finley*, 136 Ky. 346, 124 S. W. 348; *Kollitz v. Equitable & C. F. Ins. Co.*, 92 Minn. 234, 99 N. W. 892; *Presling v. Feinberg*, 203 Pa. 144, 52 Atl. 22; *Hidden v. German Sav. & C. Soc.*, 48 Wash. 384, 93 Pac. 668.

⁹⁴ *Eaton v. Emerson*, 14 Maine 335; *Adams v. Helm*, 55 Mo. 468; *Buck v. Burk*, 18 N. Y. 337; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812. See also, *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90.

⁹⁵ *Scott v. Beach*, 172 Ill. 273, 50 N. E. 196; *Beatty v. Miller*, 47 Ind. App. 494, 94 N. E. 897; *Auxier v. Taylor*, 102 Iowa 673, 72 N. W. 291; *Davis v. Police Jury*, 120 La. Ann.

may be stated as follows: An actual tender of performance may be excused when there is a readiness and willingness and an ability to perform, and actual performance has been prevented or waived by the party to whom performance is due.⁹⁶ Thus, it has even been held that where the other party expressly repudiates the contract and refuses to be bound by it or it appears that he will not accept the tender where offer of performance is made, actual tender is excused.⁹⁷ So, where the vendee was ready to perform before there was a forfeiture, but the vendor had conveyed the land to a third person, a tender by the vendee before bringing suit was held not to be necessary.⁹⁸

§ 1973. Keeping tender good.—The tender must be kept good.⁹⁹ And in order that this may be done it is generally necessary to bring the money into court.¹ The

163, 45 So. 47, 124 Am. St. 430; *Baumann v. Pinkney*, 118 N. Y. 604, 23 N. E. 916; *McPherson v. Fargo*, 10 S. Dak. 611, 74 N. W. 1057, 66 Am. St. 723; *McLeod v. Morrison*, 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.) 783. See also, *Gillespie v. Fulton Oil & Co.*, 236 Ill. 188, 86 N. E. 219; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Byers v. McDonald* (Miss.), 54 So. 664; *Ward v. Thorndyke*, 65 Wash. 11, 117 Pac. 593. Compare also, *Jackson v. Jacob*, 3 Bing. N. Cas. 869, 32 E. C. L. 399. The same principle is applied in *Donijanovic v. Hartman* (Mo. App.), 152 S. W. 424, where it is held that production of the depositor's bank book is not necessary to a demand for balance of deposit where the defendant banker claimed payment.

⁹⁶ *Thomas v. Evans*, 10 East 101; *Cort v. Ambergate R.*, 17 Q. B. 127; *Scott v. Beach*, 172 Ill. 273, 50 N. E. 196; *Soderberg v. Crockett*, 17 Nev. 406, 30 Pac. 826; *Levy v. Loeb*, 85 N. Y. 365; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. In *Scott v. Beach*, 172 Ill. 273, 50 N. E. 196, the following is quoted from *Pom. Cont.*, §§ 360, 365: "An actual tender by the

plaintiff, before suit brought, is unnecessary, when, from the acts of the defendant, or from the situation of the property, it would be wholly nugatory—a mere useless form. If, before or at the time of completion, the defendant has openly and avowedly refused to perform his part, or declared his intention not to perform at all events, then the plaintiff need not make a tender, or demand his performance, before bringing suit. It is enough that he is ready and willing and offers to perform in his pleading."

⁹⁷ *McPherson v. Fargo*, 10 S. Dak. 611, 74 N. W. 1057, 66 Am. St. 723; *McLeod v. Morrison*, 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.) 783. ⁹⁸ *Auxier v. Taylor*, 102 Iowa 673, 72 N. W. 291.

⁹⁹ *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Lewis v. Helton*, 144 Ky. 595, 139 S. W. 772; *Dunn v. Hunt*, 63 Minn. 484, 65 N. W. 948; *Tompkins v. Batie*, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361; *Tuthill v. Morris*, 81 N. Y. 94; *Le Vine v. Whitehouse*, 37 Utah 260, 109 Pac. 2, Ann. Cas. 1912C, 407; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

¹ *Park v. Wiley*, 67 Ala. 310; *Commercial Bank v. Crenshaw*, 103 Ala.

person making the tender must in all events keep enough money on hand for that purpose to make the payment if called upon.² Payment to a referee has been held insufficient.³ It has been held, however, that if money which has been properly paid into court to keep a tender good is afterwards withdrawn by order of the court, the validity of the tender will not be affected thereby.⁴ But a tender kept good by bringing the money into court is generally regarded as in the nature of a payment which can not be withdrawn by the party making it.⁵

§ 1974. **Effect of tender.**—The tender of the amount of a debt or liability under a contract requiring a payment of money and the refusal to accept the same will not discharge the contract and extinguish the debt,⁶ but it may stop interest and costs if kept good.⁷ A tender admits the

497, 15 So. 741; *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546; *Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322; *Deacon v. Central Iowa Investment Co.*, 95 Iowa 180, 63 N. W. 673; *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N. W. 523; *Clark v. Neumann*, 56 Nebr. 374, 76 N. W. 892; *Felker v. Hazelton*, 68 N. H. 304, 38 Atl. 1051; *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; *Bahmann v. Stoner*, 59 Ohio St. 497, 52 N. E. 1022; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248; *Hoffman v. Vandiemian*, 62 Wis. 362, 21 N. W. 542; *LeVine v. Whitehouse*, 37 Utah 260, 109 Pac. 2, Ann. Cas. 1912C, 407.

² *Beardsley v. Beardsley*, 86 Fed. 16, 29 C. C. A. 538; *Thayer v. Meeker*, 86 Ill. 470; *Slack v. Price*, 1 Bibb. (Ky.) 272; *Middle States & Co. v. Hagerstown Mattress & Co.*, 82 Md. 506, 33 Atl. 886; *Sanders v. Bryer*, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255. But it is not necessary that the identical money tendered should be kept on hand all the time. *Cheney v. Bilby*, 74 Fed. 52, 20 C. C. A. 291;

Thompson v. Lyon, 40 W. Va. 87, 20 S. E. 812.

³ *Becker v. Boon*, 61 N. Y. 317; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695.

⁴ *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

⁵ *Stevenson v. Yorke*, 4 T. R. 10; *Burstall v. Horner*, 7 T. R. 368; *Elliott v. Callow*, 2 Salk. 597; *Reed v. Armstrong*, 18 Ind. 446; *Barnes v. Bates*, 28 Ind. 15.

⁶ *Mohn v. Stoner*, 11 Iowa 30; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *Memphis Machine Works v. Aberdeen*, 77 Miss. 420, 27 So. 608; *Ruppel v. Missouri & C. Bldg. Assn.*, 158 Mo. 613, 59 S. W. 1000; *Brown v. Chicago & C. R. Co.*, 64 Nebr. 62, 89 N. W. 405; *Stowell v. Read*, 16 N. H. 20, 41 Am. Dec. 714; *Raymond v. Beuard*, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; *Gracy v. Potts*, 4 Baxt. (Tenn.) 395; *Preston v. Grant*, 34 Vt. 201. See also, *Dixon v. Clarke*, 5 C. B. 365; *Rhorer v. Bila*, 83 Cal. 51; *Cornell v. Green*, 10 Serg. & R. (Pa.) 14; *Spaulding v. Warner*, 57 Vt. 654.

⁷ *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 42 Am. St. 87; *Tuthill v. Morris*, 81 N. Y. 94; *Parker v. Beasley*, 116 N. Car. 1, 21 S. E. 955, 33 L. R. A. 231; *Riley v. McNam-*

plaintiff's cause of action, or the liability of the defendant making the tender, to the amount of the sum tendered.⁸ But it has been held that a tender is not always conclusive and that if too much has been tendered, as clearly appears from the evidence, no legal obligation is thereby created to pay or keep good the whole amount so tendered, and the court may give judgment for the amount actually due, even though more has been tendered.⁹ As already indicated, the money tendered and paid into court, as a general rule, at least, becomes the property of the creditor and can not be withdrawn by the debtor.¹⁰

§ 1975. Effect of tender on liens and collateral security.

—As a general rule, while a creditor, by refusing to accept a proper tender, may not forfeit his right to the thing tendered, he does lose collateral benefits and securities.¹¹ Thus, it has been held that where one holds a lien upon property, a good and proper tender to him of the amount of the lien will discharge the lien, even though it does not discharge the personal liability for the debt.¹² It has been so held as to the

ara, 83 Tex. 11, 18 S. W. 141. See also, *Cohoon v. Kineon*, 46 Ohio St. 590, 22 N. E. 722; *Curtiss v. Greenbanks*, 24 Vt. 536.

⁸ *Denver, South Park & Pac. R. Co. v. Harp*, 6 Colo. 420; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. 586; *Udelhofen v. Mason*, 201 Ill. 465, 66 N. E. 364; *Metropolitan National Bank v. Commercial State Bank*, 104 Iowa 682, 74 N. W. 26; *Davis v. Millandon*, 17 La. Ann. 97, 87 Am. Dec. 517; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507; *Eaton v. Wells*, 82 N. Y. 576; *Simpson v. Carson*, 11 Ore. 361, 8 Pac. 325; *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421; *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357. See also, 1 *Elliott's Gen. Pr.* § 318; 1 *Elliott Ev.* § 225; *Burrough v. Skinner*, 5 Burr. 2639; *Yate v. Willan*, 2 East 128; *Lipscombe v. Holmes*, 2 Camp. 441.

⁹ *Gloss v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Abel v. Opel*, 24 Ind. 250. See also, *Young v. Borzone*,

26 Wash. 4, 23, 66 Pac. 135, 421. But compare *Dyer v. Ashton*, 1 B. & C. 3; *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *Bacon v. Charlton*, 7 Cush. (Mass.) 581.

¹⁰ *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. 586; *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543. In *Clarke v. Cowan*, 206 Mass. 252, 92 N. E. 474, 138 Am. St. 388, it is said that ordinarily, in a case of tender, judgment will be rendered only for the amount, if any, which the plaintiff recovered over and above the amount tendered.

¹¹ *Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612; *Kortright v. Cady*, 21 N. Y. 366, 78 Am. Dec. 145, revg. 5 Abb. Prac. (N. Y.) 358; *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509.

¹² *Yeager v. Groves*, 78 Ky. 278; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468 and note; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep.

lien of an attorney,¹³ the lien of a pledge,¹⁴ the lien of a mortgage,¹⁵ and mechanics' liens.¹⁶ As will be seen from the cases cited in the notes, there is some conflict as to just when, if at all, a lien on a mortgage or a mechanic's lien is thus discharged and if the tender is accompanied with an improper condition or is made before the debt is matured or is due and hence too soon, it will not discharge the lien.¹⁷ There is more doubt as to whether the tender can have the effect of taking away the lien of a judgment or discharging the lien of an attachment.¹⁸

§ 1976. Tender of specific goods.—So far we have had to do mainly with tender of money, although attention has been called to the distinction that exists where there are mutual and concurrent acts to be performed and also to the rule as to the place of tender of specific goods or articles. The general rules are much the same except as to the effect of the tender, but in the very nature of the case there must be some special matters to be considered where

612; *Jones v. Guaranty &c. Co.*, 101 U. S. 622, 25 L. ed. 1030.

¹³ *Jones v. Tarlton*, 9 M. & W. 675.

¹⁴ *Ryall v. Rolle*, 1 Atk. 165; *McCalla v. Clark*, 55 Ga. 53; *In re Price*, 69 App. Div. (N. Y.) 37, 74 N. Y. 624. See also, *Gould v. Armagost*, 46 Nebr. 897, 65 N. W. 1064 (chattel mortgage).

¹⁵ *Shields v. Lozeur*, 34 N. J. L. 496, 3 Am. Rep. 256; *Jones v. New York Guaranty &c. Co.*, 101 U. S. 622, 25 L. ed. 1030. See also, *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620, 76 N. W. 142; *Felker v. Hazelton*, 68 N. H. 304, 38 Atl. 1051; *Werner v. Tuch*, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. 443. But compare, *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Rowell v. Mitchell*, 68 Maine 21; *Holman v. Bailey*, 3 Metc. (Mass.) 55; *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.*, 140 Mo. 103, 41 S. W. 450, 62 Am. St. 722; *American Net & Twine Co. v. Githens*, 57 N. J. Eq. 539, 41 Atl.

405; *Parker v. Beasley*, 116 N. Car. 1, 21 S. E. 955, 33 L. R. A. 231.

¹⁶ *Blakely v. Moshier*, 94 Mich. 299, 54 N. W. 54; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Pittsburg Plate Glass Co. v. Leary*, 25 S. Dak. 256, 126 N. W. 271, 31 L. R. A. (N. S.) 746; *Ann. Cas.* 1912B, 928 and cases cited in opinions and note.

¹⁷ *Patch v. Collins*, 158 Mass. 468, 33 N. E. 567; *Moore v. Kime*, 43 Nebr. 517, 61 N. W. 736; *Pittsburg Plate Glass Co. v. Leary*, 25 S. Dak. 256, 126 N. W. 271, 31 L. R. A. (N. S.) 746; *Ann. Cas.* 1912B, 928. See also, *Palmer v. McGinniss*, 127 Iowa 118, 102 N. W. 802; *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. 526.

¹⁸ See *Jackson v. Law*, 5 Cow. (N. Y.) 248, 9 Cow. (N. Y.) 641 (judgment). But see *Mason v. Sudam*, 2 Johns. Ch. (N. Y.) 172. See also, *Chase v. Welch*, 45 Mich. 345, 7 N. W. 895; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612. See both the latter cases as to attachment.

the tender is of specific goods or articles. As in the case of money, there must ordinarily be more than a mere readiness and ability to perform, and where the articles are portable and such as can readily be carried from place to place their actual production is generally required.¹⁹ But in the case of bulky and cumbersome articles, where manual delivery is impractical, this is not required.²⁰ If, however, the property is not homogeneous, the exact property to be tendered should be set apart or selected by the debtor,²¹ and there are many authorities to the same effect, even if it is homogeneous.²² But in some cases it has been held that tender of a larger amount than that required by the contract where the property is homogeneous, such as grain or nuts of the same kind, leaving the creditor to select, is good and sufficient.²³ The creditor may also be entitled, in the absence of anything to the contrary, to a reasonable opportunity to inspect or examine the goods to see whether they are in accordance with the contract,²⁴ and while the tender is not required to be kept good in the same manner as in case of a tender of money, yet the debtor must act in good faith and can not appropriate the goods to his own use and claim that the debt is satisfied.²⁵ As already

¹⁹ See *McPherson v. Gale*, 40 Ill. 368; *Henley v. Streeter*, 5 Ind. 207; *Johnson v. Mulvey*, 51 N. Y. 634; *Barr v. Myers*, 3 Watts & S. (Pa.) 295. But see Vol. V, Title fifteen, "Sales."

²⁰ *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.

²¹ *Clark v. Baker*, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; *Croninger v. Croker*, 62 N. Y. 151.

²² *Dixon v. Fletcher*, 3 M. & W. 146; *Rommel v. Wingate*, 103 Mass. 327; *Bates v. Bates*, Walk. (Miss.) 401, 12 Am. Dec. 572; *Croninger v. Crocker*, 62 N. Y. 151; *Perry v. Mount Hope Iron Co.*, 16 R. I. 318, 15 Atl. 87. See also, *Smith v. Loomis*, 7 Conn. 110; *Dorman v. Elder*, 3 Blackf. (Ind.) 490; *Hamilton v. Finnegan*, 117 Iowa 623, 91 N. W. 1039; *Wyman v. Winslow*, 11 Maine 398, 26 Am. Dec. 542; *Cherry*

v. Newby, 11 Tex. 457; *Gilman v. Moore*, 14 Vt. 457.

²³ *Armstrong v. Tait*, 8 Ala. 635, 42 Am. Dec. 656; *Brownfield v. Johnson*, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48 (but in this case it appeared to be a custom); *Hughes v. Prewitt*, 5 Tex. 264.

²⁴ *Isherwood v. Whitmore*, 11 M. & W. 347. See also, *Startup v. Macdonald*, 6 M. & G. 593; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Lincoln v. Gallagher*, 79 Maine 189, 8 Atl. 883; *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441.

²⁵ *McPherson v. Wiswell*, 16 Nebr. 625, 21 N. W. 391. See also, *Fisk v. Holden*, 17 Tex. 408. And see in what respect it may be said that the tender must be kept good, *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *Ortmann v. Fletcher*, 117 Mich. 501, 76 N. W. 63. With

intimated, the effect of a tender and refusal where the contract provides for performance other than payment in money is different from that in the latter case. Where it is to be in specific goods or articles, or the like, and not in money, a proper tender when refused will operate as a discharge.²⁶ The title vests in the creditor,²⁷ and he becomes, in effect, after tender and refusal, a bailee of the goods.²⁸

which compare, *Johnson v. Baird*, 3 Blackf. (Ind.) 182; *Dorman v. Elder*, 3 Blackf. (Ind.) 490.

²⁶ *Peytoe's Case*, 9 Coke 77b; *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; *DeLong v. Wilson*, 80 Iowa 216, 45 N. W. 764; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; *Des Arts v. Leggett*, 16 N. Y. 582; *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696; *Savary v. Goe*, 3 Wash. (C. C.) 140, Fed. Cas. No. 12388. See also, *Garrard v. Zachariah*, 1 Stew. (Ala.) 272; *Robbins v. Luce*, 4 Mass. 474; *Case v. Green*, 5 Watts (Pa.) 262, 30 Am. Dec. 311.

²⁷ *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; *West*

v. Chase, 3 Ind. 301; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174; *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. Dak. 547, 91 N. W. 330, and cases cited in note 28. But compare, *McJilton v. Smizer*, 18 Mo. 111; *Weld v. Hadley*, 1 N. H. 295; *Stowell v. Read*, 16 N. H. 20, 41 Am. Dec. 714.

²⁸ *Garrard v. Zachariah*, 1 Stew. (Ala.) 272; *Rex v. Strong*, 1 Root (Conn.) 55; *Holt v. Brown*, 63 Iowa 319, 19 N. W. 235; *Leballister v. Nash*, 24 Maine 316; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 524, 21 Am. Dec. 161; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *Zinn v. Rowley*, 4 Pa. St. 169; *Gilman v. Moore*, 14 Vt. 457. See also, *McJilton v. Smizer*, 18 Mo. 111.

CHAPTER XLV.

MERGER AND BANKRUPTCY.

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| § 1980. Discharge by operation of law—Generally. | § 1991. Provability of debts determined by section 63 of the Bankruptcy Act. |
| 1981. Definition of merger. | 1992. "Debts provable" under provisions of section 63, subdivision a. of the Bankruptcy Act. |
| 1982. Merger of implied, in express contract. | 1993. "Debts provable" under provisions of section 63, subdivision b. |
| 1983. Merger of parol, in written contract. | 1994. Debts discharged. |
| 1984. Merger of simple contract in specialty. | 1995. Construction of section 17—Exception 2. |
| 1985. Merger of contract in judgment. | 1996. Construction of section 17—Exception 3. |
| 1986. Merger of one judgment in another. | 1997. Construction of section 17—Exception 4. |
| 1987. Merger by modification. | 1998. Discharge of codebtors of bankrupt—Section 16. |
| 1988. Merger by modification—Continued. | |
| 1989. Modification — Necessity for new consideration. | |
| 1990. Discharge by bankruptcy. | |

§ 1980. Discharge by operation of law—Generally.—A contract may also be discharged by operation of law. In other words, there are rules of law which, operating on certain sets of circumstances, will discharge or bring about the discharge of a contract. And this may be brought about or occur without any reference to the intention of the parties. It may result from merger,¹ from bankruptcy

¹"Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and, being by act of the law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently between securities of the same degree or of different degrees; and being by act of the parties, it is the creature of their will. No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing in rem judi-

catam. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions and the distribution of assets." *Jones v. Johnson*, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760. But see *United States v. Lyman*, 1 Mason (U. S.) 482, Fed. Cas. No. 15647.

proceedings, or from the alteration of a written instrument. The first and second of these subjects will be considered in this chapter.

§ 1981. **Definition of merger.**—Merger of one contract in or by another may be said to be the unavoidable destruction of the operative force of one contract by another of higher degree. In other words, merger causes one contract to absorb, “swallow up” or supersede another, i. e., the second to become a substitute for the first. That such a metamorphosis does take place in certain instances in the absence of all design on the part of the contractors to that effect, is not open to question. The problem in regard to the solution of which difficulty is involved is the one of just when, or better under what circumstances, this supersedence takes place. Although the words “of higher degree” occupy a relatively inferior position in the definition given above, such words are by no means of the least importance therein, in fact, they are of controlling significance, and call for specific emphasis. While there are cases on record which apparently lend color to the possibility of a merger—in a sense—of one contract, in another of only co-ordinate rank,² these cases are, in the main, ones in which the second contract, by reason of its partial or entire inconsistency with, or altogether different provisions from,

²“A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two can not stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject.” *Housekeeper Pub. Co. v. Swift*, 97 Fed. 290, 38 C. C. A. 187, citing *Patmore v. Colburn*, 1 *Crompt. M. & R.* 65; *Stow v. Russell*, 36 Ill. 18; *Harrison v. Polar Star Lodge*, 116 Ill. 279, 5 N. E. 543; *Paul v. Meservey*, 58 Maine 419; *Howard v. Wilmington &c. R. Co.*, 1 Gill (Md.) 311; *Chrisman v. Hodges*, 75 Mo. 413; *Renard v. Sampson*, 12 N. Y. 561.

See also, *McDonough v. Kane*, 75 Ind. 181; *Howard v. Scott*, 98 Mo. App. 509, 72 S. W. 709; *Grand Trunk Western R. Co. v. Chicago &c. R. Co.*, 141 Fed. 785, 73 C. C. A. 43; *Hoag v. Carpenter*, 18 Ill. App. 555; *Graham v. Sadlier*, 165 Ill. 95, 46 N. E. 221; *Mather v. Butler*, 28 Iowa 253; *Cocheco Bank v. Berry*, 52 Maine 293; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098. See post §§ 1983, 1986. The term “merger” is used in various senses, but as we are here treating primarily of merger as a discharge of contracts by operation of law, comparatively little attention will be paid to merger in any other sense, especially as different phases have already been considered.

the first, created the conclusive presumption that the parties intended by it to abrogate their former agreement. Concerning the weight to be attached to the words "of higher degree" it will not be amiss to quote from an early Pennsylvania case in which it is said that "most clearly all the authorities go to show that, at law, the accepting of a security of equal degree, either from the debtor himself, with or without a surety, or from a stranger alone, at the instance of the debtor, is no extinguishment of the first debt; as where a second bond is given to the obligee; for one bond can not determine the duty of another."³ And since, as has been indicated,⁴ merger from a technical standpoint excludes the idea of a mutually intended absorption of one contract by another, the endeavor in the succeeding pages will be to treat mainly of contracts which imperatively, as an unavoidable consequence of their execution, and even in derogation of a unilateral intention to the contrary, stand in the eyes of the law as substitutes for others.

§ 1982. Merger of implied, in express contract.—In considering this doctrine of merger it will be proper to treat of its application to the different classes of contracts in the reverse order of their relative dignity. Thus, it seems that an implied contract will ordinarily be merged in an express one into which the parties subsequently enter. For example, the express contract of a person operating a public river-boom, to sort and saw, with reasonable dispatch, the logs of another delivered in the jam above the boom supersedes his contract, implied from his operation of the boom, to sort and deliver with reasonable dispatch the logs which came down the river, while on the drives.⁵

§ 1983. Merger of parol, in written contract.⁶—As regards parol contracts it has been stated by one learned

³Weakly v. Bell, 9 Watts (Pa.) 273, 36 Am. Dec. 116 and cases therein cited. See also, Andrews v. Smith, 9 Wend. (N. Y.) 53.

⁴See ante note 1, § 1980.

⁵Riedinger v. Diamond Match Co., 123 Fed. 244, 60 C. C. A. 1.

⁶For complete treatment of this subject see chap. 37, "Parol Evidence."

authority that "When parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."⁷ While in some cases it may be fairly said that this is a rule of evidence rather than of substantive law,⁸ there is much reason for the view taken in a comparatively recent case that "the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law."⁹ Lord Coke accounts for the rule in the following language: "It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases if such nude averments against matter in writing should be admitted."¹⁰ Examples of the application of this rule might be given in indefinite number, there seeming to be little deviation from the view that "when a written contract is so signed by both the parties to be bound, in the absence of clear and convincing proof of fraud or

⁷ 1 Greenl. on Ev. (15th ed.) § 275. This is declared to be the established rule in *Badart v. Foulon*, 80 Md. 579, 31 Atl. 513. See also, *Harmon v. Harmon*, 51 Fed. 113, revd. 70 Fed. 894, 17 C. C. A. 479.

⁸ See Thayer's Prelim. Treatise on Ev., 397, 398, 413, 414.

Pitcairn v. Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657. In this case the court also held that the competency of the evidence, as

a matter of law, to affect the writing was not necessarily conceded by the failure to object at the time it was offered, citing *Moody v. McCown*, 39 Ala. 586; *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 100. See also, 1 Elliott on Ev. §§ 568 et seq.

¹⁰ *Countess of Rutland's Case*, 5 Coke 26, quoted in *Harmon v. Harmon*, 51 Fed. 113, revd. 70 Fed. 894, 17 C. C. A. 479.

deception in procuring it to be signed it must be presumed to express the entire contract, and parol evidence of previous understandings of the parties is not admissible to vary its terms,"¹¹ and while this exclusion by a writing of parol evidence to enlarge or restrict its provisions may appear at first glance not to be comprehended by the technical doctrine of merger, and probably is not, yet it so far savors of the latter that a discussion of such doctrine would not be complete without due attention being given to it. In fact, very express authority for denominating this parol evidence rule as a rule of merger is to be found in a recent Massachusetts case, in which it is said that "in the absence of fraud or mistake, all previous or contemporary verbal negotiations are merged in the written instrument, which is conclusively presumed to express the bargain."¹² While in some instances oral contracts have, at least in part, been saved by the courts having construed them as of a "collateral" character, the fact remains that in cases where this has been done, the source of authority for receiving parol evidence has been the written contract itself.¹³ "The test of the completeness of the writing, proposed as a contract, is the writing itself. If this bears evidence of careful preparation of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract, and if it is reasonable to conclude from it that the parties have therein ex-

¹¹ *Wrought-Iron Range Co. v. Graham*, 80 Fed. 474, 25 C. C. A. 570. See also, *Cortelyou v. United States*, 32 App. (D. C.) 20; *Bowser v. Tarry*, 156 N. Car. 35, 72 S. E. 74; *Spencer v. Huntington*, 100 App. Div. (N. Y.) 463, 91 N. Y. S. 561, 34 Civ. Proc. 30, affd. 183 N. Y. 506, 76 N. E. 1109; *Spencer v. Huntington*, 183 N. Y. 506, 76 N. E. 1109; *Harrington v. F. W. Brockman Commission Co.*, 107 Mo. App. 418, 81 S. W. 629, and compare *American Sales Book Co. v. Whitaker* (Ark.), 140 S. W. 132; *Metzger v. Highland Brew. Co.*, 151 Ill. App. 332; *Hillyard v. Hewitt* (Ore.), 120 Pac. 750.

¹² *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036. See also, *Doniphan &*

R. Co. v. Missouri & C. R. Co. (Ark.), 149 S. W. 60; *Brown v. Holloway's Estate*, 47 Colo. 461, 108 Pac. 25; *Cleveland, C. C. & St. L. R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *Cleveland, C. C. & St. L. R. Co. v. Kennedy*, 22 Ind. App. 698, 53 N. E. 1135; *Ragette v. Boliger* (Iowa), 138 N. W. 818; *Bergin v. Williams*, 138 Mass. 544; *Berberet v. Myers*, 240 Mo. 58, 144 S. W. 824; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, 57 N. E. 480; *Putnam v. Macleod*, 23 R. I. 373, 50 Atl. 646; *Curtis Bros. Lumber Co. v. McLoughlin*, 80 App. Div. (N. Y.) 636, 80 N. Y. S. 1016.

¹³ *Gordon v. Parke & C. Mach. Co.*, 10 Wash. 18, 38 Pac. 755.

pressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract."¹⁴ Again, it has been held that where there has been partial performance under a parol agreement for the sale of land, such agreement does not become merged in a written one to the extent that it can not be employed to show acts done or rights acquired under it, the merger going no further than to preclude the establishment of a variance between the two contracts.¹⁵ So also, it has been held that the fact that a written contract merges into itself all prior parol negotiations having reference to it does not necessarily cause it to abrogate all other contracts relating to the same subject-matter, actually entered into between the parties, especially when not only the execution but the breach of the first contract precedes the consummation of the second.¹⁶ But notwithstanding an oral contract of sale has been executed to the point of delivery of the article and the payment of the price, a variance can not be established between it and a written contract covering the matter into which the parties subsequently enter.¹⁷ So also, the fact that a written contract in relation to land does not go into operation by reason of the lessor's death does not fur-

¹⁴ Jones, Com. & Tr. Cont. § 134, quoted in *National Cash Register Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622; *Gordon v. Parke & Co. Mach. Co.*, 10 Wash. 18, 38 Pac. 755. See also, *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Savage v. Stone*, 1 Utah 35; *Carr v. Hays*, 110 Ind. 408, 11 N. E. 25; *Willis v. Hulbert*, 117 Mass. 151; *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, 57 N. E. 480; *Dickinson v. Vance*, 31 App. Div. (N. Y.) 464, 53 N. Y. S. 619; *Eighmie v. Taylor*, 98 N. Y. 288,

Engelhorn v. Reitlinger, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512.

¹⁵ *Mills v. Matthews*, 7 Md. 315.

¹⁶ *Louisville, N. A. & C. R. Co. v. Craycraft*, 12 Ind. App. 203, 39 N. E. 523; citing *Pittsburgh, C. C. & St. L. R. Co. v. Racer*, 10 Ind. App. 503, 37 N. E. 280, 38 N. E. 186; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318; *McAbsher v. Richmond & C. R. Co.*, 108 N. Car. 344, 12 S. E. 892; *Cleveland & Toledo R. Co. v. Perkins*, 17 Mich. 296.

¹⁷ *Wrought-Iron Range Co. v. Graham*, 80 Fed. 474, 25 C. C. A. 570.

nish a basis for the allegation that a former parol contract was not merged in the written one.¹⁸

§ 1984. Merger of simple contract in specialty.—It is a fundamental principle that a valid contract under seal absorbs a simple contract involving the same subject-matter, executed by the same parties and providing no remedy more extensive than that afforded by the specialty.¹⁹ Thus, it will be seen that in accomplishing the merger of a simple contract in one under seal, four things are absolutely essential: In the first place, validity must accompany the new contract; secondly, there must be an identity, between the contracts, of subject-matter; next, a uniformity of parties; and last, equality, at least, of remedies. This requirement of validity and of these identities is not, however, peculiar to the merger of a contract not under seal in one under seal, for although no particular mention has been heretofore made of it, the merger of an implied in an express contract, and of an oral contract in a written one, each equally presupposes it. It is frequently said that a simple contract for the payment of a debt will not be merged in a sealed contract to pay the same unless the specialty was accepted, not as collateral security, but in satisfaction of the debt.²⁰ This, however, seems to conflict with the doc-

¹⁸ *Harmon v. Harmon*, 51 Fed. 113, revd. 70 Fed. 894, 17 C. C. A. 479.

¹⁹ *Leonard v. Hughlett*, 41 Md. 380; *Myers v. Oglesby*, 6 How. (Miss.) 46; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125; *Jones v. Johnson*, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760; *Charles v. Scott*, 1 Serg. & R. (Pa.) 294; *Gardner v. Hust*, 2 Rich. L. (S. Car.) 601; *Witz v. Fite*, 91 Va. 446, 22 S. E. 171; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

²⁰ In 3 Page on Contracts the concluding sentence of § 1352 reads as follows: "The distinguishing feature of merger is that it operates without any dependence on the intention of the parties that merger shall exist." In § 1355 several cases are cited to support the statement that, "the specialty will not merge the prior simple contract if it is not intended as

satisfaction thereof but merely as collateral security thereto." One of these cases, *Witz v. Fite*, 91 Va. 446, 22 S. E. 171, will be considered infra; another, *Heeg v. Weigand*, 33 Ind. 289, is one in which, in the first place, no sealed instrument is involved, and in the second place the contracts (promissory notes) are of equal degree; still another, *Grant v. School Town Monticello*, 71 Ind. 58, hinges on the question of payment and neither "merger" nor any equivalent word appears in any part of the opinion; of those remaining, no one is any more in point as sustaining authority. This proposition, however, has likewise seemed to appeal to the author of the article on "Merger" in 20 Am. & Eng. Ency. of Law (2d ed.) 597. See also, *Rees v. Logsdere*, 68 Md. 93, 11 Atl. 708; *Van Vleit v.*

trine of merger as the same has been enunciated, namely, that the intention of the parties is immaterial, the law not permitting one to "have, in respect of the same demand, a coexisting remedy by proceeding both on covenant and on simple contract."²¹ Evidently the idea that an intent is essential arises through a confusion of merger with satisfaction. That a distinction between the two exists and at the same time that the distinction is frequently overlooked, if it was ever known, is pointed out in an early Pennsylvania case, as follows: "There is a substantial distinction, which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These questions, though depending on different principles, have usually been confounded; and hence, a perceptible want of precision in the language of those who have written or spoken of them. In the first of them, the original security is extinguished, but the debt remains; in the second, the debt, as well as the security, is extinguished by the acceptance of another debt in payment of it. * * * The difference, on the whole, consists in this, that in a case of merger, there is a change only of the security; but in a case of satisfaction by substitution, there is a change of the debt. Thus, the matter stands on principles uncontradicted by authority."²² In a case, decided more than fifty years after the one from which the above quotation is taken, however, it is said: "The counsel of the defendants insist that the question of merger can not be controlled by the intention or agreement of the parties, but results from operation of law from their acts, without regard to intention. In general, a simple contract is extinguished by a specialty security for the same debt, if the remedy upon the latter is coextensive with that which the creditor has on the former. This question has been much discussed in England and in this country, but the weight of authority

Jones, 20 N. J. L. 340; Charles v. Scott, 1 Serg. & R. (Pa.) 294, Graves v. Allen, 66 Tex. 589.

²¹Price v. Moulton, 10 C. B. 561, 15 Jur. 228.

²²Jones v. Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760.

is in favor of the doctrine that if the higher security shows upon its face that it was executed for the same debt as the simple contract, and shows further that it was not taken in satisfaction of the simple contract, but in addition to or collateral to it, there is no merger. If the higher security shows upon its face that it was executed for the same debt as the simple contract, and nothing more appears, the presumption is—at least, of fact—that it was in satisfaction of the simple contract, and that the latter is merged into it.”²³

§ 1985. **Merger of contract in judgment.**—“If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, transit in rem judicatam, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever.”²⁴ It would indeed be difficult to find a general doctrine announced more emphatically or in broader terms than this one. Clear cut and unambiguous, it can mean but one thing, and that is just exactly what it says. Moreover, “cause of action,” used as it is here, is not a phrase of restricted meaning, but must necessarily include causes of action arising from crime, tort and contract alike. In other words, where a person sues ex contractu and recovers a valid judgment upon the merits he must, provided he does not thereafter obtain satisfaction of the amount owing him, sue upon the judgment, as evidence of his claim, rather than upon the original contract, i. e., the latter is merged in the former.

²³ *Witz v. Fite*, 91 Va. 446, 22 S. E. 171.

²⁴ *United States v. Leffler*, 11 Pet. (U. S.) 86, 9 L. ed. 642. “Sound policy has led to the adoption of the rule that, where a precedent liability is made the basis of a final money judgment, the rights of the parties are merged in what the law treats as the higher obligation.” *McKittrick v. Cahoon*, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. 606. So it has been held that a judgment against a number of de-

fendants on joint and several notes merges the notes and is joint as to all defendants. *Rohrabacher v. Walsh* (Mich.), 135 N. W. 907. See also, *Knight v. Rothschild*, 132 App. Div. (N. Y.) 274, 117 N. Y. S. 26; *In re Whitney*, 146 App. Div. (N. Y.) 45, 130 N. Y. S. 629. But it has been held that a decree of foreclosure of a mortgage, while it merges the right of action, does not merge the lien of the mortgage. *Evansville Gas Light Co. v. State*, 73 Ind. 219.

"The general doctrine of merger of the cause of action by judgment can not, of course, be disputed. No suit or proceeding can thereafter be brought upon the original liability, but only for the enforcement of the judgment. The power of the court can not be again invoked to adjudicate the question of liability. It is for the interest of the public that litigation shall come to an end, and the inconvenience of preserving the original liability as a continuing cause of action would be great. The pursuit must proceed along the line adopted, and the satisfaction of the claim must be sought through the judgment. But this rule of law prevails only to the extent that the reason for it exists. It does not prevent the recognition in the judgment of the attributes of the original cause of action. For the purposes of relief, the judgment embodies those attributes and gives ground for their enforcement. The rights of the parties are established, and are in no wise diminished thereby. So, when the judgment is general in form, it is often necessary to go behind it and see upon what liability it is founded, and to the end that the characteristics of the cause of action may be impressed upon it."²⁵ But "in order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the

²⁵ *Thompson v. Judy*, 169 Fed. 553, 95 C. C. A. 51. Accepted at its face value, the case of *Attorney-General v. Supreme Council*, 196 Mass. 151, 81 N. E. 966, would make a later case decided by the Supreme Court of the United States (*Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. 981) render worthless on this point the one from which this quotation is taken. Reference to the case of *Boynton v. Ball*, however, readily dispels any idea that it discounts this doctrine as such, as witness its actual words: "But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the

change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy." In fact, this case, if it does anything, affirms the proposition that a judgment absorbs the contract upon which it is rendered, though the debt remains the same. Neither courts nor text writers who are careful to make the nice distinctions which the correct interpretation of the law requires, give any sanction to the idea that the debt as such is merged. What they do contend—and logically—is that the evidence of the debt is merged.

same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."²⁶ And yet it seems that the judgment need not have been rendered in a court of the state or district in which the question arises in order that the doctrine of merger may apply.²⁷ "While it is certainly true that the pendency of a suit in one court is not a defense, though it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but when the matter is pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered."²⁸ In this connection it is of no

²⁶ *Hughes v. United States*, 4 Wall. (U. S.) 232, 18 L. ed. 303 quoted with approval in *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425. "Where a former adjudication is relied upon as an absolute bar, technically known as an estoppel by judgment, there must be, as between the two actions, identity of parties, of subject-matter, and cause of action." *Chicago v. Partridge*, 248 Ill. 442, 94 N. E. 115. "The rule seems to be that a matter is not to be regarded as res adjudicata unless there is a concurrence of four conditions: first, identity in the thing sued for; second, identity of the cause of action; third, identity of persons and of parties to the cause of action; fourth, identity of the quality of the persons for or

against whom the claim is made." *Lane v. Kuehn* (Tex. Civ. App.), 141 S. W. 363. See also, *Jones v. Charles Warner Co.* (Del.), 83 Atl. 131; *People v. Chicago, B. & Q. R. Co.*, 247 Ill. 340, 93 N. E. 422; *State v. Kaemmerling*, 83 Kans. 383, 111 Pac. 443; *Johnson v. United R. Co. of St. Louis* (Mo.), 147 S. W. 1077; *McDonald v. Hygienic Ice &c. Co.*, 148 App. Div. (N. Y.) 539, 132 N. Y. S. 857; *Kaplan v. Friedman Const. Co.*, 148 App. Div. (N. Y.) 14, 132 N. Y. S. 233; *Seigfried v. Boyd*, (Pa.) 85 Atl. 72.

²⁷ *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425.

²⁸ *Schuler v. Israel*, 120 U. S. 506, 30 L. ed. 707, 7 Sup. Ct. 648.

consequence that the question decided in the prior case was one purely of law,²⁹ nor that a motion or demurrer gave rise to the decision,³⁰ "provided the merits were involved and were decided, and the order or decision of the court was final."³¹ Where an action is dismissed on the merits, the judgment operates as a bar to a subsequent suit between the same parties on the same cause of action.³² Likewise a judgment in favor of a defendant who pleads failure of consideration in an action on one or more of a series of notes is held *res adjudicata* of the right of the payee to sue on the other notes of the same series.³³ So neither a want of proof,³⁴ nor the inadequacy of pleadings on a former trial can be set up in reply to a plea of *res adjudicata*.³⁵ So, also, it seems to be settled that a valid, final decree in equity has the same effect in merging the cause of action as has a judgment at law.³⁶ But manifestly a judgment does not merge a cause of action which does not exist at the time the judgment was rendered. Thus, an action may be maintained to recover the amount of an incumbrance actually paid off even after judgment for nominal damages for a breach of covenant against incumbrances has been recovered, the incumbrance not having been discharged at the time of the rendition of such judgment.³⁷ So, where a contract is severable to the extent that delinquency in performance creates successive causes

²⁹ *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. 418.

³⁰ *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 27 Fed. 277, revd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072; *Comrs. Wilson County v. McIntosh*, 30 Kans. 234, 1 Pac. 572; *Truesdale v. Farmer's Loan & Trust Co.*, 67 Minn. 454, 70 N. W. 568, 64 Am. St. 430.

³¹ *Spencer v. Watkins*, 169 Fed. 379, 94 C. C. A. 659.

³² *Rogers v. Hendrick* (Conn.), 82 Atl. 590, citing *Flanders v. Hall*, 159 Mass. 95, 34 N. E. 178; *Hubbell v. United States*, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. 828, 33 Ct. Cl. (U. S.) 513.

³³ *Puffer Mfg. Co. v. Rivers*, 10 Ga.

App. 154, 73 S. E. 20. See also, *State v. Cheney*, 67 Wash. 151, 121 Pac. 48; *Sylvester v. J. I. Case Threshing Mach. Co.* (Colo. App.), 122 Pac. 62. Compare *McCargo v. Jergens*, 133 N. Y. S. 956.

³⁴ *Abbott v. 76 Land & C. Co.*, 111 Cal. 42, 118 Pac. 425; *Forest City Steel & C. Co. v. Detroit & C. R. Co.*, 154 Mich. 182, 117 N. W. 645.

³⁵ *Kellogg v. Thompson's Estate*, 115 Mich. 618, 73 N. W. 893.

³⁶ *Mutual Life Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756. See also, *Brown v. Fletcher*, 182 Fed. 963, 105 C. C. A. 425, and cases cited.

³⁷ *Harsin v. Oman*, 68 Wash. 281, 123 Pac. 1. See also, *Meth v. Butler*, 126 N. Y. S. 656.

of action, the judgment in an action for the first breach will not merge the right to sue for a subsequent one. For example, where a tenant holds over after the expiration of the original term, a judgment for rent for one year does not preclude a judgment for rent for the succeeding year, notwithstanding the fact that the first judgment is rendered after the cause of action, upon which the second is sought, has accrued.³⁸ But a servant who has been wrongfully discharged and who recovers judgment for one week's wages can not, after the rendition of such judgment, upon any theory of constructive service, sue for wages to which he would have become entitled but for the termination of the contract.³⁹ But where a claim is single, entire and indivisible, it can not be split up and separate actions be brought on its several fractional portions.⁴⁰ Thus, there is much authority for the proposition that where the sales have not been made upon stated periods of credit,⁴¹ or there has been no agreement between the parties that each sale is to constitute a separate transaction, "an account of several items, all of which are due and payable, constitutes but one demand, and if the party to whom the account is due sees fit to bring suit for a part thereof and recovers judgment, such recovery will be a bar to any further suit for the remainder of the claim."⁴² Likewise where one resorts to a suit in equity for specific performance instead of to an action at law for damages, the decree in his favor precludes him from subsequently bringing suit for damages, equity having the power to award in

³⁸ *Kennedy v. New York*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847n.

³⁹ *Doherty v. Schipper*, 250 Ill. 128, 95 N. E. 74, 34 L. R. A. (N. S.) 557 and note. See also, *Stradley v. Bath Portland Cement Co.*, 228 Pa. 108, 77 Atl. 242, 139 Am. St. 993. And compare *McCargo v. Jergens* (N. Y.), 99 N. E. 838.

⁴⁰ *Kennedy v. New York*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847n. See also, *Central Bank &c. v. State* (Ga.), 76 S. E. 587; *Mutual Fire Ins. Co. v. Ritter*, 113

Md. 163, 77 Atl. 388; *Puckett v. National Annuity Assn.*, 134 Mo. App. 501, 114 S. W. 1039; *Meth v. Butler*, 126 N. Y. S. 656; *Gladden v. Jacobowski*, 61 Wash. 242, 112 Pac. 268.

⁴¹ See note in 13 L. R. A. (N. S.) on page 529.

⁴² *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174, citing *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529n; *Buck v. Wilson*, 113 Pa. 423, 6 Atl. 97. See also, *Hughes v. Dundee Mortgage &c. Co.*, 26 Fed. 831.

the original suit all such damages as are actually sustained, provided the same be demanded.⁴³ But this doctrine of merger does not defeat the right of a creditor to show that his judgment was based upon an act of fraud on the part of the debtor and hence that such judgment was not released by the debtor's discharge in bankruptcy.⁴⁴

§ 1986. Merger of one judgment in another.—The possibility indicated by this section-head creates an exception to that portion of the definition antecedently given⁴⁵ which requires the merging contract to be of higher degree than is the one merged. Moreover, it does not appear to have been decided by any very recent case that such a merger does actually take place—in fact, there are cases which might be cited in support of the position that such absorption of one judgment by another is unknown to the law.⁴⁶ And yet the Supreme Court of Indiana, in a well considered case decided some years ago, placed itself on record as convinced that a merger between judgments does, upon occasion, take place. In this case it is said that, “A judgment is a ‘debt of record;’ and, whether foreign or domestic, an action may be maintained thereon for the recovery of such debt, even where it might appear that the judgment plaintiff could enforce the collection of his judgment by an execution issued out of the court in which it was rendered. * * * The judgment plaintiff, of course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the

⁴³ *Abbott v. 76 Land &c. Co.*, 161 Cal. 42, 118 Pac. 425.

⁴⁴ *Packer v. Whittier*, 91 Fed. 511, 33 C. C. A. 658, citing *Bennett v. Justices of the Municipal Court*, 166 Mass. 126, 44 N. E. 121; *Huntington v. Saunders*, 166 Mass. 92, 43 N. E. 1035; *Boynton v. Ball*, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. 981; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. 1370; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. 763.

⁴⁵ See ante note 2, § 1981.

⁴⁶ *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809; *Sellers v. Floyd*, 24 Colo. 484, 52 Pac. 674; *Armour Bros. Banking Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100; *Springs v. Pharr*, 131 N. Car. 191, 42 S. E. 590, 92 Am. St. 775. See also, *Roberts v. Rice*, 71 Ala. 187; *Smith's Exrs. v. Anderson*, 18 Md. 520.

same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new ‘debt of record,’ in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond or any other evidence of debt. If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it can not be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon. This is so, without regard to the ‘dignity’ of the courts in which the respective judgments may have been rendered.”⁴⁷ So also two judgments of the same purport having been rendered in the same case at the same term of court, the presumption arises that the first judgment merged in the second or was constructively vacated by it.⁴⁸ On the other hand, it has been held that the judgment in the trial court is not merged in

⁴⁷ *Gould v. Hayden*, 63 Ind. 443, quoting *Freeman on Judgments* (4th ed.) §§ 215, 216, 388, citing *Neale v. Jeter*, 20 Ark. 98; *Frazier v. McQueen*, 20 Ark. 68; *Whiting v. Beebe*, 12 Ark. 421; *Denegre v. Haun*, 13 Iowa 240; *Chitty v. Glenn*, 3 T. B. Mon. (Ky.) 424; *Bank of United States v. Patton*, 5 How. (Miss.) 200, 35 Am. Dec. 428; *Purdy v. Doyle*, 1 Paige (N. Y.) 558; *Brown v. Clark*, 4 How. (U. S.) 4, 11 L.

ed. 850, and considering *Stockwell v. Walker*, 3 Ind. 215; *Armstrong v. McLaughlin*, 49 Ind. 370. See also, 2 Black Judg. §§ 264, 267; *Hay v. Alexandria &c. R. Co.*, 20 Fed. 15; *Boos v. Morgan*, 130 Ind. 305, 30 N. E. 141, 30 Am. St. 237; *Lawton v. Perry*, 40 S. Car. 255, 18 S. E. 861.

⁴⁸ *Johnson v. Hesser*, 61 Nebr. 631, 85 N. W. 894. See also, *Price v. First Nat. Bank*, 62 Kans. 735, 64 Pac. 637, 84 Am. St. 419.

the judgment of affirmance.⁴⁹ Nor is a personal judgment against an administrator merged in a judgment on his bond, recovered on the personal judgment.⁵⁰ Where a certain judgment is the only lien on the whole property of the ancestor at the time of his death, it is not absorbed in another judgment rendered upon it against the heirs, at least to the extent that the claims of those subsequently obtaining judgments will rank equally with that of the original judgment creditor.⁵¹ Moreover, it has been declared that the doctrine of merger will not be applied in equity to destroy the security of a decree as a lien when by so doing justice will be defeated.⁵² But a judgment, pursuant to which execution is levied, is merged in the statutory judgment which springs into existence upon the forfeiture of the forthcoming bond,⁵³ it being understood, of course, that such forthcoming bond was of legal origin and valid.⁵⁴

§ 1987. Merger by modification.—Since a contract may be modified by an agreement which is its inferior in the manner and form of its execution, modification at least in this particular does not measure up to the dignity of a technical merger.⁵⁵ And yet where a contract is modified by agreement of the parties, a new contract comes into existence, into which the original one as such is, after a fashion, undoubtedly “merged.” Herein lies the authority for introducing the subject of modification under the heading of merger. The parties to a contract may agree to modify it—they ordinarily do not at the same time con-

⁴⁹ *Planters' Bank v. Calvit*, 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616. See also, *Austin v. Townes*, 10 Tex. 24. And compare *Wilson v. Isbell*, 45 Ala. 142.

⁵⁰ *Townsend v. Whitney*, 75 N. Y. 425; *McLean v. McLean*, 90 N. Car. 530.

⁵¹ *Lawton v. Perry*, 40 S. Car. 255, 18 S. E. 861. See also, *In re Wiley's Estate*, 138 Cal. 301, 71 Pac. 441.

⁵² *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

⁵³ *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. Rep. 607; *Briggs v. Spencer*, 3 Rob. (La.) 265, 38 Am. Dec. 239;

Bank of United States v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; *Davis v. Hoopes*, 33 Miss. 173; and compare *Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 11 S. E. 618; *Trenary v. Cheever*, 48 Ill. 28; *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. 387; *Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784; *Weston v. Ralston*, 51 W. Va. 157, 41 S. E. 338.

⁵⁴ *Carleton v. Osgood*, 6 How. (Miss.) 285; *Lester's Case*, 4 Humph. (Tenn.) 383, and compare *Douglas v. Twombly*, 25 Ark. 124.

⁵⁵ See ante, note 2, § 1981.

template the fact that they execute a new contract by their very act of modification. Thus, though the element of intent may likewise seem to enter into the discussion in this section, it must be observed that the intent has to do with the modification and not with the merger. Notwithstanding this distinction may appear to be academic, it is one which is based upon an actual difference and is altogether practical. Though the modification is voluntary, the merger, resulting from operation of law, is, in the majority of cases, unintentional to say the least. The comprehensive power which parties possess as regards the modification of a contract into which they have previously entered is thus stated in a comparatively recent case: "Parties who have the power to make a contract have the power to unmake or modify it regardless of self-imposed limitations, and notwithstanding they insert in their written contract an agreement expressed in the strongest terms, prohibiting its alteration except in a particular manner, they may, by a subsequent agreement based upon a sufficient consideration, modify their contract in any manner they choose."⁵⁶ When, however, the power of modification is thus given to the parties to the contract, "parties" must be held to include those indirectly as well as directly such. In other words, the law will not merge the original contract in the one resulting from its modification when such modification, made by the immediate parties to the former, impairs property rights which others have in good faith acquired thereunder in pursuance thereof. Thus, what is commonly known as a "trading stamp" is a chose in action and once obtained by a collector in the regular order, its transferable quality can not be limited by the redeeming company by a modification of its agreement with its subscribers.⁵⁷

⁵⁶ Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397. See also, New York Life Ins. Co. v. O'Dom (Miss.), 56 So. 379; A. J. Anderson Elec. Co. v. Cleburne Water &c. Co. (Tex.), 44 S. W. 929; Ritchie v. State, 39 Wash. 95, 81

Pac. 79; Hinkley v. Grafton Hall, 101 Wis. 69, 76 N. W. 1093. And compare Van Santvoord v. Smith, 79 Minn. 316, 82 N. W. 642.

⁵⁷ Sperry & Hutchinson Co. v. Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368.

§ 1988. **Merger by modification—Continued.**—Since the parties have the right to modify their contract in any manner they choose, they may, unless prohibited by positive enactment, modify their written contract, even though it be of the most solemn character, by a subsequent valid parol agreement⁵⁸ at any time before performance.⁵⁹ But it seems that the statute of frauds will not permit the oral modification of a contract which it requires to be in writing unless, at least, part performance is actually had under such modification.⁶⁰ Likewise, there are statutes whose effect is to make void the unexecuted oral modification of a written contract generally.⁶¹ But "strict performance of a contract subject to the statute of frauds may be waived by words and acts inconsistent with an intention to require it which have induced the other contracting party to omit it," although such words and acts do not evidence an enforceable agreement.⁶² While cases may be found to support the proposition that as a general thing a parol ex-

⁵⁸ *Zanella v. Smith & Co. Iron Works* (Ore.), 124 Pac. 660. See also, *The Sappho*, 89 Fed. 366; *Kurtz v. Payne Inv. Co.* (Iowa), 135 N. W. 1075; *Dean v. Washburn & Co. Mfg. Co.*, 177 Mass. 137, 58 N. E. 162; *Youngberg v. Lamberton*, 91 Minn. 100, 97 N. W. 571; *Davis v. Scovern*, 130 Mo. 303, 32 S. W. 986; *Pitty v. Winslow* (Ore.), 125 Pac. 298; *Beatty v. Larzelere*, 194 Pa. St. 605, 45 Atl. 653; *Whitehill v. Schwartz*, 27 Pa. Super. Ct. 526; *Kent v. Kent* (Va.), 34 S. E. 32; *Dinsmore Sawmill Co. v. Falls City Lumber Co.* (Wash.), 126 Pac. 72.

⁵⁹ *Hartford v. Attalla*, 119 Ala. 59, 24 So. 845; *Smith v. Consumers' Cotton Oil Co.*, 30 C. C. A. 103, 86 Fed. 359; *England v. Houser*, 163 Mo. App. 1, 145 S. W. 514; *Bowman v. Wright*, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580; *Solomon v. Vallette*, 152 N. Y. 147, 46 N. E. 324; *Eagle Iron Works v. Farley*, 178 N. Y. 595, 70 N. E. 1098.

⁶⁰ *Christian v. Highlands*, 32 Ind. App. 104, 69 N. E. 266; *Denison v. Sawyer*, 95 Minn. 417, 104 N. W. 305; *Beckmann v. Mephram*, 97 Mo. App. 161, 70 S. W. 1094; *Hanson v. Gun-*

derson, 95 Wis. 613, 70 N. W. 827. See also, *Reid v. Diamond Plate-Glass Co.*, 85 Fed. 193, 29 C. C. A. 110; *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491; *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139; *Augusta Southern R. Co. v. Smith & Co.*, 106 Ga. 864, 33 S. E. 28; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. ed. 554. See *Prestwood v. Eldridge*, 119 Ala. 72, 24 So. 729.

⁶¹ *Beaver v. Continental Building & Co. Assn.*, 15 Cal. App. 190, 116 Pac. 1105; *Annis v. Burnham*, 15 N. Dak. 577, 108 N. W. 549; *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. 610; *Mettel v. Gales*, 12 S. Dak. 632, 82 N. W. 181; *Share v. Coats* (S. Dak.), 137 N. W. 402. See also, the statutes of the several states.

⁶² *Smiley v. Barker*, 28 C. C. A. 9, 83 Fed. 684 and cases cited. See also, *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34; *Nonamaker v. Amos*, 73 Ohio St. 163, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 112 Am. St. 708. But see *Culy v. Upham*, 135 Mich. 131, 97 N. W. 405, 106 Am. St. 388.

ecutory modification of a contract under seal is inoperative,⁶³ no less eminent an authority than the Supreme Court of the United States has declared that "notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity."⁶⁴ So, it seems that a parol agreement is potent as a waiver of a condition in a sealed contract⁶⁵ and to fix⁶⁶ or extend the time within which such contract is to be performed.⁶⁷ Likewise, the place of performance of a sealed contract, none having been designated therein, may be subsequently fixed by parol.⁶⁸

§ 1989. Modification—Necessity for new consideration.

—As to whether a new consideration is required in order for the attempted modification to be valid, or, in other words, in order for the new agreement to absorb the contract which it purports to modify, authorities differ. Thus, it has been held

⁶³ *Standifer v. White*, 9 Ala. 527; *Miller v. Hemphill*, 9 Ark. 488; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *In re Johnson*, 125 Fed. 838; *Tischler v. Kurtz*, 35 Fla. 323, 17 So. 661; *Morehouse v. Terrill*, 111 Ill. App. 460; *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869; *Sinard v. Patterson*, 3 Blackf. (Ind.), 353; *Eddy v. Graves*, 23 Wend. (N. Y.) 82; *Kuhn v. Stevens*, 36 How. Pr. (N. Y.) 275, 30 N. Y. Super. Ct. 544; *Vaughn v. Ferris*, 2 Watts & S. (Pa.) 46; *Bond v. Jackson* (Cooke Tenn.), 500; *Cartwright v. Bostwick*, Fed. Cas. No. 2481; *Sherwin v. Rutland & B. R. Co.*, 24 Vt. 347. That performance validates such modification, see *McDonald v. Mountain Lake Water Co.*, 4 Cal. 335; *In re McDougald's Estate*, 146 Cal. 196, 79 Pac. 875; *Starin v. Kraft*, 174 Ill. 120, 50 N. E. 1059; *Munson v. Herzog*, 109 Ill. App. 302; *McClay v. Gluck*, 41 Minn. 193, 42 N. W. 875; *Bassini v. Brockner*, 10 N. J. L. 105; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793.

⁶⁴ *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522, 25 L. ed. 792. See also, *Pecos Val. Bank v. Evans-Snyder-Buel Co.*, 107 Fed. 654, 46 C. C. A. 534; *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. 194; *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366; *McGrann v. North Lebanon R. Co.*, 29 Pa. St. 82; *Lawrence v. Dole*, 11 Vt. 549.

⁶⁵ *New York v. Butler*, 1 Barb. (N. Y.) 325, affd. 4 How. Pr. (N. Y.) 446; *Hadden v. Dimick*, 48 N. Y. 661, 13 Abb. Pr. (N. S.) (N. Y.) 135; *Devling v. Little*, 26 Pa. St. 502. See also, *McDonald v. Mountain Lake Water Co.*, 4 Cal. 335; *Munson v. Herzog*, 109 Ill. App. 302.

⁶⁶ *Lawrence v. Miller*, 86 N. Y. 131. ⁶⁷ *Flanders v. Barstow*, 18 Maine 357; *Stryker v. Vanderbilt*, 25 N. J. L. 482; *Stone v. Sprague*, 20 Barb. (N. Y.) 509; *Flynn v. McKeon*, 13 N. Y. Super. Ct. 203; *Barker v. Troy & C. R. Co.*, 27 Vt. 766.

⁶⁸ *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366.

that, generally speaking, a parol modification of a written contract need not be based upon a new consideration,⁶⁹ and yet again the weight of authority seems to support the proposition that an agreement that the time of payment be extended will be inoperative unless supported by a sufficient consideration.⁷⁰ Likewise, where the statute of frauds requires a contract to be in writing, an executory modification thereof must be based upon a waiver of some of its requirements.⁷¹ So, a person who refuses to perform the services contracted for at the stipulated price can not predicate consideration for his subsequent agreement to perform them upon increased compensation upon the actual performance thereof.⁷² Again, a person who has contracted to pay another a royalty can not defend an action therefor on the ground that certain conditions have not been established, which conditions were, by subsequent agreement, to be brought about as a prerequisite to liability on his part.⁷³ So, the subsequent agreement of one who undertakes to drill a well under a contract, at a stip-

⁶⁹ *Cooper v. McIlwain*, 58 Ala. 296; *Strahl v. Western Grocer Co.*, 5 Nebr. (unof.) 482, 98 N. W. 1043; *Bowman v. Wright*, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580; *Morrissey v. Schindler*, 18 Nebr. 672, 26 N. W. 476; *Brown v. Catawba River Lumber Co.*, 117 N. Car. 287, 23 S. E. 253; *Lynch v. Henry*, 75 Wis. 631, 44 N. W. 837. Contra, *North v. Kizer*, 72 Ill. 172; *Jones v. Alley*, 4 G. Greene (Iowa) 181; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Pittsburgh Bessemer Steel Co. v. Buckley*, 51 N. Y. Super. Ct. 342; *Marshall v. Ames*, 5 Ohio C. D. 403, 11 Ohio Cir. Ct. 363. See also, *Thurston v. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 328.

⁷⁰ *Raymond v. Smith*, 5 Conn. 555; *Unruh v. Taylor*, 2 Pennew. (Del.) 42, 43 Atl. 515; *Jones v. Chamberlain* 97 Ill. App. 328; *Tomlinson v. Smith*, 2 Iowa 39; *Haynes v. Fuller*, 40 Maine 162; *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Babcock v. Kuntzsch*, 85 Hun (N. Y.) 615, 66 N. Y. St. 47, 32 N. Y. S. 663; *Bronner v. Hirsch*, 84 N. Y. S. 139; *Hilderbrandt v. Fallot*, 46 Misc. (N. Y.) 615, 92 N.

Y. S. 804, 16 N. Y. Ann. Cas. 138; *Gibson v. Irby*, 17 Tex. 173; *Randolph v. Mitchell* (Tex.), 51 S. W. 297; *McIntyre v. Ajax Min. Co.*, 20 Utah 323, 60 Pac. 552. Compare *Cox v. Bennet*, 13 N. J. L. 165. See also, *Hill v. Smith*, 34 Vt. 535.

⁷¹ *Bowman v. Wright*, 65 Nebr. 661, 91 N. W. 580, 92 N. W. 580.

⁷² *Domenico v. Alaska Packers' Assn.*, 117 Fed. 99, 54 C. C. A. 485. See also, *Willingham Sash & C. Co., v. Drew*, 117 Ga. 850, 45 S. E. 237; *Combs v. Burt & C. Lumber Co.*, 27 Ky. L. 439, 85 S. W. 227; *Wear Bros. v. Schmelzer*, 92 Mo. App. 314; *Cosgray v. New England Piano Co.*, 10 App. Div. (N. Y.) 351, 75 N. Y. St. 1254, 41 N. Y. S. 886; *Major v. Schubert*, 82 App. Div. (N. Y.) 633, 81 N. Y. S. 703. But see as contrary to this holding, *Maxwell v. Graves*, 59 Iowa 613, 13 N. W. 758; *Romaine v. Beacon Lithographic Co.*, 13 Misc. (N. Y.) 122, 68 N. Y. St. 108, 34 N. Y. S. 124. And compare *Evans v. McKay*, 48 Mich. 597, 12 N. W. 868.

⁷³ *Sommers v. Myers*, 69 N. J. L. 24, 54 Atl. 812.

ulated price per foot, to do a part of the work at his own risk or to accept compensation less in amount than that provided, must be based upon consideration.⁷⁴ Likewise, there being no consideration for an agreement by a party to a written contract to pay for certain appliances which the other contractor has agreed to furnish free of cost, the same will be unenforceable.⁷⁵

§ 1990. Discharge by bankruptcy.—Section 17 of the Federal Bankruptcy Act of 1898, as amended in 1903, reads as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," and it is of the construction which has been placed upon the various portions of this statutory provision, that the succeeding sections will deal.⁷⁶

§ 1991. Provability of debts determined by section 63 of the Bankruptcy Act.—As to what debts are provable within the meaning of the section just quoted, resort must be had to section 63 of the same act,⁷⁷ this latter section out-

⁷⁴ *Wendling v. Snyder*, 30 Ind. App. 330, 65 N. E. 1041. See also, *Little v. Rees*, 34 Minn. 277, 26 N. W. 7.

⁷⁵ *Rooney v. Thomson*, 84 N. Y. S. 263.

⁷⁶ For cases on the subject of the constitutionality of the Act of 1898,

see *Hanover Nat. Bank of New York v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. 857. See also, *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 37 C. C. A. 210.

⁷⁷ *In re Van Orden*, 96 Fed. 86; *In re Hilton*, 104 Fed. 981.

lining with much particularity just what debts come within the provable category.⁷⁸ However, before proceeding to consider the more specific restrictions imposed by the express terms of such section, a few general observations may not be amiss. In the first place, "the remedy by which a liability is enforced is not determinative of its provability as a debt in bankruptcy. The nature of the liability is rather the test."⁷⁹ But the provisions of the act in regard to provable debts are to be accorded such a construction as will permit all debts reasonably coming within the meaning of the law to be treated as provable, and when doubt exists as to the provable character of a debt or as to its being an unliquidated demand which may be made a provable debt, the owning creditor should be given the

⁷⁸ "Section 63. Debts which may be proved.—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such man-

ner as it shall direct, and may thereafter be proved and allowed against the estate." In a recent case it has been held that "the language of subdivision 1, i. e., 'fixed liability absolutely owing,' does not limit the broad term of subdivision 4" ["upon contract express or implied"]. In *re Lyons' Beet Sugar Ref. Co.*, 192 Fed. 445, citing *In re Smith*, 146 Fed. 923; *In re Gerson*, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11; *Cobb v. Overman*, 48 C. C. A. 223, 109 Fed. 65, 54 L. R. A. 369n. See also, *Moch v. Market St. Nat. Bank*, 107 Fed. 897, 47 C. C. A. 49. But a case decided less than four months after the one from which the above quotation is taken declares that "it is held by the decided weight of authority that subdivisions 1 and 4 of section 63a of the Bankruptcy Act are in *pari materia*, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4." *Colman Co. v. Withoft*, 195 Fed. 250, citing *In re Roth*, 104 C. C. A. 649, 181 Fed. 667, 31 L. R. A. (N. S.) 270n; *In re Swift*, 112 Fed. 315, 50 C. C. A. 264; *In re Adams*, 130 Fed. 381; *In re Burka*, 104 Fed. 326. Apparently it remains for the United States Supreme Court to reconcile these two views, diametrically opposed as they are one to the other.

⁷⁹ *In re Southern Steel Co.*, 183 Fed. 498.

benefit thereof.⁸⁰ Furthermore, the question as to where or how the claimant obtained the money loaned to a bankrupt does not seem to affect the provability of the debt. Thus, the fact that the money belonged to the children of the lender will not nullify its status as a provable claim.⁸¹ Equitable claims may be proved under the present bankruptcy law provided they come within the purview of the general rules of equity, and this notwithstanding the fact that they are such claims as have no status in courts of law.⁸² But "a debt outlawed by the statute of limitations is not a provable claim within the meaning of the bankruptcy act."⁸³ Moreover, civil liabilities, as demands between debtor and creditor as such, are alone comprehended by the word "debts," the act having no reference to fines inflicted *pro bono publico* for crimes committed.⁸⁴ It cer-

⁸⁰ *Dycus v. Brown*, 135 Ky. 140, 121 S. W. 1010.

⁸¹ *In re American Specialty Co.*, 112 C. C. A. 321, 191 Fed. 807.

⁸² *In re Putman*, 193 Fed. 464.

⁸³ *In re Putman*, 193 Fed. 464.

⁸⁴ *In re Moore*, 111 Fed. 145. *Contra In re Alderson*, 98 Fed. 588. *In Olds v. Forrester*, 126 Iowa 456, 102 N. W. 419, it is held that costs accruing in a prosecution which resulted in a fine were released by the discharge of the bankrupt convict. In thus holding, the court says: "It is finally insisted that to make the discharge effectual against the judgment is to interfere with the due course of justice in criminal proceedings, and is therefore against good morals and public policy. If it were true that to uphold the claim of the appellee is to enable the bankruptcy court to cancel and set aside penalties which the courts have adjudged against persons found guilty of crime, the objection raised by the appellants would have much force. If the appellee had been convicted of some offense punishable by fine, and adjudged to pay a fine of \$800, it would be an intolerable condition if he could immediately be discharged from such liability by a proceeding in bankruptcy. * * * But a fine is not, strictly speaking, a debt due from the person against whom it is

assessed. The judgment is not entered against him because he owes the state so much money. His obligation to pay is not a debt obligation. He is adjudged to pay a certain sum of money as a punishment for a public offense, and his obligation to suffer that punishment can not be discharged except by performance, or by the interposition of executive clemency. But the same is not true as to costs accruing in the prosecution which results in the fine. They are no part of the penalty. They are not assessed against the accused as a punishment, but rather in pursuance of the general policy by which the losing party in judicial proceedings is required to pay all taxable costs. This we have expressly held to be the law. *Albertson v. Kriechbaum*, 65 Iowa 17, 21 N. W. 178. While in form the judgment for costs is in favor of the state, its interest is nominal only, the real parties in interest being the officers and witnesses to whom the fees are due. That the obligation of such judgment is civil, and not penal, is further recognized in our former holdings that the general power vested in the Governor of the state to pardon public offenses and to remit fines and forfeitures does not extend to the remission of costs accruing in the prosecution of crimes

tainly needs no citation of authority to support the statement that a claim resting upon an illegal contract or other transaction is not of a provable nature.⁸⁵ So, too, the inclusion by a creditor of fictitious items or incorrect amounts in his account whereby he attempts to obtain an advantage has been held to work a forfeiture of his right to have his claim allowed in any sum.⁸⁶ But illegality is not a matter of mere allegation, and before a claim will be disallowed on the ground that its moving cause was illegal, the trustee must introduce evidence sufficient to prove the same.⁸⁷ Moreover, the fact that a mortgage which secures a bona fide debt is invalid against other creditors because unrecorded does not preclude proof of the debt against the mortgagee's estate.⁸⁸ Since the courts of bankruptcy are governed by the principles of equity jurisprudence and a wife who has loaned her husband money from her separate estate may recover it in equity, she may prove her claim based upon the loan against his estate when he has subsequently become bankrupt, notwithstanding the fact that under the state law her claim would be unenforceable.⁸⁹ But the claim of a wife, based on an express contract with her husband, for services as bookkeeper in his store, has been held not of a provable nature.⁹⁰ Nor can a wife whose suit for divorce has not yet culminated in a decree prove her claim to one-third of her bankrupt husband's personal estate, although the statute provides that a wife upon being

and misdemeanors. *State v. Beebe*, 87 Iowa 639, 54 N. W. 479; *Estep v. Lacy*, 35 Iowa 419, 14 Am. Rep. 498."

⁸⁵ See *In re Aetna Cotton Mills*, 171 Fed. 994; *In re Roanoke Furnace Co.*, 166 Fed. 944; *In re Lamon*, 171 Fed. 516; *In re L. M. Alleman Hardware Co.*, 172 Fed. 611.

⁸⁶ *In re Flick*, 105 Fed. 503.

⁸⁷ *Jacobs v. Ballantine Brew. Co.*, 193 Fed. 393. Compare *In re Hopper-Morgan Co.*, 166 Fed. 1020, 91 C. C. A. 37; *Kimmerle v. Farr*, 189 Fed. 295, 111 C. C. A. 27.

⁸⁸ *Post v. Berry*, 99 C. C. A. 186, 175 Fed. 564. See also, *In re Burlage*, 169 Fed. 1006; *In re Vogt*, 188

Fed. 764; *In re Gray*, 170 Fed. 638; *Mapes v. German Bank of Tilden*, 176 Fed. 89, 99 C. C. A. 609; *In re T. H. Bunch Co.*, 180 Fed. 519. And compare *In re Montello Brick Works*, 174 Fed. 498.

⁸⁹ *James v. Gray*, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321. See also, *In re Nickerson*, 116 Fed. 1003; *In re Miner*, 117 Fed. 953; *In re Domenig*, 128 Fed. 146; *In re Neiman*, 109 Fed. 113; *Tucker v. Curtin*, 78 C. C. A. 557, 148 Fed. 929; *In re Hill*, 190 Fed. 390.

⁹⁰ *In re Winkels*, 132 Fed. 590. See also, *In re Kaufman*, 104 Fed. 768; *In re Suckle*, 176 Fed. 828.

granted a divorce from her husband, "shall be entitled to one-third of the husband's personal property absolutely."⁹¹

§ 1992. "Debts provable" under provisions of section 63, subdivision a, of the bankruptcy act.—Under the provisions of this subdivision "the provability of a claim depends upon its status at the time the petition is filed,"⁹² i. e., only such debts as existed at the date of the filing of the petition are provable and released by the discharge of the bankrupt.⁹³ In a case very recently decided, it was said: "The date of filing the petition in bankruptcy is intended to mark the line of separation between debts that are provable and those that are not provable against the bankrupt's estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge."⁹⁴ Notwithstanding this rule is not to be interpreted as meaning that an executory contract can not give rise to a provable claim,⁹⁵ it does preclude the proving of a claim for work done under a contract entered into before, but executed after, the filing of the petition.⁹⁶ Likewise, where the breach of a poor debtor's bond occurs after bankruptcy proceedings have been voluntarily instituted, such breach can not be proved against the estate.⁹⁷ What may seem to be somewhat of an exception to this rule arises through the fact that when a contract is breached by filing of a voluntary petition, the claim for resultant damages comes within the provable class.⁹⁸ But it has been declared that where a bankrupt has not voluntarily or posi-

⁹¹ *Hawk v. Hawk*, 102 Fed. 679.

⁹² *In re Pettingill*, 137 Fed. 143. See also, *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387; *In re Bingham*, 94 Fed. 796; *In re Reading Hosiery Co.*, 171 Fed. 195.

⁹³ *In re Burka*, 104 Fed. 326. See also, *Zavelo v. Reeves*, 171 Ala. 401, 54 So. 654; *In re Walker*, 176 Fed. 455; *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435.

⁹⁴ *Colman Co. v. Withoft*, 195 Fed. 250. See also, *Cohen v. Pecharsky*,

67 Misc. (N. Y.) 72, 121 N. Y. S. 602.

⁹⁵ *In re Glick*, 184 Fed. 967, citing *In re Stern*, 54 C. C. A. 60, 116 Fed. 604.

⁹⁶ *In re Adams*, 130 Fed. 381.

⁹⁷ *Rice v. Murphy (Maine)*, 82 Atl. 842.

⁹⁸ *In re Swift*, 112 Fed. 315, 50 C. C. A. 264. See also, *In re Saxton Furnace Co.*, 142 Fed. 293. And compare *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571.

tively disabled himself from performance which does not become obligatory until after the institution of involuntary proceedings, or has not refused to recognize the contract, a claim for damages for a possible future breach does not arise through the mere fact of the adjudication in bankruptcy and hence that such a claim can not be proved against the estate.⁹⁹ Thus, an involuntary petition against the buyer does not per se breach a contract of sale to the extent that the latter thereby becomes provable.¹ But bankruptcy may be the culminating one of a series of incidents which, taken together, will constitute a breach of such a contract, on the ground whereof a claim may be proved against the bankrupt estate.² So also, the bankruptcy of a buyer may breach the contract and render it a provable claim.³ Ordinarily, a judgment for debt obtained prior to the filing of the petition may be proved against the judgment debtor's estate.⁴ But again, in determining whether a judgment comes within the meaning of clause 1, it seems that the court will look beyond the form of the same. Inquiry will be had as to the nature of the liability and the character of the original cause of action, this clause not including "every fixed liability evidenced by a judgment absolutely owing at the time of the filing of the petition, whether

⁹⁹In *re Imperial Brew. Co.*, 143 Fed. 579, distinguishing *In re Swift*, 112 Fed. 315, 50 C. C. A. 264; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780, approving *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, and disapproving a construction which might possibly be placed upon *In re Pettin-gill*, 137 Fed. 143. See also, *In re Morgantown Tin Plate Co.*, 184 Fed. 109; *Baker v. Hooks*, 6 Ga. App. 121, 64 S. E. 573; *Bacot v. Fessenden*, 130 App. Div. (N. Y.) 819, 115 N. Y. S. 698. A recent Georgia case is authority for the proposition that, "Damages are not recoverable against a firm, or any member thereof, for a failure to perform a contract of the firm for the purchase and acceptance of merchandise to be delivered at designated periods, where the performance of the contract was

prevented, not by the act of the buyer, but solely by the bankruptcy law in seizing the assets of the firm and the members thereof under involuntary bankruptcy proceedings. Any damage that may result in such case is in law *damnum absque injuria*." *Lesser v. Gray*, 8 Ga. App. 605, 70 S. E. 104 (syllabus by the court).

¹*In re Inman*, 175 Fed. 312.

²*In re National Wire Corp.*, 166 Fed. 631.

³*In re Duquesne Incandescent Light Co.*, 176 Fed. 785. The opinion in this case does not state whether the proceedings were voluntary or involuntary. It is altogether possible, however, to draw the inference that they were voluntary.

⁴See *Ellis v. Mobile J. & K. C. R. Co.* (Ala.) 51 So. 860; *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553.

then payable or not.”⁵ But since under section 17, as amended in 1903, a claim “for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation” is not released by the discharge of the bankrupt, it is unnecessary for our purpose to consider whether any one or other of these “liabilities” in judgment form is provable against his estate.⁶ Concerning judgments in actions sounding in tort, recent cases have held to the effect that if a judgment for damages for personal injuries⁷ or wrongful death is entered before bankruptcy proceedings are instituted, the same will come within the category of “provable debts” which a discharge releases.⁸ So, again, the obligee in a penal bond, based upon a valuable consideration and conditioned that he shall be paid a certain sum each month during his life, may prove against the estate of the obligor, who has since become bankrupt, the amount of the penalty where it is less than the sum total of the monthly instalments which would afterward accrue in the event that the obligee fulfilled the days allotted him by the

⁵ *Turner v. Turner*, 108 Fed. 785.

⁶ In adjudging the fact that a claim for arrears in alimony and an allowance for the support of minor children is not released by a discharge of the bankrupt, the court (*Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172), uses the following language: “The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment, the courts should

not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case that the obligation has become fixed by an unalterable decree, so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect and making available to the wife and children the right which the law gives them as against the husband and father.” See also, *In re Williams*, 149 App. Div. (N. Y.) 295, 136 N. Y. S. 707.

⁷ *In re Ostrom*, 185 Fed. 988. See also, *In re Lorde*, 144 Fed. 320.

⁸ *In re Putman*, 193 Fed. 464.

mortality tables.⁹ Since a lease for years, under which the rent is to be paid at the end of the several months composing the term, does not continue after the adjudication of the lessee as a bankrupt, the rent which would have accrued but for such adjudication does not constitute a provable claim against the bankrupt's estate.¹⁰ Moreover, where premises are leased for a term of years, the lessees

⁹ *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, reversing *Bray v. Cobb*, 100 Fed. 270. But see *In re Hartman*, 166 Fed. 776.

¹⁰ *In re Jefferson*, 93 Fed. 948. See also, *Shapiro v. Thompson*, 160 Ala. 363, 49 So. 391; *Bray v. Cobb*, 100 Fed. 270, judgment reversed on another point *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369; *Witherow v. South Side Trust Co. of Pittsburgh*, 181 Fed. 753; *In re Rubel*, 166 Fed. 131; *In re Roth*, 181 Fed. 667, 31 L. R. A. (N. S.) 270n; *In re Hays & Co.*, 117 Fed. 879; *In re Ells*, 98 Fed. 967; *In re Mahler*, 105 Fed. 428; *In re Arnstein*, 101 Fed. 706; *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *Scott v. Demarest*, 135 N. Y. S. 264. In a comparatively recent case the court, in reaching the conclusion that while bankruptcy does not terminate the lease, subsequent rent is not provable, says: "It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he

then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability." *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, citing *In re Curtis*, 9 Am. Bankr. Rep. 286, 109 La. 171, 33 So. 125, 94 Am. St. 445; *White v. Griffing*, 44 Conn. 437; *In re Ells*, 98 Fed. 967; *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571; *Witthaus v. Zimmerman*, 11 Am. Bankr. Rep. 314, 91 App. Div. (N. Y.) 202, 86 N. Y. S. 315, 14 N. Y. Ann. Cas. 379. Compare *McCann v. Evans*, 185 Fed. 93, 107 C. C. A. 313; *In re Caloris Mfg. Co.*, 179 Fed. 722.

contracting to pay a specified rental and to make certain repairs at their own expense, and the latter are actually made but not fully paid for at the time the lessees become bankrupt, the lessor can not prove against the estate the amount of the lien filed by the contractor who made the repairs.¹¹ But "the obligation of an indorser is a provable claim even when it is subject to the condition of presentation and notice of protest."¹² Again, where a deputy tax collector has given a bond to the county treasurer, who is accountable on his own bond for the taxes collected, and defaults through the failure of his depositary, the liability of his surety who subsequently becomes bankrupt has been held provable against the latter's estate, notwithstanding the fact that an action at law on the bond is pending and that the county authorities have obtained from the receiver of the defunct bank a portion of the funds which had been therein deposited.¹³ Where a petition in bankruptcy against the maker precedes the maturing of a note, the attorney's fees for which the latter provides "in case it shall be placed in the hands of an attorney for collection," are not provable against the bankrupt's estate.¹⁴ Even where the note was due when the petition was filed, collection fees are not provable unless at such time the note had actually been turned over to an attorney.¹⁵ But where notes have matured and have been placed in the hands of an attorney who has performed services looking toward their collection prior to the time of the filing of the petition, the stipulated attorney's fees are provable.¹⁶ Notwithstanding an assignee, under a general assignment for the benefit of creditors made within four months prior to an adjudication of bankruptcy, is not entitled to an allowance for his services in preserving

¹¹ *In re O'Malley*, 191 Fed. 999.

¹² *In re Buzzini*, 183 Fed. 827. See also, *Whitwell v. Wright*, 136 App. Div. (N. Y.) 246, 120 N. Y. S. 1065; *Cohen v. Pecharsky*, 67 Misc. (N. Y.) 72, 121 N. Y. S. 602.

¹³ *Loeser v. Alexander*, 176 Fed. 265, 100 C. C. A. 89. But see *Bankr. Act*, § 17 exception 4.

¹⁴ *In re Garlington*, 115 Fed. 999.

See also, *In re Gebhard*, 140 Fed. 571; *In re V. & M. Lumber Co. Inc.*, 182 Fed. 231; *In re T. H. Thompson Milling Co.*, 144 Fed. 314.

¹⁵ *In re Keeton*, 126 Fed. 426.

¹⁶ *Merchants' Bank v. Thomas*, 121 Fed. 306, 57 C. C. A. 374. Compare, *McCabe v. Patton*, 174 Fed. 217, 98 C. C. A. 225.

the property since by reason of his connection with the assignment, which was an act in violation of the bankruptcy law, he became the agent of the bankrupt, yet inasmuch as the actual and necessary expenses incurred in such preservation of the property would have been provable debts had they been incurred by the bankrupt himself, the amount of the same may be allowed the assignee.¹⁷ Services performed by attorneys in preparing and filing, on behalf of certain creditors, a defective and insufficient petition will not support a claim against the estate which has been subsequently thrown into bankruptcy on a petition filed by other creditors.¹⁸ So, also, the fact alone that attorneys "were employed by the receiver in the state court proceedings, and rendered useful professional services therein, establishes no legal claim for allowances out of the estate in bankruptcy, by way of lien upon the assets or otherwise, as they were not performed on behalf of the bankrupt nor in the bankruptcy administration. * * * Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact."¹⁹ But a creditor whose attachment lien on personal property is dissolved by the fact of his debtor's being adjudged a bankrupt less than four months after the attachment suit is commenced may prove the attachment costs which preceded the filing of the petition in bankruptcy.²⁰ So, also, damages for breach of an appeal bond constitute a provable claim against the estate of the bankrupt surety.²¹ And it seems that margins put up with a stockbroker may be proved against the estate of the latter who is subsequently

¹⁷ *In re Mays*, 114 Fed. 600. See also, *In re Congdon*, 129 Fed. 478; *In re Tatum*, 112 Fed. 50; *Wilbur v. Watson*, 111 Fed. 493; *Stearns v. Flick*, 103 Fed. 919. And compare *In re Chase*, 124 Fed. 753, 59 C. C. A. 629; *In re Klein*, 116 Fed. 523; *Summers v. Abbott*, 122 Fed. 36, 58 C. C. A. 352. See, however, *In re Marble Products Co. Inc.*, 199 Fed. 668.

¹⁸ *In re Fischer*, 175 Fed. 531, 99

C. C. A. 153. See also, *In re Crave*, 183 Fed. 769, 106 C. C. A. 180.

¹⁹ *In re Zier*, 142 Fed. 102, 73 C. C. A. 326; *affd.* 127 Fed. 399. See also, *In re Marble Products Co. Inc.*, 199 Fed. 668; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 23 Sup. Ct. 710.

²⁰ *In re Allen*, 96 Fed. 512. See also, *In re Lewis*, 99 Fed. 935; *In re Heller*, 176 Fed. 656.

²¹ *Coe v. Waters*, 16 Colo. App. 311, 64 Pac. 1054.

adjudged bankrupt.²² So, too, an unpaid stock subscription constitutes a provable claim.²⁵ Again, a stockholder-director of a trading corporation may, after the latter has gone into bankruptcy, prove his claim for services as general manager of the company on the basis of their reasonable value, but not a claim for arrearages in his salary, which had been fixed by agreement of the board of directors and not by a by-law or formal resolution or entry of record.²⁶ So, a county may prove its claim for hire of convict labor.²⁷ Again, proof will not be denied a claim based on the balance due for merchandise sold and delivered.²⁸ But the seller of goods which become exempt in the hands of the buyer can not enforce his lien for the purchase-price of the same against the estate of the buyer after the latter has been adjudged bankrupt.²⁹ Where a corporation posts a notice to the effect that its employes are entitled to vacations proportionate in length to the time during which they have been continuously employed, and that, as is customary, the vacation pay will be withheld until a specified time, on condition that, if, before that time, the employment is severed for any reason, voluntary or otherwise, such pay will be forfeited, and the employer before the time designated becomes bankrupt, an employe may prove his claim for vacation pay against the bankrupt estate.³⁰ But where corporations are required to pay an annual license fee or franchise tax, such fee or tax for a particular year can not, when for that particular year it has not been assessed and is not collectible, be proved against the bankrupt estate of a corporation on the ground that it constitutes a liability which has existed from the time of such

²² *In re Smith*, 112 Fed. 309; *In re Swift*, 105 Fed. 493. See also, *In re Gaylord*, 113 Fed. 131; *In re Dorr*, 186 Fed. 276, 108 C. C. A. 322; *Streeter v. Lowe*, 184 Fed. 263, 106 C. C. A. 405. And compare, *In re Knott*, 109 Fed. 626; *Streeter v. Lowe*, 184 Fed. 263.

²⁵ *In re Putman*, 193 Fed. 464. See also, *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438.

²⁶ *In re Grubbs-Wiley Grocery Co.*,

96 Fed. 183. See also, *In re Dr. Voorhees Awning Hood Co.*, 187 Fed. 611, *revd.* on another point, 188 Fed. 425.

²⁷ *In re Wright*, 95 Fed. 807.

²⁸ *Standard Sew. Mach. Co. v. Kattell*, 132 App. Div. (N. Y.) 539, 117 N. Y. S. 32.

²⁹ *In re Wells*, 105 Fed. 762.

³⁰ *In re B. H. Gladding Co.*, 120 Fed. 709. See also, *In re Silverman*, 101 Fed. 219.

corporation's birth.³¹ But "where a claim arises *ex delicto*, but is also of such a character as to constitute a claim on the theory of quasi contract, the debt is provable in bankruptcy."³² Thus, where one who has embezzled or misappropriated funds becomes bankrupt, the person defrauded may, at his option, prove the claim as one upon an implied contract to repay.³³ But since "there is no element of contract, express or implied, about a statutory penalty, except the common-law form of action by which it may be enforced, when no specific remedy is prescribed," the liability of the bankrupt for the statutory penalty for cutting trees can not be proved in bankruptcy.³⁴ For the same reason, the statutory liability for "double rent," of a tenant who unlawfully withholds possession of the rented premises, is not provable against his bankrupt estate.³⁵ But the words "upon a contract" found in clause 4 are sufficiently broad to include damages for breach of contract.³⁶ And "the liability of a bankrupt endorser of commercial paper, whose liability did not become absolute until after the filing of the petition in bankruptcy, may be proved against his es-

³¹ *In re Danville Rolling Mill Co.*, 121 Fed. 432. See also, *Bankr. Act*, § 17 exception 1.

³² *In re Filer*, 125 Fed. 261. See also, *Beers v. Hanlin*, 99 Fed. 695; *In re Hirschman*, 104 Fed. 69; *Clarke v. Rogers*, 183 Fed. 518, 106 C. C. A. 64; *Winfrey v. Jones*, 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201. "A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tort-feasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. This, of course, is a mere fiction of law; but, like all other such fictions, it is effectual when it will accomplish the ends of justice. So that, in that case, the owner of the property may proceed for a tort, or, at his option, on an implied contract, which would entitle

him to make proof under section 63. An illustration appears in *Tindle v. Birkett*, 205 U. S. 186, 27 Sup. Ct. 493, 51 L. ed. 762. On the other hand, a mere tort, for example, a trespass involving a mere destruction of property, does not lay the foundation for a proceeding under that section." *Clarke v. Rogers*, 183 Fed. 518.

³³ *Burgoyne v. McKillip*, 182 Fed. 452, 104 C. C. A. 590. See also, *In re Norris*, 190 Fed. 101; *Reynolds v. New York Trust Co.*, 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391n. See also, *Bankr. Act*, § 17 exception 4.

³⁴ *In re Southern Steel Co.*, 183 Fed. 498.

³⁵ *Hamilton v. McCroskey*, 112 Ga. 651, 37 S. E. 859. But see *In re Scheidt*, 177 Fed. 599.

³⁶ *In re Frederick L. Grant Shoe Co.*, 130 Fed. 881, 66 C. C. A. 78. But see *Northwest Fixture Co. v. Kilbourne & Clark Co.*, 128 Fed. 256, 62 C. C. A. 638.

tate after such liability has become fixed, and within the time limited for proving claims."³⁷ Under clause 5, a judgment obtained on a valid and provable debt in a suit, in a state court brought after the debtor has been adjudged bankrupt, may be proved against his estate "less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments."³⁸ So, also, a mortgagee who institutes foreclosure proceedings against a bankrupt may prove against the latter's estate attorney's fees included in the judgments finally entered, where no question as regarded such fees was raised in the proceedings and the trustee was served with scire facias and had an opportunity to defend against the amount claimed.³⁹ Likewise the judgment entered in a breach of promise suit after the defendant has filed his petition in bankruptcy, upon a verdict returned prior to such act, may be proved against the defendant's estate.⁴⁰ But this clause "simply declares one character of duty which may be proved against the estate of a bankrupt, and does not alter or control the time in which such debts may be presented for proof and allowance. Section 57n of the act is controlling as to the time in which claims must be presented for proof," and where a claimant does not bring himself within the time limit prescribed by such section, he loses his right to prove his claim, notwithstanding the fact that his delay is caused by the assertion and litigation of the validity of a preference.⁴¹

§ 1993. "Debts provable" under provisions of section

³⁷ *Moch v. Market St. Nat. Bank*, 107 Fed. 897, 47 C. C. A. 49; *In re Gerson*, 105 Fed. 891. See also, *In re Phillip Seminer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551 (appeal dismissed); *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. 50.

³⁸ *In re McBryde*, 99 Fed. 686. See also, *In re Fitzgerald*, 191 Fed. 95; *In re Smith*, 176 Fed. 426. And compare, *In re Kranich*, 182 Fed. 849. A recent case decided in Massachusetts, however, declares that "a judg-

ment procured in a common-law court after the date of bankruptcy proceedings does not entitle the creditor to share in the assets administered in and by the bankruptcy court." *Hackett v. Supreme Council American Legion of Honor*, 206 Mass. 139, 92 N. E. 133.

³⁹ *In re Torchia*, 185 Fed. 576. See also, *In re Holmes Lumber Co.*, 189 Fed. 178.

⁴⁰ *In re Fife*, 109 Fed. 880.

⁴¹ *In re Leibowitz*, 108 Fed. 617. See also, *In re Havens*, 182 Fed. 367.

63, subdivision b.—This subdivision provides for the liquidation of such provable debts as, falling under subdivision a, are unliquidated at the time the petition is filed. Under the older English bankruptcy acts, unliquidated damages which had arisen *ex contractu* were not regarded as provable debts, since the debtor was apparently required to swear to a precise sum. In order to obviate the possibility of such a construction being placed upon our bankruptcy act of 1898, congress inserted therein the provision found in this subdivision. But except in cases where the claimant has the option of sounding his claim in quasi contract or in tort, this subdivision does not authorize the liquidation and subsequent proof of claims *ex delicto*, liquidated debts of such a character not being provable under the preceding subdivision.⁴² In other words, this subdivision adds nothing to the class of debts which are provable under subdivision a—its sole purpose being to permit the liquidation, as the court may direct, of an unliquidated claim, which comes within the provisions of the preceding subdivision.⁴³ Under subdivision a, contingent debts and liabil-

⁴²In *re Hirschmann*, 104 Fed. 69. But see on this latter point, *ante*, § 1992.

⁴³*Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. 757. See also, *In re Inman*, 171 Fed. 185; *In re Duquesne Incandescent Light Co.*, 176 Fed. 785; *In re Griffin*, 188 Fed. 389. "The one section (17) with regard to the effect of a discharge assumes that torts generally are provable and proceeds accordingly; while the other (63) makes no provision for anything of the kind, except by a construction which it is safe to say was not in contemplation when it was passed, and can not consistently be read into it. * * * The first of the two paragraphs into which it is divided is given up to an enumeration of the debts which are entitled to be proved against the estate, among which is to be found everything in the way of a fixed obligation, or which, as being of a commercial character, a bankrupt could expect to be relieved from; and, complete in itself, it is not to

be added to. The other paragraph plainly has to do with a mere matter of procedure; how unliquidated claims founded upon open account or contract, specified in the preceding paragraph, may be liquidated or settled. Nor can it properly be made to serve any other purpose. Argument may amplify this, but can not make it clearer. And as so interpreted a claim for damages, such as the one before us [damages resulting from injury to property] is not included among debts which are made provable. This, if not the latest deliverance of the statute (the amendment of 1903 having to be accorded that position), as the one devoted specifically to the subject must control." *Brown v. United Button Co.*, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961n, which holds to the effect that *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. 9, is not authority for a view contrary to that just expressed. See also, *Weisfield v. Beale*, 231 Pa. 39, 79 Atl. 878; *In re Southern Steel*

ities, and demands, proof of the valuation or estimation of which it is substantially impossible to obtain, are not provable in bankruptcy. Hence, unliquidated claims based upon debts of such a character can not be liquidated and proved under subdivision b. Thus, the contract of a husband to pay his divorced wife an annuity "during her life or until she remarries," can not be proved against his bankrupt estate "because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."⁴⁴

§ 1994. Debts discharged.—There is absolutely no ambiguity whatever in the provision in section 17 of the bankruptcy act that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts," and when it has once been determined what debts are actually provable, there remains practically nothing to be considered in regard to such section save the construction to be placed upon the exceptions found therein. "'Discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act,"⁴⁵ and a "provable debt" is just as fully released unproved as proved. Susceptibility of proof is all that is required.⁴⁶ Thus, since section 63b expressly provides for the proof of an unliquidated claim arising out of the breach of a contract, a creditor can not voluntarily "withhold such a claim from liquidation and thereby preserve it as a claim against any subsequently acquired property, and thus practically defeat the object of the bankruptcy act as respects the debtor."⁴⁷ Moreover, the effect of a discharge is wholly

Co., 183 Fed. 498. And compare *Beers v. Hamlin*, 99 Fed. 695; *In re Graff*, 117 Fed. 343.

⁴⁴ *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. 757.

⁴⁵ 1898 Bankruptcy Act, § 1, subd. 12. See, *In re American Vacuum Cleaner Co.*, 192 Fed. 939; *Richards v. Shields* (Ga.), 75 S. E. 602; *Peterson v. Calhoun* (Ga.), 74 S. E. 519; *Drake v. Vernon*, 26 S. Dak. 354, 128 N. W. 317.

⁴⁶ *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. 9. See also, *In re Kuffler*, 153 Fed. 667, 80 C. C. A. 508; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. 493, affg. 183 N. Y. 267, 76 N. E. 25; *Cohen v. Pecharsky*, 67 Misc. (N. Y.) 72, 121 N. Y. S. 602.

⁴⁷ *In re Hilton*, 104 Fed. 981. See also, *Pearce v. Fisher*, 170 Ala. 456, 54 So. 164; *Dycus v. Brown*, 135 Ky. 140, 121 S. W. 1010.

distinct from the right to a discharge. "The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge can not properly arise or be considered in determining the right to a discharge,"⁴⁸ and the fact that the only debt scheduled was one which was not provable does not present a ground for refusing a discharge.⁴⁹ And yet, though the remedy to enforce payment of the debt ceases to exist coincidentally with the bankrupt's discharge, the moral obligation to pay the debt remains and is, in many jurisdictions at least, a good consideration upon which to base a new promise to pay at some future time.⁵⁰ Furthermore, since the presumption exists that the intention of the legislature to divest sovereignty of a right, title, privilege or interest will be manifested by express words to that effect, and that where an act contains no such words, such intent did not obtain, it must be held that section 17, in releasing a bankrupt by his discharge from his provable debts, does not apply to debts owing the United States,⁵¹ or any one of the several states

⁴⁸ *In re Marshall Paper Co.*, 102 Fed. 872, 43 C. C. A. 38. See also, *In re Rhutassel*, 96 Fed. 597; *In re Thomas*, 92 Fed. 912; *In re Mussey*, 99 Fed. 71; *Hanan v. Long*, 134 N. Y. S. 786.

⁴⁹ *In re Maples*, 105 Fed. 919; *In re McCarty*, 111 Fed. 151; *In re Tinker*, 99 Fed. 79. See also as to dismissal of voluntary petition scheduling a single debt saved from release by one of the exceptions found in this section, *In re Colaluca*, 133 Fed. 255.

⁵⁰ *Mutual Reserve Fund Life Assn. v. Beatty*, 93 Fed. 747, 35 C. C. A. 573, citing *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13. See also, *Feeny v. Daly*, 8 Cal. 84; *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *Mutual Reserve Fund Life Assn. v. Beatty*, 93 Fed. 747, 35 C. C. A. 573; *Ross v. Jordan*, 62 Ga. 298; *Post v. Losey*, 111 Ind. 74, 88, 12 N. E. 121, 60 Am. Rep. 677; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Andrien's Succession*, 44 La. Ann. 103,

10 So. 388; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Katz v. Moore*, 13 Md. 566; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261; *McWillie v. Kirkpatrick*, 28 Miss. 802, 74 Am. Dec. 125; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729; *Stewart v. Reckless*, 24 N. J. L. 427; *Scouton v. Eislord*, 7 Johns. (N. Y.) 36; *Ingersoll v. Rhoades*, Hill & Denio (N. Y.) 371; *Bolton v. King*, 105 Pa. St. 81; *Hobough v. Murphy*, 114 Pa. St. 358, 7 Atl. 139; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. 142; *Farmers & Mechanics' Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351. Compare, *Jones v. Phelps*, 20 Wkly. Rep. 92.

⁵¹ *United States v. Herron*, 20 Wall. (U. S.) 251, 22 L. ed. 275. While this case construed the bankruptcy law of 1867, the reasoning employed therein applies equally (*In re Baker*, 96 Fed. 954) to the bank-

therein.⁵² Again, the release being limited to provable debts, habeas corpus will not lie to the bankruptcy court by a bankrupt who has been arrested, on civil process issued by a state court, for a debt or claim which can not be proved against his estate.⁵³ But money earned by a bankrupt after he has been adjudged such is exempt and his employer can not be garnished therefor.⁵⁴ And yet, as a general thing, a discharge is impotent as a defense to subsequent proceedings on the debt unless it be pleaded.⁵⁵

ruptcy law of 1898. The court in the course of its opinion says: "Sufficient appears from this summary of the proceedings required under the Bankrupt Act to establish two propositions beyond all doubt or cavil: (1) That the United States are not named in any of the provisions of the Act except the one which provides that all debts due to the United States and all taxes and assessments under the laws thereof shall be entitled to priority or preference, as heretofore fully explained. (2) That many of the provisions describing the rights, duties and obligations of creditors are in their nature inapplicable to the United States, and that if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment." See also, *In re Moore*, 111 Fed. 145; *Hamilton v. Reynolds*, 88 Ind. 191; *Smith v. Hodson*, 50 Wis. 279, 6 N. W. 812. And compare *In re Alderson*, 98 Fed. 588; *United States v. Zerega*, Fed. Cas. No. 16786. The court in *Olds v. Forrester*, 126 Iowa 456, 102 N. W. 419, however, takes the view that taxes constitute the only debts owing sovereignty which are not released by the bankrupt's discharge, and holds that judgment for costs against the defendant in a criminal prosecution by the state can not be excepted by implication. In thus holding, the court says: "Were there no reference in the statute to claims due to the United States or to the state, we might, perhaps, be at liberty to assume that the discharge of the bankrupt was not intended to affect his liability for the payment of such debts. But the statute is not

silent in this respect. It does expressly withhold from its operation all debts due to the sovereign as taxes, and under the familiar rule *expressio unius [est] exclusio alterius* it must be held that, as in other matters of civil liability for the payment of money, the state has no advantage or preference over the individual citizen in the enforcement of its claims against one who has been discharged as a bankrupt." This holding is in clear accord with *United States v. Herron*, 20 Wall. (U. S.) 251, 22 L. ed. 275, cited by the appellants. It was there held that 'a discharge will not release the debtor from a debt due the sovereign unless the sovereign is expressly named in the clauses relating to the discharge of debts.' The present statute was enacted since that decision was rendered, and as 'the sovereign is there expressly named' and the debts reserved from the operation of the law are there expressly enumerated we must assume that all other debts are provable in the bankruptcy proceedings." See Bankruptcy Act, § 17, exception 1.

⁵² *State v. Shelton*, 47 Conn. 400; *Commonwealth v. McMillen*, 1 Ky. L. 270. See also, *Commonwealth v. Hutchinson*, 10 Pa. St. 466; *Saunders v. Commonwealth*, 10 Grat. (Va.) 494. See Bankruptcy Act, § 17, exception 1.

⁵³ *In re Baker*, 96 Fed. 954.

⁵⁴ *Ellis v. Mobile J. & K. C. R. Co.* (Ala.), 51 So. 860.

⁵⁵ *Lovell v. Sneed*, 79 Ark. 204, 95 S. W. 157; *McDougald v. Chattanooga Medicine Co.*, 10 Ga. App. 653, 73 S. E. 1089; *Lane v. Holcomb*, 182 Mass. 360, 65 N. E. 794; *Collins v. McWalters*, 33 Misc. (N. Y.) 648, 72

§ 1995. **Construction of section 17—Exception 2.**⁵⁶—The 1903 amendment to this exception struck therefrom the words “judgments in actions” and substituted therefor the word “liabilities.” Under the exception in its original form, liabilities not evidenced by judgment were not excepted from the effect of a discharge. The purpose of the amendment of 1903 was to extend the application of this exception by adding thereto liabilities arising from false pretenses, etc., which do not appear in judgment form.⁵⁷ The exception as it appeared in the original act of 1898 has been held to comprehend “judgments rendered in actions, the gist of which is the actual fraud of the defendants. In determining this question the courts will look to the plead-

N. Y. S. 203; *Bailey v. Kraus*, 39 Misc. (N. Y.) 845, 81 N. Y. S. 492, 13 N. Y. Ann. Cas. 1; *Broadway Trust Co. v. Manheim*, 47 Misc. (N. Y.) 415, 95 N. Y. S. 93, 34 Civ. Proc. 310; *White v. Powell*, 38 Tex. Civ. App. 38, 84 S. W. 836; *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417. See also, *Taber v. Wayne Circuit Judge*, 156 Mich. 652, 121 N. W. 481; *Rogers v. Abbot*, 206 Mass. 270, 92 N. E. 472, 138 Am. St. 394. As to manner of making, sufficiency of, and time for plea, see *House v. Johnson*, 19 Colo. App. 524, 76 Pac. 743; *Mach. Mfg. Co. v. Van Duereson*, 138 Fed. 953; *Bennett v. Lewis*, 23 Ky. L. 2037, 66 S. W. 523; *Stevenson v. Bird*, 168 Ala. 422, 53 So. 93; *B. F. Roden Grocery Co. v. Lessley* (Ala.), 53 So. 815; *Coe v. Waters*, 16 Colo. App. 311, 64 Pac. 1054; *Boyd v. Agricultural Ins. Co.*, 20 Colo. App. 28, 76 Pac. 986; *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. 249; *Griffith v. Adams*, 95 Md. 170, 52 Atl. 66; *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 8 D. L. N. 263, 53 L. R. A. 801; *Stranch v. Flynn*, 108 Minn. 313, 122 N. W. 320; *Reeves v. McCracken*, 73 N. J. 729, 69 Atl. 247; *Kahn v. Casper*, 51 App. Div. (N. Y.) 540, 64 N. Y. S. 838; *De Marco v. Mass*, 31 Misc. (N. Y.) 827, 64 N. Y. S. 768; *Fowler v. Michael* (Tex.), 81 S. W. 321; *Biela v. Urbanczyk*, 38 Tex. Civ. App. 213, 85 S. W. 451.

⁵⁶ As yet, exception 1 has not apparently been the source of much

controversy. It has been held, however, that the liability of a person convicted of crime for the costs adjudged against him is not a debt “due as a tax levied * * * by the state,” and that his discharge in bankruptcy releases the debt. *Olds v. Forrester*, 126 Iowa 456, 102 N. W. 419. See further, *In re Ott*, 95 Fed. 274.

⁵⁷ *Woehrl v. Canclini*, 158 Cal. 107, 109 Pac. 888. See also, *Thompson v. Judy*, 169 Fed. 553, 95 C. C. A. 51; *Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 121 S. W. 1042, 135 Am. St. 451. *Atlanta Skirt Mfg. Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077; *Lund v. Bull*, 76 N. H. 132, 80 Atl. 141; *Standard Sew. Mach. Co. v. Kattell*, 132 App. Div. (N. Y.) 539, 117 N. Y. S. 32. “The character of the ‘liability,’ as that word is used in amended section 17 (2) of the bankruptcy act, is not changed by the fact that the liability was reduced to judgment.” *Peters v. United States*, 101 C. C. A. 99, 177 Fed. 885. See also, *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754. Notwithstanding § 14 of the bankruptcy act as amended by the act of February 5, 1903, it is not necessary that the false pretenses or representations be in writing. *Katzenstein v. Reid*, 41 Tex. Civ. App. 106, 91 S. W. 360; *Katzenstein v. Austin* (Tex. Civ. App.), 91 S. W. 363. See also, *Talcott v. Friend*, 179 Fed. 676, 103 C. C. A. 80; *In re Taff*, 182 Fed. 899.

ings and judgment; and if the relief granted in the judgment is based upon actual, as distinguished from constructive, fraud of the bankrupt, the bankrupt shall not be discharged from its obligation, notwithstanding the action may not be strictly *ex delicto* in form."⁵⁸ Moreover, this exception "should be liberally construed so as to prevent the discharge * * * from relieving against a liability which would not exist but for the fraudulent conduct of the bankrupt."⁵⁹ But one who induces the rendition of legal services by false pretenses or false representations does not thereby incur a liability for obtaining property by such means.⁶⁰ Again, it has been held that a debtor does not, by going into voluntary bankruptcy, bring within this clause his liability for a loan, evidenced by a promissory note which has been delivered to him upon his promise that if the promisee will turn the instrument back, consider the action begun thereupon at an end, and not again annoy him by legal proceedings looking to the collection of the amount owing, he will soon pay the entire amount of the debt.⁶¹ While the fact that it does not appear from the judgment that the action was to recover for a fraud is not conclusive, it is necessary, in order for the judgment to come within this exception, that the record bear evidence that such was actually the case.⁶² So too, notwithstanding the fact that the form of the complaint is not conclusive,⁶³ an action for conversion of a title obtained through

⁵⁸ *Moody v. Muscogee Mfg. Co.*, 134 Ga. 721, 68 S. E. 604 (syllabus by the court). See also, *Mackel v. Rochester*, 135 Fed. 904; *Halsey v. Jordan*, 155 Ill. App. 144; *Oberreich v. Foster*, 148 Ill. App. 397; *Lund v. Bull*, 76 N. H. 132, 80 Atl. 141. In this connection it has been held that "a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability as to such debt." *Frank v. Michigan Paper Co.*, 179 Fed. 776, 103 C. C. A. 268.

⁵⁹ *Gaddy v. Witt* (Tex. Civ. App.), 142 S. W. 926.

⁶⁰ *Gleason v. Thaw*, 196 Fed. 359.

⁶¹ *Jenkins v. Pilcher*, 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423n.

⁶² *In re Benoit*, 194 N. Y. 549, 87 N. E. 1115, *affd.* 124 App. Div. (N. Y.) 142, 108 N. Y. S. 889. See also, *Ziegler v. Suggit* (Minn.), 136 N. W. 411; *Johnston v. Bruckheimer*, 133 App. Div. (N. Y.) 649, 118 N. Y. S. 189.

⁶³ *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340, 25 Sup. Ct. 118. See also, *In re Ennis*, 171 Fed. 755.

the very fraud on which the plaintiff bases his action does not give rise to a liability within this exception.⁶⁴ But an action to recover moneys collected by the defendant, based upon a complaint which alleges that such defendant made a representation as to the amount that he had collected and that such representation was untrue, since he had actually collected a greater sum, but which does not allege that the plaintiff relied upon this representation, that the defendant intended to deceive or that the plaintiff sustained any damage, and which asks only for judgment for the amount denied to be due, is essentially one for money had and received, rather than for fraud, and a judgment rendered therein upon consent does not measure up to the character of judgments excepted from release by the debtor's discharge.⁶⁵ Moreover, in order that a judgment may escape release by discharge of the bankrupt defendant, on the ground of his fraud, such fraud must have been more than incidental—it must have been actively and creatively present at the inception of the transaction which constituted the basis of the suit in which the judgment was rendered. Thus, this exception does not save a judgment which has been rendered against a bankrupt who converted the proceeds of a sale of stock given to him to be sold.⁶⁶ More restrictive even than the rule just announced is the one that "To be within the exception it is not enough that there may have been fraud in the creation of the debt, and certainly not enough that there may have been a suppressio veri in the giving of a guaranty securing payment of the debt. The provable debt, to be within this exception, must itself have been a judgment recovered in an action brought for fraud," etc.⁶⁷ Thus, it has been held that an action of

⁶⁴ *In re Ennis*, 171 Fed. 755.

⁶⁵ *In re Benoit*, 194 N. Y. 549, 87 N. E. 1115, *affd.* 124 App. Div. (N. Y.) 142, 108 N. Y. S. 889.

⁶⁶ *State v. Beck* (Ind.), 93 N. E. 664. See also, *In re Ennis*, 171 Fed. 755.

⁶⁷ *Barnes Cycle Co. v. Haines*, 69 N. J. Eq. 651, 61 Atl. 515. See also, *Hargadine-McKittrick Dry Goods*

Co. v. Hudson, 58 C. C. A. 596, 122 Fed. 232; *In re Blumberg*, 94 Fed. 476; *In re Rhutassel*, 96 Fed. 597; *Olds v. Forrester*, 126 Iowa 456, 102 N. W. 419; *Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054; *Harrington v. Herman*, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; *Lippincott v. Herman*, 179 Mo. 350, 78 S. W. 1132; *Barnes Mfg. Co. v. Norden*, 67 N. J.

trover and conversion does not sound in fraud, and hence, that the judgment rendered therein is not saved by this clause.⁶⁸ Concerning the second clause in this exception, it has been held that " 'wilful and malicious injury' * * * does not necessarily involve hatred or ill will as a state of mind, but arises from 'a wrongful act, done intentionally, without just cause or excuse.' "⁶⁹ "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained."⁷⁰ But in order to bring a liability within this clause, its very gist and gravamen must arise from a wilful and malicious injury to person or property. In this connection it has been held that a judgment for costs awarded the successful defendant in a suit for slander does not partake of the nature of the plaintiff's cause of action and is not saved to him from release by the discharge of the bankrupt plaintiff.⁷¹ But the nature of the original action inheres in a judgment upon a recognizance given by one who, upon being arrested on execution upon a judgment against him for assault and battery, makes application to take the poor debtor's oath.⁷² Where judgment is returned in favor of a widow, for the wrongful death of her husband which had been caused either by the administration of chloral given him as a sedative while he was in an intoxicated condition, or by the negligence of the defendant in failing to properly care for him at their inn while he was thus intoxicated, it has been held that the discharge of the defendant in bankruptcy op-

L. 493, 51 Atl. 454; *Collins v. McWalters*, 33 Misc. (N. Y.) 648, 72 N. Y. S. 203; *In re Arkell*, 65 App. Div. (N. Y.) 130, 72 N. Y. S. 555.

⁶⁸ *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328. See also, *Fechter v. Postel*, 114 App. Div. (N. Y.) 776, 100 N. Y. S. 207; *Spaulding v. Wolfe*, 100 N. Y. S. 1144; *Burnham v. Pidcock*, 58 App. Div. (N. Y.) 273, 68 N. Y. S. 1007; *In re Benedict*, 37 Misc. (N. Y.) 230, 75 N. Y. S. 165; *Ex parte Peterson*, 77 Vt. 226, 59 Atl. 828. *Contra*, *Watertown Car-*

riage Co. v. Hall, 176 N. Y. 313, 68 N. E. 629.

⁶⁹ *Peters v. United States*, 101 C. C. A. 99, 177 Fed. 885. See also, *Johnston v. Bruckheimer*, 133 App. Div. (N. Y.) 649, 118 N. Y. S. 189.

⁷⁰ *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. 505, quoted in *Peters v. United States*, 101 C. C. A. 99, 177 Fed. 885. See also, *In re Munro*, 197 Fed. 450.

⁷¹ *Drake v. Vernon*, 26 S. Dak. 354, 128 N. W. 317.

⁷² *In re Colaluca*, 133 Fed. 255.

erates to extinguish the right of action upon such judgment.⁷³ But the wilful and malicious injuries contemplated by this clause "are not restricted to those which are inflicted upon the physical person of the party, but extend to those inherent rights of the person, which stand in the same class as his right to security from violence done to his body." Hence, a judgment for damages for libel is not released by the debtor's discharge in bankruptcy.⁷⁴ Again, this clause excepts judgments for malicious prosecution⁷⁵ and for forcible entry and detainer,⁷⁶ but not for trespass devoid of both malice and wilfulness.⁷⁷ So, also, notwithstanding this exception provides that a liability "for alimony due or to become due" shall not be released, it has been held in a case decided in New York six years after the law of 1898 was amended that a judgment rendered in that state for arrearages of alimony decreed in South Dakota, which the debtor included in his bankruptcy schedule, might be proved against his estate.⁷⁸ But a judgment obtained by a wife against another woman for damages sustained by the former by reason of the alienation of the affections of her husband is not released by the discharge of the bankrupt debtor where such alienation was accomplished by schemes and devices and resulted in the loss of support and impairment of health of the wife.⁷⁹ On the other hand, it has been held that a judgment for breach of promise will be released despite the fact that one of the grounds on which recovery was sought was the seduction of the plaintiff, there being

⁷³ *Tompkins v. Williams*, 137 App. Div. (N. Y.) 521, 122 N. Y. S. 152.

⁷⁴ *Thompson v. Judy* (C. C. A.), 169 Fed. 553, citing *In re Freche*, 109 Fed. 620; *In re Maples*, 105 Fed. 919; *Leicester v. Hoadley*, 66 Kans. 172, 71 Pac. 318, 65 L. R. A. 523; *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. ed. 754. See also, *Sanderson v. Hunt*, 116 Ky. 435, 25 Ky. L. 626, 76 S. W. 179; *McDonald v. Brown*, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. 659; *Drake v. Vernon*, 26 S. Dak. 354, 128 N. W. 317. And compare, *In re Ennis*, 171 Fed. 755.

⁷⁵ *Taylor v. Marshall*, 153 Ill. App. 409. See also, *McChristal v. Clisbee*, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702; *Mason v. Perkins*, 180 Mo. 702, 79 S. W. 683, 103 Am. St. 591.

⁷⁶ *In re Munro*, 197 Fed. 450.

⁷⁷ *Weisfield v. Beale*, 44 Pa. Super. Ct. 386.

⁷⁸ *In re Williams' Estate*, 118 N. Y. S. 562.

⁷⁹ *Leicester v. Hoadley*, 66 Kans. 172, 71 Pac. 318, 65 L. R. A. 523. See also, *Exline v. Sargent*, 23 Ohio Cir. Ct. 180.

no action allowed her for her seduction alone.⁸⁰ Under the express provision of this exception, a judgment for criminal conversation will be saved to the husband, although the wife suffered no physical injury thereby and the husband, no actual deprivation of her society or services.⁸¹ But whether a final money judgment for the total amount due, rendered on an order in bastardy proceedings whereby the putative father of a natural child was required to pay a monthly stipend for its support, will be released, *quaere*.⁸²

§ 1996. Construction of section 17—Exception 3.—This clause requires one of two things, either proof that the debt has been properly scheduled, or that the creditor has had notice or actual knowledge of the bankruptcy proceedings,⁸³ in time to prove his claim.⁸⁴ “Actual knowledge

⁸⁰ *Biela v. Urbanczyk*, 38 Tex. Civ. App. 213, 85 S. W. 451. See also, *In re Warth*, 196 Fed. 571; *Finnegan v. Hall*, 35 Misc. (N. Y.) 773, 72 N. Y. S. 347; *Disler v. McCatley*, 66 App. Div. (N. Y.) 42, 73 N. Y. S. 270. And compare, *Bond v. Milliken*, 134 Iowa 447, 109 N. W. 774, 120 Am. St. 440.

⁸¹ *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. 505, cited in *In re Munro*, 197 Fed. 450.

⁸² *McKittrich v. Cahoon*, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. 606.

⁸³ *Lutz v. Kalmus*, 115 N. Y. S. 230. See also, *Perry Navel Stores Co. v. Caswell* (Fla.), 57 So. 660; *Ross-Lewin v. Goold*, 211 Ill. 384, 71 N. E. 1028; *Gilmore v. Farmer*, 156 Ill. App. 70; *Jones v. Walter*, 115 Ky. 556, 24 Ky. L. 2459, 74 S. W. 249; *Wineman v. Fisher*, 135 Mich. 604, 98 N. W. 404; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2; *Longfield v. Minnesota Sav. Bank*, 95 Minn. 54, 103 N. W. 706; *Bernheim v. Bloch*, 45 Misc. (N. Y.) 581, 91 N. Y. S. 40; *Schiller v. Weinstein*, 47 Misc. (N. Y.) 622, 94 N. Y. S. 763; *Broadway Trust Co. v. Mannheim*, 47 Misc. (N. Y.) 415, 95 N. Y. S. 93, 34 Civ. Proc. 310; *Guasti v. Miller*, 203 N. Y. 259, 96 N. E. 416; *Feldmark v. Weinstein*, 45 Misc. (N. Y.) 329, 90 N. Y. S.

478; *Westheimer v. Howard*, 47 Misc. (N. Y.) 145, 93 N. Y. S. 518; *Knapp v. Harold*, 25 Ohio Cir. Ct. 213; *Fifth Ave. Bldg. & Assn. v. Goldberg*, 22 Pa. Super. Ct. 197; *Delta County Bank v. McGranahan*, 37 Wash. 307, 79 Pac. 796. Constructive notice has been held insufficient in *Santa Rosa Bank v. White*, 139 Cal. 703, 73 Pac. 577; *Zimmerman v. Ketchum*, 66 Kans. 98, 71 Pac. 264. See also, *Kreitlein v. Ferger* (Ind. App.), 97 N. E. 819; *Kaufman v. Schreier*, 108 App. Div. (N. Y.) 298, 95 N. Y. S. 729. And yet it has been said in *Wright-Dalton-Bell-Anchor Store Co. v. St. Louis & C. R. Co.*, 142 Mo. App. 50, 125 S. W. 517, that “The filing of a petition in bankruptcy is notice to the world of the pendency of the proceedings.” See also, *Dight v. Chapman*, 44 Ore. 265, 75 Pac. 585, 65 L. R. A. 793. A recent case decided in South Carolina apparently discounts the express provision that notice or actual knowledge of the creditor is sufficient to relieve from the ordinary consequences of the bankrupt’s failure to schedule a certain debt. In this case the court, basing its opinion on want of consideration, holds that payment to a creditor who has himself filed the petition in bankruptcy, and who has agreed with his debtor that the latter shall not schedule his debt, but

of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends.”⁸⁵ But applying the law of agency, notice to or knowledge of an agent as to proceedings in bankruptcy is generally notice to or knowledge of the principal.⁸⁶ Failure to properly schedule a promissory note can not be predicated of the fact that the promisee filed his petition in voluntary bankruptcy under a name, the middle initial of which was different from that of the name appearing on the note.⁸⁷ But where the schedule shows an unsecured debt due to “Dalton & Bell Co.,” such debt in the absence of extrinsic evidence is not identified as a judgment on a note owned by the “Wright-Dalton-Bell-Anchor Store Co.”⁸⁸ And yet it has been held that where a debtor asks to be adjudged a bankrupt under

that he shall receive as large a percentage as the other creditors, **payment** of his percentage operates only as a payment pro tanto. *Davis v. Barwick*, 88 S. Car. 355, 70 S. E. 1007.

⁸⁴ *Karter v. Fields*, 140 Ala. 352, 37 So. 204; *In re Monroe*, 114 Fed. 398; *Hughes v. Clark*, 109 Ill. App. 107; *Reynolds v. Whittemore*, 99 Maine 108, 58 Atl. 415; *Armstrong v. Sweeney*, 73 Nebr. 775, 103 N. W. 436; *Tyrrel v. Hammerstein*, 33 Misc. (N. Y.) 505, 67 N. Y. S. 717, 8 N. Y. Ann. Cas. 432; *Collins v. McWalters*, 33 Misc. (N. Y.) 648, 72 N. Y. S. 203.

⁸⁵ *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. 38, affg. *Columbia Bank v. Birkett*, 174 N. Y. 112, 66 N. E. 652, 102 Am. St. 478. Continuing, in the former case, the court says: “The provisions of the law relied upon by plaintiff in error [inter alia § 17 cl. 3] are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law

would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding, without penalty to him. It is easy to see what results such looseness would permit—what preference could be accomplished and covered by it.”

⁸⁶ *Atkinson v. Elmore*, 103 Mo. App. 403, 77 S. W. 492, citing *In re Beerman*, 112 Fed. 662. See also, *In re David*, 44 Misc. (N. Y.) 516, 90 N. Y. S. 85; *Vaughn v. Irwin*, 49 Misc. (N. Y.) 611, 96 N. Y. S. 742. And compare, *Strickland v. Capital City Mills*, 74 S. Car. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

⁸⁷ *Northern Commercial Co. v. Hartke*, 110 Minn. 338, 125 N. W. 508. See also, *Grosso v. Marx*, 45 Misc. (N. Y.) 500, 92 N. Y. S. 773.

⁸⁸ *Wright-Dalton-Bell-Anchor Store Co. v. St. Louis I. M. & S. R. Co.*, 142 Mo. App. 50, 125 S. W. 517. See also, *Haack v. Theise*, 51 Misc. (N. Y.) 3, 99 N. Y. S. 905; *Liesum v. Kraus*, 35 Misc. (N. Y.) 376, 71 N. Y. S. 1022.

his correct name, a creditor who has brought a pending suit against him in a justice's court wherein through the fault of the justice the defendant has been wrongly named, can not on account of the variance in names assail the schedule where there is no evidence that he has ever dealt with the bankrupt in the name under which the latter was sued.⁸⁹ Nor is the schedule insufficient because the address of the creditor whose name appears therein was not correctly given, it being neither alleged nor shown that the bankrupt knew the correct address or that the failure to give the same was intentional or fraudulent.⁹⁰ But a voluntary bankrupt can not employ a certain street number as indicating the residence of a judgment creditor when as an actual fact such residence is to him unknown.⁹¹ Moreover, the fact that a debt was unknown to the bankrupt when he prepared his schedules does not prevent its preservation by this clause.⁹² Furthermore, no presumption exists that a certain debt was actually included in the schedule. The schedule itself is the best evidence and must be produced when the fact that the debt in controversy was properly entered therein is denied.⁹³

§ 1997.—Construction of section 17 — Exception 4. — It would seem that the correct interpretation of the word "fraud" in this exception requires that it be regarded as having reference only to the conduct of an officer or other person acting in a fiduciary capacity.⁹⁴ Moreover, "fraud"

⁸⁹ Finnell v. Armoura (Utah), 117 Pac. 49.

⁹⁰ Steele v. Thalheimer, 74 Ark. 516, 86 S. W. 305. See also, In re Mollner, 75 App. Div. (N. Y.) 441, 78 N. Y. S. 281.

⁹¹ Sutherland v. Lasher, 41 Misc. (N. Y.) 249, 84 N. Y. S. 56.

⁹² Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577. See also, In re Boom, 48 Misc. (N. Y.) 632, 96 N. Y. S. 204.

⁹³ Woodward v. Schaefer, 91 N. Y. S. 104.

⁹⁴ "The contention that 'fraud' should be segregated from the qualifying language, 'while acting as an

officer or in any fiduciary capacity,' is without merit. Such interpretation would not only destroy the grammatical structure of the sentence, and contravene its plain meaning, but would likewise be inconsistent with paragraph 2 of the same section." Morse v. Kaufman, 100 Va. 218, 40 S. E. 916; citing In re Lewensohn, 99 Fed. 73; affd. 104 Fed. 1006, 44 C. C. A. 309; Bracken v. Milner, 104 Fed. 522. See also, Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320; In re Rhutassel, 96 Fed. 597; In re Harper, 133 Fed. 970, affd. 141 Fed. 626, 72 C. C. A. 320; In re Ennis, 171 Fed. 755; Gee v. Gee, 84

* * * means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.⁹⁵ Again, it has been held that the word "officer" includes an officer of a private corporation.⁹⁶ Thus, where the bankrupt has embezzled and misappropriated bank funds while acting as vice president of the bank and having general charge of its affairs, the indebtedness consequent upon his embezzlement and misappropriation is not released by his discharge in bankruptcy.⁹⁷ Nor does the reduction to judgment of the indebtedness caused by the misappropriation, etc., alter the fact of its preservation by this exception.⁹⁸ Regarding the words "fiduciary capacity," it has been declared that they comprehend technical or express trusts and that they can not be extended to the relationship of principal and agent, broker and principal, or partner and copartner.⁹⁹ But the liability of an executor who has col-

Minn. 384, 87 N. W. 1116; *Harrington v. Herman*, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; *Lippincott v. Herman*, 179 Mo. 350, 78 S. W. 1132; *J. C. Smith & Wallace Co. v. Lambert*, 69 N. J. L. 487, 55 Atl. 88; *Watertown Carriage Co. v. Hall*, 176 N. Y. 313, 68 N. E. 629; *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328; *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. 493; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. 9; *Bullis v. O'Beirne*, 195 U. S. 606, 49 L. ed. 340, 25 Sup. Ct. 118. And compare, *In re Wollock*, 120 Fed. 516; *In re Butts*, 120 Fed. 966; *Frey v. Torrey*, 175 N. Y. 501, 67 N. E. 1082; *Predmore v. Torrey*, 38 Misc. (N. Y.) 127, 77 N. Y. S. 86; *Hyde v. Lesser*, 93 App. Div. (N. Y.) 320, 87 N. Y. S. 878; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. 623.

⁹⁵ *Neal v. Clark*, 95 U. S. 704, 24 L. ed. 586, construing the word "fraud" as it was used in the bankruptcy act of 1867. The same word, as used in the law of 1898, has been held subject to the same construction, in *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442. The

court in the former case continuing said: "Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." See also, *Bracken v. Milner*, 104 Fed. 522; *Lund v. Bull*, 76 N. H. 132, 80 Atl. 141; *Hanan v. Long*, 134 N. Y. S. 786. Compare, *Warren v. Robinson*, 21 Utah 429, 61 Pac. 28.

⁹⁶ *In re Harper*, 133 Fed. 970, judgment affirmed without deciding this particular point in 141 Fed. 626, 72 C. C. A. 320; *Harper v. Rankin*, 141 Fed. 626, 72 C. C. A. 320. See also, *Tatum v. Leigh*, 136 Ga. 791, 72 S. E. 236.

⁹⁷ *In re Harper*, 133 Fed. 970, affd. 141 Fed. 626, 72 C. C. A. 320. See also, *Morris v. Covey* (Ark.), 148 S. W. 257.

⁹⁸ *Brown v. Hannagan*, 210 Mass. 246, 96 N. E. 714.

⁹⁹ *Karger v. Orth*, 116 Minn. 124, 133 N. W. 471. See also, *Boyd v.*

lected and misappropriated insurance money is not affected by his discharge in bankruptcy.¹ On the other hand, the surety of an administrator is released by his discharge from his liability on the bond of his principal where he filed his petition after the misappropriation of funds by, and the death of, the administrator.² But a person who holds funds as trustee under an assignment for the benefit of creditors or as receiver appointed by the court holds them in a fiduciary capacity within the meaning of this clause.³ So, again, it has been held that one who assigns money to be earned, collected and paid over by him in the future, and who fails to pay it over after collecting it, can not interpose his discharge in bankruptcy as a bar to the enforcement of his liability.⁴

§ 1998. Discharge of codebtors of bankrupt—Section 16.—Only the liability of the bankrupt himself is released by his discharge, and as expressive of this underlying principle, section 16 of the bankruptcy act provides that “the liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.”⁵ Thus, notwithstanding the fact that the husband has been discharged in bankruptcy, the liability of a wife on a judgment rendered against her husband and herself remains intact.⁶ But it has been held that “a full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings con-

Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; *In re Gulick*, 186 Fed. 350; *In re Basch*, 97 Fed. 761; *In re Camelo*, 195 Fed. 632; *Ehrhart v. Rork*, 114 Ill. App. 509; *Reeves v. McCracken*, 73 N. J. 729, 69 Atl. 247; *Clarke v. Milliken*, 70 Misc. (N. Y.) 492, 127 N. Y. S. 339; *Johnson's Admr. v. Parmenter*, 74 Vt. 58, 52 Atl. 73. And compare, *Field v. Howry*, 132 Mich. 687, 94 N. W. 213, 10 D. L. N. 55; *Shipley v. Platts*, 17 S. Dak. 357, 97 N. W. 1, affd. 26 S. Dak. 57, 127 N. W. 470.

¹*Brown v. Hannagan*, 210 Mass. 246, 96 N. E. 714. See also, *John-*

son's Admr. v. Parmenter, 74 Vt. 58, 52 Atl. 73.

²*Harmon v. McDonald*, 187 Mass. 578, 73 N. E. 883.

³*Field v. Howry*, 132 Mich. 687, 94 N. W. 213, 10 D. L. N. 55.

⁴*J. L. Mott Ironworks v. Toumey*, 94 App. Div. (N. Y.) 216, 87 N. Y. S. 1020.

⁵See, *In re Marshall Paper Co.*, 102 Fed. 872, 43 C. C. A. 38; *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

⁶*Love v. McGill*, 41 Tex. Civ. App. 471, 91 S. W. 246.

cerning that partner only.”” On the subject of the discharge of codebtors this section is explicit, and it makes no difference as regards the liability of a surety or guarantor that the claim was not proved against the bankrupt estate of his codebtor.⁸ Moreover, the guarantor of rent for the period of a year is liable for the rent for that portion of the year which elapses after the renter has become bankrupt.⁹ Yet again, claims for material furnished a municipal bridge contractor, allowed against him in bankruptcy, may be enforced against his surety and the municipality.¹⁰ And an attachment defendant who has given bond for the discharge of the property attached, conditioned on the payment of the final judgment, and who more than four months after the commencement of the attachment action has filed a petition in voluntary bankruptcy, may be made the subject of a special judgment carrying with it a perpetual stay of execution against him, and the plaintiff be thus enabled to proceed against the surety on the bond.¹¹ But where a judgment debtor under arrest on execution gave, on February 12, the statutory bond commonly known as the “six months’ bond,” and on February 29 was duly adjudged a bankrupt and on April 24 was duly discharged, the discharge released both the principal and the sureties from all further liability on the bond, the judgment having been a debt which was provable in bankruptcy.¹² Again,

⁷ *Loomis v. Wallblom*, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771 (syllabus by the court). See also, *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. 249; *In re Laughlin*, 96 Fed. 589; *In re Kaufman*, 136 Fed. 262. And compare, *In re McFaun*, 96 Fed. 592; *Dodge v. Kaufman*, 46 Misc. (N. Y.) 248, 91 N. Y. S. 727.

⁸ *Gurley v. Robertson* (Ala.), 59 So. 643.

⁹ *Dersch v. Walker*, 121 Ky. 374, 28 Ky. L. 325, 89 S. W. 233. See also, *Witthaus v. Zimmerman*, 91 App. Div. (N. Y.) 202, 86 N. Y. S. 315, 14 N. Y. Ann. Cas. 379.

¹⁰ *Empire State Surety Co. v. Des Moines*, 152 Iowa 531, 131 N. W. 870, 132 N. W. 837. See also, *State*

v. Federal Union Surety Co., 156 Mo. App. 603, 137 S. W. 613.

¹¹ *Butterick Pub. Co. v. E. F. Bowen Co.*, 33 R. I. 40, 80 Atl. 277. See also, *Schunack v. Art Metal Novelty Co.*, 84 Conn. 331, 80 Atl. 290; *Brown & Coal Co. v. Antezak*, 164 Mich. 110, 128 N. W. 774, 130 N. W. 305; *United States Wind Engine & Co. v. North Penn Iron Co.*, 227 Pa. 262, 75 Atl. 1094. And compare *Crook Horner Co. v. Gilpin*, 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233n, 136 Am. St. 376.

¹² *Fogg Co. v. Bartlett*, 106 Maine 122, 75 Atl. 380, 138 Am. St. 338. But see *Carpenter v. Goddard*, 191 Mass. 54, 76 N. E. 953.

it has been held that this section "refers to codebtors, guarantors, or sureties for the bankrupt on the same or original debt—the debt on which the release is given by the discharge," and is not sufficiently broad to include the liability of the surety on the bond to discharge a garnishment, had in a suit, on a provable debt, pending against the bankrupt when bankruptcy proceedings are instituted.¹³ In another case, the defendant in a justice's court appealed and gave bond conditioned for costs and, provided the judgment was affirmed or the appeal was dismissed, to pay the amount of the judgment or the part thereof affirmed and all damages awarded against him on such appeal. On appeal, he escaped judgment through a plea of a discharge in bankruptcy obtained *pendente lite*, and it was held that immunity from judgment likewise accrued to his sureties.¹⁴ Again, "the right of custody and the power to seize and surrender his principal is an incident of the relation of bail and principal, and when the right of the bail to seize and surrender his principal has been taken away by the discharge of the principal from all liability to pay the debt [as in this case, by a discharge in bankruptcy] which the bail bond was given to secure, the relation of bail and principal is at an end, as is also the liability of the bail."¹⁵ But the discharge of a bankrupt corporation does not discharge the directors or stockholders therein from their individual statutory liability for the corporation's debts and contracts.¹⁶

¹³ *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A. 229.

¹⁴ *Lafoon v. Kerner*, 138 N. Car. 281, 50 S. E. 654. See also, *Goyer Co. v. Jones*, 79 Miss. 253, 30 So. 651. And compare, *St. Louis World Pub. Co. v. Rialto Grain &c. Co.*, 108 App. 479, 83 S. W. 781.

¹⁵ *Keyes v. Bennett*, 218 Ill. 625, 75 N. E. 1075.

¹⁶ *In re Marshall Paper Co.*, 102 Fed. 872, 43 C. C. A. 38. See also, *Virginia-Carolina Chem. Co. v. Fisher*, 58 Fla. 377, 50 So. 504; *Way v. Barney*, 116 Minn. 285, 133 N. W. 801; *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60.

CHAPTER XLVI.

ALTERATION OF CONTRACTS.

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§ 2005. **What is an alteration.**—The alteration of a written contract is the intentional change by a party thereto, his agent or bailee, without the consent of the opposite party, of the meaning or language of the instrument in such a manner as to affect its legal operation and mislead or injure the nonconsenting other party.¹ While this is technically the correct definition of the word “alteration” as applied to a written contract, the courts have not been invariably precise in choosing between its use and that of the word “disfigurement,”² they having frequently em-

¹“Not every change in a bill or note amounts to an alteration. If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words which the law would imply, or by striking out words of no legal significance.” 2 Dan. on Neg. Inst. 359, quoted in *Reilly v. First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120. *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Chamberlain v. Wright* (Tex.), 35 S. W. 707. “A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed by one of the parties there-

to, without the consent of the other, which changes the legal effect of the instrument in any respect.” *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 124 N. W. 20, 32 L. R. A. (N. S.) 519.

²That not every disfigurement is an alteration, see *Tutwiler v. Burns*, 160 Ala. 386, 49 So. 455; *Hakes v. Russ*, 175 Fed. 751, 99 C. C. A. 327; *Chamberlain v. White*, 79 Ill. 549; *Davis v. Campbell*, 93 Iowa 524, 61 N. W. 1053; *Schafer v. Jackson*, (Iowa), 135 N. W. 622; *Howe v. Thompson*, 11 Maine 152; *Bachelor v. Priest*, 12 Pick. (Mass.) 399; *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239; *Stone v. White*, 8 Gray (Mass.) 589; *Barnes-Smith*

ployed the former term as denoting merely an unauthorized intentional "change," thus rendering necessary the determination of the materiality of the same.³

§ 2006. Modification by accident.—Considering the constituent elements of this definition one at a time, it is, in the first place, obvious that although the appearance of a contract may be changed through accident, inadvertence or mistake other than one of law, it is not ipso facto altered in the technical sense.⁴

§ 2007. Alteration must be by interested party—Spoliation.—Again, a modification to amount to an alteration must be by a party to the instrument, his agent or bailee. This fact precludes denominating as an alteration a mutilation by a stranger suo motu—he not having been impelled thereto by authorization or permission of an interested party. Such a varying of an instrument is of dignity only as a mere spoliation, incapable, if the terms of the contract can still be discerned, of affecting the rights and liabilities born thereof.⁵ But a directed material modification by

Mercantile Co. v. State, 156 Mo. App. 236, 137 S. W. 619; *Morrill v. Otis*, 12 N. H. 466; *Goodfellow v. Inslee*, 12 N. J. Eq. 355; *Rosenkrans v. Snover*, 19 N. J. Eq. 420, 97 Am. Dec. 668; *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595; *McShan v. Watlington* (Tex. Civ. App.), 133 S. W. 722; *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127; *Hutches v. J. I. Case Threshing-Mach. Co.* (Tex. Civ. App.), 35 S. D. 60; *Lombardo v. Lombardini*, 57 Wash. 352, 106 Pac. 907.

³ Post, § 2011.

⁴ *Newton v. Bramlett*, 55 Ill. App. 661; *Frazier v. Boss*, 66 Ind. 1; *Horst v. Wagner*, 43 Iowa 373, 22 Am. Rep. 255; *Murray v. Graham*, 29 Iowa 520; *Brett v. Marston*, 45 Maine 401; *Nickerson v. Swett*, 135 Mass. 514; *Seymour v. Mickey*, 15 Ohio St. 515; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Rhoades v. Frederick*, 8 Watts (Pa.) 448; *Fisher v. King*, 153 Pa.

St. 3, 25 Atl. 1029; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. 321; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. ed. 360, 12 Sup. Ct. 657.

⁵ "The act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible." *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598. *Nichols v. Johnson*, 10 Conn. 192; *Condict v. Flower*, 106 Ill. 105; *State v. Berg*, 50 Ind. 496; *John v. Hatfield*, 84 Ind. 75; *Terry v. Hazlewood*, 1 Duv. (Ky.) 104; *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764; *Young v. Young*, 157 Mich. 80, 121 N. W. 264; *Spreng v. Juni*, 107 Minn. 85, 122 N. W. 1015; *State v. Scott*, 104 Mo. 26, 15 S. W. 987, 17 S. W. 11; *Gurley Bros. v. Bunch*, 130 Mo. App. 665, 108 S. W. 1109; *Bingham v. Shadle*, 45 Nebr. 82, 63 N. W.

an agent or bailee will, of course, constitute an alteration.⁶ Although, in this connection, it has been declared that a change in a contract by an unauthorized agent is equivalent to a mutilation by a stranger,⁷ there really appears to be no good reason why the law of principal and agent which casts upon the former liability for an act of the latter done within the apparent scope of his authority, should not apply in a proper case.⁸

§ 2008. Modification by consent.—Further, it is practically self-evident that, aside from any question as to form and as between the parties, a change made by or with the consent of the opposite party is valid.⁹ Coincidentally, however, with such variation, the original contract usually ceases to exist; there is a new meeting of minds and a new contract is the result. Where there are several parties bound by

143; *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Solon v. Williamsburg Sav. Bank*, 114 N. Y. 122, 21 N. E. 168; *Commonwealth Nat. Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332; *Wicker v. Jones* (N. Car.), 74 S. E. 801; *United States v. Linn*, 1 How. (U. S.) 104, 11 L. ed. 64; *Union Nat. Bank v. Roberts*, 45 Wis. 373.

⁶ See *Gurley Bros. v. Bunch*, 130 Mo. App. 665, 108 S. W. 1109.

⁷ *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697; *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Lanum v. Patterson*, 143 Ill. App. 244; *Brooks v. Allen*, 62 Ind. 401; *Kingman v. Silvers*, 13 Ind. App. 80, 37 N. E. 413; *Mathias v. Leathers*, 99 Iowa 18, 68 N. W. 449; *White Sew. Mach. Co. v. Dakin*, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; *Nickerson v. Swett*, 135 Mass. 514; *Ames v. Brown*, 22 Minn. 257; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Moore v. Ivers*, 83 Mo. 29; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; *Fullerton v. Sturges*, 4 Ohio St. 529; *Robertson v. Hay*, 91 Pa.

St. 242; *Bigelow v. Stilphen*, 35 Vt. 521.

⁸ See *Morrison v. Welty*, 18 Md. 169.

⁹ *Eadie v. Chambers*, 172 Fed. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879n; *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470; *Prettyman v. Goodrich*, 23 Ill. 330; *Stiles v. Probst*, 69 Ill. 382; *Nelson v. White*, 61 Ind. 139; *Grimstead v. Briggs*, 4 Iowa 559; *Phillips v. Crips*, 108 Iowa 605, 79 N. W. 373; *Holyfield v. Harrington*, 84 Kans. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131n; *Brown v. Warnock* (5 Dana (Ky.) 492; *Bassett v. Bassett*, 55 Maine 127; *Boston v. Benson*, 12 Cush. (Mass.) 61; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Montgomery v. Dresher*, 90 Nebr. 632, 134 N. W. 251; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Wooley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; *Wardlow v. List*, 41 Ohio St. 414; *Barrett v. Effenberg*, 29 Okla. 679, 119 Pac. 135; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; *Speake v. United States*, 9 Cranch (U. S.) 28, 3 L. ed. 645; *Schmelz v. Rix*, 95 Va. 509, 28 S. E. 890; *Kane v. Herman*, 109 Wis. 33, 85 N. W. 140.

each of the opposing obligations, however, one of the contractors has no inherent right to permit, on behalf of his associates, a change in the evidentiary instrument,¹⁰ nor, logically, can one of the opposite parties, not authorized so to do, use his cocontractors' names in obtaining a modification thereof. And there is some difference of opinion as to whether a deed can be thus changed and whether the attempted change after delivery affects it as an executed contract, especially if it has been recorded.¹¹

§ 2009. Extra-judicial reformation.—But it seems that the reformation of an instrument which, either through inadvertence or mistake, does not give expression to the contract actually entered into, may be extra-judicially effected by an interested party acting in good faith, although he has not received sanction for his act from the one with whom he has contracted.¹² And the correction of a name

¹⁰ *Hockmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Mundy v. Stevens*, 61 Fed. 77, 9 C. C. A. 366; *Canon v. Grisley*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; *Gardiner v. Harback*, 21 Ill. 129; *Snell v. Davis*, 149 Ill. App. 391; *Judah v. Zimmermann*, 22 Ind. 388, approving and following *Zimmerman v. Judah*, 13 Ind. 286; *State v. Van Pelt*, 1 Ind. 304, *Smith* 118; *Citizens' Sav. Bank v. Halstead*, 42 Ind. App. 79, 84 N. E. 1098; *Bell v. Mahin*, 69 Iowa 408, 29 N. W. 331; *Rhoades v. Leach*, 93 Iowa 337, 61 N. W. 988; *Horn v. Newton City Bank*, 32 Kans. 518, 4 Pac. 1022; *Warring v. Williams*, 8 Pick. (Mass.) 322; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *State v. Findley*, 101 Mo. 217, 14 S. W. 185; *Brown v. Straw*, 6 Nebr. 536, 29 Am. Rep. 369; *Davis v. Bauer*, 41 Ohio St. 257; *Thompson v. Masie*, 41 Ohio St. 307; *Wolf v. Fink*, 1 Pa. St. 435, 44 Am. Dec. 141; *Hartley v. Corboy*, 150 Pa. St. 23, 24 Atl. 295; *Martin v. Thomas*, 24 How. (U. S.) 315; *Wood v. Steele*, 6 Wall. (U. S.) 80, 18 L. ed. 725;

United States v. Freely, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. 875; *Broughton v. Fuller*, 9 Vt. 373.

¹¹ See *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284, and note reviewing authorities.

¹² *Rogers v. Shaw*, 59 Cal. 260; *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494; *Osborn v. Hall*, 160 Ind. 153, 66 N. E. 457; *Basey v. McKinney*, 43 Ind. App. 422, 87 N. E. 693; *Duker v. Franz*, 7 Bush (Ky.) 273, 3 Am. Rep. 314; *Ames v. Colburn*, 11 Gray (Mass.) 390, 71 Am. Dec. 723; *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. 466; *Nickerson v. Swett*, 135 Mass. 514; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162; *James v. Tilton*, 183 Mass. 275, 67 N. E. 326; *Union Banking Co. v. Martin's Estate*, 113 Mich. 521, 71 N. W. 867; *Foote v. Hambrick*, 70 Miss. 157, 11 So. 567, 35 Am. St. 631; *McRaven v. Crisler*, 53 Miss. 542; *Blenkiron v. Rogers*, 87 Nebr. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127n, Ann. Cas. 1912A, 1042 and note; *Styles v. Scotland* (N. Dak.), 134 N. W. 708; *Wallace v. Tice*, 32 Ore. 283,

so as to make it conform to a party's true name has often been permitted and held not to amount to a material alteration.¹³

§ 2010. Right to fill blanks.—Likewise blanks, at least in unsealed instruments, may, as a general thing, be thus informally filled agreeably to the prior mutual understanding of those concerned.¹⁴ The authority to properly fill blanks is often implied, especially under the law merchant, although there is considerable difference of opinion in the case of sealed instruments.¹⁵

§ 2011. Alteration must be material.—If a party is guilty of an alteration as first defined¹⁶ it might be broadly stated that the one guilty of altering a written contract loses all his rights thereunder.¹⁷ Although there are courts which have held that a mere disfigurement, or to use the commonly employed designation, an “immaterial alteration” will avoid the contract as regards the modifier there-

51 Pac. 733; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541; *McClure v. Little*, 15 Utah 379, 49 Pac. 298, 62 Am. St. 938; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Lombardo v. Lomardini*, 57 Wash. 352, 106 Pac. 907, 32 L. R. A. (N. S.) 515n. *Contra Merritt v. Dewey*, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217; *Kelly v. Trumble*, 74 Ill. 428; *Murray v. Graham*, 29 Iowa 520; *Barnes-Smith Mercantile Co. v. Tate*, 156 Mo. App. 236, 137 S. W. 619; *Evans v. Foreman*, 60 Mo. 449; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Newman v. King*, 54 Ohio St. 273, 43 N. E. 683. See also, *Citizens' Nat. Bank v. Williams*, 174 Pa. St. 66, 34 Atl. 303, 35 L. R. A. 464.

¹³ See *Blenkiron v. Rogers*, 87 Nebr. 716, 127 N. W. 1062, 31 L. R. A. (N. S.) 127n, Ann. Cas. 1912A 1042, and note citing many authorities.

¹⁴ Shows *v. Steiner* (Ala.), 57 So. 700; *Crawford v. Simonton*, 163 Ala. 609, 50 So. 1024; *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534; *Visher*

v. Webster, 8 Cal. 109; *Rainbolt v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152; *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131; *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 Am. Rep. 254; *Abbott v. Rose*, 62 Maine 194, 16 Am. Rep. 427; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Montgomery v. Dresher*, 90 Nebr. 632, 134 N. W. 251; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Garrard v. Hadden*, 67 Pa. St. 82, 5 Am. Rep. 412. Compare, *Luellen v. Hare*, 32 Ind. 211; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661. See also, *Johnston v. Hoover*, 139 Iowa 143, 117 N. W. 277.

¹⁶ *Hartington Nat. Bank v. Breslin*, 88 Nebr. 47, 128 N. W. 659, Ann. Cas. 1912B, 1008, 1010, note and cases cited.

¹⁶ Ante, note 1, § 2005.

¹⁷ Post, note 19, § 2011.

of,¹⁸ the rule almost universally adopted¹⁹ requires that an alteration be material before fatal consequences are assigned to it. In other words, forfeiture of rights accompanies, in general, only a material alteration.²⁰

§ 2012. Test for determining character of alteration.—
“The test in determining whether or not there has been a material alteration of the instrument is: Has the change or addition injuriously affected the complaining parties, or could the change, under any possible circumstances, enlarge the burdens already assumed by them?”²¹ Illustra-

¹⁸ McCormick Harvesting Mach. Co. v. Blair (Mo. App.), 124 S. W. 49.

¹⁹ Ante, § 2005.

²⁰ Prim v. Hammel, 134 Ala. 652, 32 So. 1006, 92 Am. St. 52; Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767; Murray v. Klinzing, 64 Conn. 78, 29 Atl. 244; Rankin v. Tygard, 198 Fed. 795; Rudesill v. Jefferson County Court, 85 Ill. 446; Reilly v. First Nat. Bank (Ryan v. First Nat. Bank), 148 Ill. 349, 35 N. E. 1120; Shuck v. State, 136 Ind. 63, 35 N. E. 993; Sawyers v. Campbell, 107 Iowa 397, 78 N. W. 56; Terry v. Hazelwood, 1 Duv. (Ky.) 104; Cushing v. Field, 70 Maine 50, 35 Am. Rep. 293; Smith v. Crooker, 5 Mass. 538; Granite R. Co. v. Bacon, 15 Pick. (Mass.) 239; Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636; Prudden v. Nester, 103 Mich. 540, 61 N. W. 777; Herrick v. Baldwin, 17 Gil. (Minn.) 183, 10 Am. Rep. 161; Fisher v. Hutton, 44 Nebr. 122, 62 N. W. 488; Cole v. Hills, 44 N. H. 227; Casoni v. Jerome, 58 N. Y. 315; Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and note; Huntington v. Finch, 30 Ohio St. 445; Express Pub. Co. v. Aldine Press, 126 Pa. St. 347, 17 Atl. 608; Arnold v. Jones, 2 R. I. 345; Reed v. Roark, 14 Tex. 329, 65 Am. Dec. 127, and note; Gordon v. Third Nat. Bank, 144 U. S. 97, 36 L. ed. 360, 12 Sup. Ct. 657; Mersman v. Werges, 112 U. S. 139, 28 L. ed. 641, 5 Sup. Ct. 65; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389; Fuller

v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600. See also, Neg. Inst. Law, § 205; Benton v. Clemmons, 157 Ala. 658, 47 So. 582.

²¹ Holthouse v. State (Ind. App.), 97 N. E. 130. “The effect of an alteration in a written instrument depends upon its nature, the person by whom, and the intention with which, it was made. If neither the rights or interest, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial.” Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298, quoted with approval in Reilly v. First Nat. Bank (Ryan v. First Nat. Bank), 148 Ill. 349, 35 N. E. 1120. “The sole question to be now decided is whether the interposition . . . was material; and this inquiry is resolvable, to practical satisfaction, by the application of what we conceive to be the true test, viz.: Did the interposed matter make the ‘instrument speak a language different in legal effect from that which it originally spoke, which carries with it some change in the rights, interests, or obligations of the parties?’” Benton v. Clemmons, 157 Ala. 658, 47 So. 582. “It is the effect of the act upon the instrument and not the particular manner in which it is done, which is material, whether it be by interlineation, addition, substitution, change of words, detaching material memoranda therefrom, erasure, or by cancelation of some material

tions of what are deemed material alterations and what are deemed immaterial are found in several recent cases and the notes to them, to which reference is made below.²²

§ 2013. **Fraud in alteration—Prejudice to maker.**—A material alteration ordinarily presupposes constructive, but not necessarily actual, fraud.²³ Further, it seems that an alteration may be material, although of prejudice to its maker and of benefit to the nonconsenting party. This holds good to an unusual degree where it is a contract of suretyship which is sought to be enforced and the surety is in no wise responsible for the alteration urged by him as a defense to his liability.²⁴ However, there is authority for

provision thereof." *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 124 N. W. 20, 32 L. R. A. (N. S.) 518; *Blenkiron v. Rogers*, 87 Nebr. 716, 127 N. W. 1062, Ann. Cas. 1912A, 1042, and note, 31 L. R. A. (N. S.) 127n; *Commonwealth Nat. Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941. See also, *Neg. Inst. Law*, § 206; *Hill v. Fruita Mercantile Co.*, 42 Colo. 491, 94 Pac. 354, 126 Am. St. 172; *La Grange v. Coyle* (Ind. App.), 98 N. E. 75; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, and note, 2 Am. Rep. 598; *People v. Burr*, 127 App. Div. (N. Y.) 907, 111 N. Y. S. 1136, affirming order; *People v. Kuhne*, 57 Misc. (N. Y.) 30, 107 N. Y. S. 1020; *Wicker v. Jones* (N. Car.), 74 S. E. 801. A modification which causes a contract to read as it would if what would be judicially implied had originally been reduced to writing, is not invalidating in its nature. *Falmouth v. Roberts*, 9 M. & W. 469; *Aldons v. Cornwell*, L. R. 3 Q. B. 573; *Crawford v. Simonton*, 163 Ala. 609, 50 So. 1024; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Reed v. Kemp*, 16 Ill. 445; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Reilly v. First Nat. Bank* (*Ryan v. First Nat. Bank*), 148 Ill. 349, 35 N. E. 1120; *Harris v. State*, 54 Ind. 2; *Briscoe v. Reynolds*, 51 Iowa 673, 2 N. W. 529; *Rowley v. Jewett*, 56 Iowa 492,

9 N. W. 353; *James v. Dalbey*, 107 Iowa 463, 78 N. W. 51; *Hunt v. Adams*, 6 Mass. 519; *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239; *Brown v. Pinkham*, 18 Pick. (Mass.) 172; *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589; *Cole v. Hills*, 44 N. H. 227; *Huntington v. Finch*, 3 Ohio St. 445; *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Dec. 459; *Langdon v. Paul*, 20 Vt. 217; *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733.

²² *O. N. Bull Remedy Co. v. Clark*, 109 Minn. 396, 124 N. W. 20, 32 L. R. A. (N. S.) 518, and note reviewing many cases; *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284, and note reviewing many cases, especially those with reference to alterations in deeds.

²³ "Constructive fraud or legal fraud is an act, or course of conduct which, if sanctioned by law would, either in the particular case, or in common experience, secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud." *Smith on Frauds*, § 1.

²⁴ "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther.

the proposition that the fact that the alteration impinges against the interest of the defacer and works to the advantage of the other party, will, in the absence of any other circumstance, rebut the presumption of a fraudulent intent.²⁵

§ 2014. Effect of material alteration.—As has been indicated,²⁶ a guilty alteration will, ordinarily, effectively nullify the right of the one accomplishing it to enlist judicial aid in enforcing the contract.²⁷ This, as will be seen from

It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has the right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal." *Miller v. Stewart*, 9 Wheat. (U. S.) 680, 6 L. ed. 189, quoted in *Wier Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232. See further, *Lesser v. Scholze*, 93 Ala. 338, 9 So. 273; *Anderson v. Bellinger*, 87 Ala. 334, 6 So. 82, 4 L. R. A. 680, 13 Am. St. 46; *Brown v. Johnson*, 127 Ala. 292, 28 So. 579, 51 L. R. A. 403, 85 Am. St. 134; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Wyman v. Yeomans*, 84 Ill. 403; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Berryman v. Manker*, 56 Iowa 150, 9 N. W. 103; *McCormick & Co. v. Lauber*, 7 Kans. App. 730, 52 Pac. 577; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 37 S. W. 490; *Doane v. Eldridge*, 16 Gray (Mass.) 254; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113; *Fillmore County v. Greenleaf*, 80 Minn. 242, 83 N. W. 157; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Moore v. Hutchinson*, 69 Mo. 429; *Brown v. Straw*, 6 Nebr. 536, 29 Am. Rep. 369; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409n, 33 Am. St.

731; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Davis v. Bauer*, 41 Ohio St. 257; *Hartley v. Corboy*, 150 Pa. St. 23, 24 Atl. 295; *Heffner v. Wenrich*, 32 Pa. St. 423; *Craighead v. McLoney*, 99 Pa. St. 211; *Martin v. Thomas*, 24 How. (U. S.) 315; *Reese v. United States*, 9 Wall. (U. S.) 13; *Wood v. Steele*, 6 Wall. (U. S.) 80, 18 L. ed. 725.

²⁵ "The evidence does not show that Daggett had any fraudulent purpose in changing the rate of interest specified in the note, or that there was any other motive for it than his scruples against receiving what might be regarded as an excessive interest. The fact that the change was to a lower rate than that specified, and consequently was against his interest as a holder of the note, and to the advantage of the parties liable on it, in the absence of any other fact, rebuts the presumption of a fraudulent intent, which otherwise, perhaps, would arise from the alteration." *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446. See further, *State Sav. Bank v. Shaffer*, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394; *Clute v. Small*, 17 Wend. (N. Y.) 238.

²⁶ Ante, § 2005.

²⁷ An early leading adjudication of this point is to be found in *Henry Pigot's Case*, 11 Coke 26. See also, *Wicker v. Jones* (N. Car.), 74 S. E. 801, and *Master v. Miller*, 4 T. R. 320. 1 *Smith's Lead. Cas.* (11th ed.) 767; *Powell v. Divett*, 15 East 29; *Davidson v. Cooper*, 11 M. & W. 778, 13 M. & W. 343. "Two reasons are given for the rule:

an examination of the authorities just cited, has been held in regard to material alterations in very many different kinds of instruments. Thus, it has been so held in regard to deeds,²⁸ leases,²⁹ mortgages,³⁰ insurance policies,³¹ promissory notes,³² and the like.³³ Upon the question as to whether recovery may be had upon the original consideration, some difference of opinion exists. While some courts have declared, in general terms, that the consideration of a contract, avoided by a material alteration, is worthless as the basis of suit,³⁴ others seem to make the intent, present in the alteration, determinative of the actionable value of the consideration.³⁵ The prevailing general rule

First, that the identity of the contract is destroyed by the alteration; and, second, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected." *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. 466. See *Houston v. Davis*, 162 Ala. 122, 49 So. 869; *Wilson v. Barnard*, 10 Ga. App. 98, 72 S. E. 943; *Owen Creek Presb. Church v. Taggart*, 44 Ind. App. 393, 89 N. E. 406; *Whitsett v. People's Nat. Bank*, 138 Mo. App. 81, 119 S. W. 999; *Bodine v. Berg* (N. J.), 82 Atl. 901; *Wicker v. Jones* (N. Car.), 74 S. E. 801; *International Bank v. Mullen*, 30 Okla. 547, 120 Pac. 257; *Shiffer v. Mosier*, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155n (discrediting); *Kountz v. Kennedy*, 63 Pa. 187, 3 Am. Rep. 541; *First Nat. Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Baldwin v. Haskell Nat. Bank* (Tex.), 134 S. W. 1178; *Matson v. Jarvis* (Tex. Civ. App.), 133 S. W. 941.

²⁸ *Sharpe v. Orme*, 61 Ala. 263; *Robbins v. Magee*, 76 Ind. 381; *Churchill v. Capen*, 84 Vt. 104, 78 Atl. 734. But, as will hereafter be shown, it is not usually held to affect the deed as an executed instrument so as to divest title.

²⁹ *St. Louis Gun. Advertising Co. v. Baptiste*, 135 Mo. App. 503, 116 S. W. 438; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165.

³⁰ *Cutter v. Rose*, 35 Iowa 456;

Johnson v. Moore, 33 Kans. 90, 5 Pac. 406; *Pereau v. Frederick*, 17 Nebr. 117, 22 N. W. 235; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. 739; *Powell v. Pearlstine*, 43 S. Car. 403, 21 S. E. 328; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131.

³¹ *Fletcher v. Minneapolis & C. Ins. Co.*, 80 Minn. 152, 83 N. W. 29.

³² *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Dietz v. Harder*, 72 Ind. 208; *Laub v. Paine*, 46 Iowa 550, 26 Am. Rep. 163; *Edwards v. Sartor*, 69 S. Car. 540, 48 S. E. 537.

³³ See note in 32 L. R. A. (N. S.) 519.

³⁴ *White v. Haas*, 32 Ala. 430, 70 Am. Dec. 548; *Black v. Bowman*, 15 Ill. App. 166; *Ballard v. Franklin Life Ins. Co.*, 81 Ind. 239; *Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395; *Hocknell v. Sheley*, 66 Kans. 357, 71 Pac. 839; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Warder v. Williard*, 46 Minn. 531, 49 N. W. 300, 24 Am. St. 250; *Whitmer v. Frye*, 10 Mo. 348; *Walton Plow Co. v. Campbell*, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468; *Smith v. Mace*, 44 N. H. 553; *Meyer v. Huneke*, 55 N. Y. 412; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. 564, 32 Atl. 730, 47 Am. St. 929.

³⁵ *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211; *Elliott v. Blair*, 47 Ill. 342; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 208; *Clough v. Seay*, 49 Iowa, 111; *Sullivan v. Rudisill*, 63 Iowa 158, 18 N. W. 856; *Owen v. Hall*, 70 Md. 97, 16

seems to be that if the alteration was innocently made, recovery may be had upon the original consideration;³⁶ while, if fraudulently made, no recovery can be had upon the original consideration.³⁷

§ 2015. Alteration of partially executed contract.—The principles just noticed apply peculiarly to the case of an executory contract. When it comes to a contract whose obligations have been wholly or even partially performed and executed, a material alteration will not from the very nature of things be attended by as sweepingly disastrous results as those heretofore outlined. Thus, it seems that where performance has been had of a portion of a written contract, an interested party presuming to alter the latter even in a material respect will not be compelled to surrender the rights already vested in him—the penalty for his act being only the loss of whatever would accrue to him upon the further execution of the contract.³⁸ In ac-

Atl. 376; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *State Sav. Bank v. Shaffer*, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *York v. Jones*, 43 N. J. L. 332; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Columbia Distilling Co. v. Rech*, 135 N. Y. S. 206; *Booth v. Powers*, 56 N. Y. 22; *Boulware v. Bank of Missouri*, 12 Mo. 542; *Merrick v. Bowry*, 4 Ohio St. 60; *Savage v. Savage*, 36 Ore. 268, 59 Pac. 461; *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446; *Otto v. Halff*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. 56; *Baldwin v. Haskell Nat. Bank (Tex.)* 133 S. W. 864, judgment modified in 134 S. W. 1178; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *Gorden v. Robertson*, 48 Wis. 493, 4 N. W. 579.

³⁶ *Hampton v. Mayes*, 3 Ind. Ter. 65, 53 S. W. 483; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Savage v. Savage*, 36 Ore. 268, 59 Pac. 461; *Otto v. Halff*, 89 Tex. 384, 34 S. W. 910, 59 Am. St. 56. This is generally conceded as will be seen from an examination of the au-

thorities cited in the last two preceding notes.

³⁷ *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395; *Hocknell v. Sheley*, 66 Kans. 357, 71 Pac. 839; *Walton Plow Co. v. Campbell*, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468; *First Nat. Bank of Decorah v. Laughlin*, 4 N. Dak. 391, 61 N. W. 473, and other authorities already cited.

³⁸ "So far as a deed passes an estate, and is not merely executory, its executed effect is not disturbed by a subsequent alteration." *Bacon v. Hooker*, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. 279. "There was apparent, on the lease executed by the plaintiff to Johnson, a material alteration and erasure, by which the estate of Johnson was enlarged. The right of the plaintiff to re-enter was erased, and the situation of the grantor and grantee was materially changed. If this . . . erasure was made by Johnson . . . it destroyed all his future rights under that lease. And although it might not divest an estate already vested, and might not have

cordance with this doctrine, it is usually held that an alteration in a deed after delivery does not affect it so far as it is an executed contract, and hence, does not divest the title already vested.³⁹

§ 2016. Time of alteration—Presumptions.—The time of the alteration is often of controlling importance, although, strictly speaking, a modification before execution may be said not to be an alteration in the sense in which the latter term is used when it is considered as discharging a contract. Such modification, or alteration in the popular sense, before delivery is really part of the negotiations, which are merged in the contract as finally agreed upon and delivered.⁴⁰ In other words, the contract as finally agreed upon is the contract of the parties. So, it has been held that alteration of a deed by consent before delivery⁴¹ or even after

operated on his acts committed before the alteration was made . . . in odium spoliatoris he must be considered as having destroyed the evidence of his title fraudulently and thereby lost all his subsequent claim under and by virtue of the same, either to retain the possession, or preclude the plaintiff from entering on the premises leased." *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165 and note. See further, *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. 78; *Alabama State Land Co. v. Thompson*, 104 Ala. 750, 16 So. 440, 53 Am. St. 80; *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470; *John v. Hatfield*, 84 Ind. 75; *Hollingsworth v. Holbrook*, 80 Iowa 151, 45 N. W. 561, 20 Am. St. 411; *Slattery v. Slattery*, 120 Iowa 717, 95 N. W. 201; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Herrick v. Malin*, 22 Wend. (N. Y.) 388; *Arrison v. Harmstead*, 2 Pa. St. 191; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Aft. 739; *United States v. West's Widow*, 22 How. (U. S.) 315, 16 L. ed. 317; *North v. Henneberry*, 44 Wis. 306. And compare, *Bryan v. Carter* (Ala.), 51 So. 999; *St. Louis*

Gunning Adv. Co. v. Baptiste, 135 Mo. App. 503, 116 S. W. 438.

³⁹ *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 117, 30 So. 466, 90 Am. St. 22; *Burgess v. Blake*, 128 Ala. 105, 28 So. 963, 86 Am. St. 78; *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942, 9 A. & E. Ann. Cas. 481; *Slattery v. Slattery*, 120 Iowa 717, 95 N. W. 201; *Clark v. Creswell*, 112 Md. 339, 76 Atl. 579; *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284. But see, *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216. Some courts hold that an alteration may be valid even after delivery if made with consent. See *Respass v. Jones*, 102 N. Car. 5, 8 S. E. 770; *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067. And compare also, *Goodwin v. Norton*, 92 Maine 532, 43 Atl. 111.

⁴⁰ *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12; *Bucki v. Seitz*, 39 Fla. 55, 21 So. 576; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Prather v. Zulauf*, 38 Ind. 155. See also, *Frazier v. State Bank of Decatur* (Ark.), 141 S. W. 941; *Hess v. Schaffner* (Tex. Civ. App.), 139 S. W. 1024.

⁴¹ *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740.

delivery, if followed by redelivery,⁴² does not invalidate and discharge the contract. But alteration before final delivery may discharge parties to the instrument whose rights are materially affected thereby and who did not consent to such alteration.⁴³ There is a sharp conflict of authority as to whether there is any presumption as to the time of alteration, and, if so, what it is. Some courts hold that there is no true presumption upon the subject; many others hold that an alteration apparent upon the face of the instrument, in the absence of explanation, is presumed to have been made before delivery, while a few hold that it is presumed to have been made after delivery and a somewhat larger number hold that this is the presumption where the circumstances are suspicious but not otherwise. It is not the purpose to consider this subject at length in this connection, and a reference to some of the best or fullest treatments of it and to some of the more recent cases must suffice.⁴⁴

⁴² *Abbott v. Abbott*, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 470. But it may be required to be reacknowledged also. *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284. In *Eadie v. Chambers*, 172 Fed. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879n, redelivery is held necessary and it is also held that on redelivery the instrument as altered by consent would govern as to the title of the grantee.

⁴³ *State v. McGonigle*, 101 Mo. 353, 13 S. W. 758, 8 L. R. A. 735, 20 Am. St. 609. See also, *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, 45 Pac. 12; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Ohio Valley Bank v. Lockwood*, 13 W. Va. 392, 31 Am. Rep. 768. Most of these cases hold the party discharged was accommodation indorser. But see as to surety held not released if alteration is before contract is signed, *Schreiber v. Worm*, 164 Ind. 7, 72 N. E. 852; but released if after. *Brannum Lumber Co. v. Pickard*, 33 Ind. App. 484, 71 N. E. 676.

⁴⁴ For a review and classification of the different decisions and views, see note in 86 Am. St. 129; 2 Elliott Ev. §§ 1504-1510. Presumption that alteration was before execution, see *Rankin v. Tygard*, 198 Fed. 795, 804. See also, *Ward v. Cheney*, 117 Ala. 238, 22 So. 996; *Cross v. Aby*, 55 Fla. 311, 45 So. 820; *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S. E. 440; *James v. Holdane*, 142 Ky. 450, 134 S. W. 435; *Kilpatrick v. Wiley*, 197 Mo. 123, 95 S. W. 213; *Cass County v. American Exch. State Bank*, 9 N. Dak. 263, 83 N. W. 12; *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770. Presumed after execution, at least, where suspicious, see, *Ramsbousch v. Supreme Council Mystic Tilers*, 119 Iowa 263, 93 N. W. 277; *Kalteyer v. Mitchell*, 102 Tex. 390, 117 S. W. 792, 132 Am. St. 889 (if suspicious); *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879. No presumption of law at least unless suspicious, see *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 264, 72 Am. St. 216; *Stockand v. Hall*, 54 Wash. 106, 102 Pac. 1037 (in case of public record).

§ 2017. **Effect of material alteration as to bona fide holders.**—The effect of an alteration is not always confined to the immediate parties. It may not only have the effect of discharging the principal or releasing a surety or the like,⁴⁵ but it may vitiate the instrument even in the hands of an innocent purchaser or bona fide holder.⁴⁶ Thus, a material alteration of a mortgage by the mortgagee after its execution and without consent of the mortgagor has been held to vitiate the instrument so as to prevent its foreclosure even by an innocent assignee,⁴⁷ and the same rule is applied in other cases of bona fide assignees who were not indorsees.⁴⁸ So, the rule has often been applied even as against bona fide holders of promissory notes.⁴⁹ But there are some cases in which a recovery has been allowed because the maker was negligent, and bona fide holders have often been protected where blanks were filled, either upon the ground of negligence or estoppel or upon the ground of implied authority.⁵⁰

⁴⁵ *Smith v. United States*, 2 Wall. (U. S.) 219, 17 L. ed. 788. See also, *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *United States Glass Co. v. West Va. Flint Bottle Co.*, 81 Fed. 993, revd. 89 Fed. 828, 32 C. C. A. 364; *State v. Findley*, 101 Mo. 368, 14 S. W. 111; *Martin v. Thomas*, 24 How. (U. S.) 315, 16 L. ed. 689; *Batchelder v. White*, 80 Va. 103.

⁴⁶ *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892, 4 Am. St. 18; *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622; *Derr v. Keaough*, 96 Iowa 397, 65 N. W. 339; *Greenfield Savings &c. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661. Compare also, *Ball v. Beaumont*, 66 Nebr. 56, 92 N. W. 170.

⁴⁷ *Coles v. Yorks*, 28 Minn. 464, 10 N. W. 775; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

⁴⁸ *Burch v. Daniel*, 101 Ga. 228, 28 S. E. 622; *Searles v. Seipp*, 6 S. Dak. 472, 61 N. W. 804.

⁴⁹ *Hert v. Oehler*, 80 Ind. 83; *Knoxville Nat. Bank v. Clark*, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129; *Bank v. Wangerin*, 65

Kans. 423, 70 Pac. 330, 59 L. R. A. 717, *First Nat. Bank v. Carter*, 138 Mich. 421, 101 N. W. 585; *Seebold v. Tatlie*, 776 Minn. 131, 78 N. W. 967; *First Nat. Bank v. Laughlin*, 4 N. Dak. 391, 61 N. W. 473; *Newman v. King*, 54 Ohio St. 273, 43 N. E. 683, 35 L. R. A. 471, 56 Am. St. 705; *Lanier v. Clarke* (Tex. Civ. App.), 133 S. W. 1093; *Hecht v. Shenners*, 126 Wis. 27, 105 N. W. 309. But compare, *Croswell v. Labree*, 81 Maine 44, 16 Atl. 331, 10 Am. St. 238; *Wolfersnaam v. Bell*, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. 126.

⁵⁰ *Winter v. Pool*, 104 Ala. 580, 16 So. 543; *Holmes v. Bank of Ft. Gaines*, 120 Ala. 493, 24 So. 959 (both upon the ground of negligence); *Harvey v. Smith*, 55 Ill. 224 (but compare *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769); *Bowen v. Laird*, 166 Ind. 421, 77 N. E. 852; *Cason v. Grant County &c. Bank*, 97 Ky. 487, 17 Ky. L. 344, 31 S. W. 40, 53 Am. St. 418; *Humphrey &c. Hardware Co. v. Herrick*, 72 Nebr. 878, 101 N. W. 1016, 102 N. W. 1010.

§ 2018. Effect of ratification of alteration.—As a material alteration is the cause, and loss of rights the effect, so ratification is that which renders the cause impotent and the effect abortive. Ratification preserves the rights which would otherwise be ipso facto lost. In it lies the hope of him whom it has pleased to violate the integrity of a written instrument. "With some exceptions, * * * he who may authorize in the beginning,⁵¹ may ratify in the end,"⁵² and ratification after a material alteration has been made differs not at all, it is said, in its antidotal operation, from consent procured prior thereto.⁵³ As to "whether a new consideration is essential to support the contract thus made by ratification, there is some conflict of authority. The courts of Kentucky and Minnesota hold that a new consideration is necessary.⁵⁴ * * * But a great majority of courts of last resort, if indeed not all of them, except in the states named, sustain the contrary doctrine."⁵⁵ The general rules as to ratification apply here, as elsewhere. The

⁵¹ Ante, note 9, § 2008.

⁵² First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430, quoted with approval in Emerson v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24.

⁵³ Tarleton v. Shingler, 7 C. B. 812, 62 E. C. L. 812; Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. 832; Bryan v. Carter (Ala.), 51 So. 999; Woodard v. Grover, 156 Cal. 581, 105 Pac. 736; Baker v. Baker, 239 Ill. 82, 87 N. E. 868; Goodspeed v. Cutler, 75 Ill. 534; Emerson v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; Grimstead v. Briggs, 4 Iowa 559; Pelton v. Prescott, 13 Iowa 567; Andrews v. Burdick, 62 Iowa 714, 16 N. W. 275; Holyfield v. Harrington, 84 Kans. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131n; Prouty v. Wilson, 123 Mass. 297; Stewart v. First Nat. Bank, 40 Mich. 348; King v. Hunt, 13 Mo. 97; Humphreys v. Guillo, 13 N. H. 385, 38 Am. Dec. 499; Bodine v. Berg (N. J.), 82 Atl. 901; National State Bank v. Rising, 4 Hun (N. Y.) 793; Styles v. Scotland (N. Dak.), 134 N. W. 708;

Barrett v. Effenberg, 29 Okla. 679, 119 Pac. 135; Stahl v. Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; Wilson v. Jamieson, 7 Pa. St. 126; Shiffer v. Mosier, 225 Pa. 552, 74 Atl. 426, 24 L. R. A. (N. S.) 1155n; Matson v. Jarvis (Tex. Civ. App.), 133 S. W. 941; Smith v. United States, 2 Wall. (U. S.) 219, 17 L. ed. 788. And compare, Linnington v. Strong, 107 Ill. 295.

⁵⁴ Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. 754. See also, Warren v. Fant's Trustee, 79 Ky. 1.

⁵⁵ Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. 832. See further, Goodspeed v. Cutler, 75 Ill. 534; Pelton v. Prescott, 13 Iowa 567; Holyfield v. Harrington, 84 Kans. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131n; Prouty v. Wilson, 123 Mass. 297; Stewart v. First Nat. Bank, 40 Mich. 348; First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; King v. Hunt, 13 Mo. 97; Commercial Bank v. Warren, 15 N. Y. 577; Matson v. Jarvis (Tex. Civ. App.), 133 S. W. 941.

ratification may, therefore, be implied as well as express.⁵⁶ but the party against whom it is sought to show implied ratification by conduct, or the like, must have had knowledge of the alteration.⁵⁷ And where the old strict rule as to seals still obtains, it is held that the ratification of an alteration of a sealed instrument must be under seal.⁵⁸

§ 2019. Questions of law and questions of fact.—The question as to the materiality or immateriality of an alteration is a question of law for the court.⁵⁹ But the question as to whether in fact an alteration has been made is a question of fact for the jury.⁶⁰ So, whether the change was made before or after execution, by whom it was made, and whether with or without consent are, likewise, usually questions of fact.⁶¹

⁵⁶ *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *Prouty v. Wilson*, 123 Mass. 297; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *Matlock v. Wheeler*, 29 Ore. 64, 40 Pac. 5, 43 Pac. 867.

⁵⁷ *Cutler v. Rose*, 35 Iowa, 456; *Boalt v. Brown*, 13 Ohio St. 364; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567. See also, *Jacobs v. Gilbreath*, 45 S. Car. 46, 22 S. E. 757.

⁵⁸ *Nesbitt v. Turner*, 155 Pa. St. 429, 26 Atl. 750; *Kilkelly v. Martin*, 34 Wis. 525. But see, *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290; *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093.

⁵⁹ *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Heard v. Tapan*, 116 Ga. 930, 43 S. E. 375; *Belfast Nat. Bank v. Harriman*, 68 Maine 522; *Fisher-dick v. Hutton*, 44 Nebr. 122, 62 N. W. 488; *Kinard v. Glenn*, 29 S. Car. 590, 8 S. E. 203; *Keen's Exr.*

v. Monroe, 75 Va. 424. See also, *Cross v. Aby*, 55 Fla. 311, 45 So. 820, citing 2 Elliott Ev. § 1516.

⁶⁰ *Elbert v. McClelland*, 8 Bush (Ky.) 577; *Von Eherenkrook v. Webber*, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761; *Wood v. Steele*, 6 Wall. (U. S.) 80, 18 L. ed. 725.

⁶¹ 2 Elliott Ev. § 1516; *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Millikin v. Marlin*, 66 Ill. 13; *Cornell v. Nebeker*, 48 Ind. 463; *Wilson v. Hotchkiss' Estate*, 81 Mich. 172, 45 N. W. 838; *Wilson v. Henderson*, 9 Sm. & M. (Miss.) 375, 48 Am. Dec. 716; *Citizens' Nat. Bank v. Williams*, 174 Pa. St. 66, 34 Atl. 303, 35 L. R. A. 464; *Martin v. Kline*, 157 Pa. St. 473, 27 Atl. 753. See also, *Whitfield v. Collingwood*, 1 C. & K. 325, 47 E. C. L. 325.

CHAPTER XLVII.

DISCHARGE BY BREACH.

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| § 2025. Meaning and effect of breach of contract in general. | § 2040. Creation of impossibility of performance by death of party. |
| 2026. Election to terminate contract on breach. | 2041. Creation of impossibility of performance where promisor is disabled by act of promisee. |
| 2027. Renunciation—Anticipatory breach—English rule. | 2042. Creation of impossibility by bankruptcy or insolvency of party. |
| 2028. Renunciation—Anticipatory breach—Controlling American rule. | 2043. Creation of impossibility of performance by ill treatment. |
| 2029. Renunciation—Anticipatory breach—Contrary American view. | 2044. Nonperformance on failure to perform conditions precedent. |
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| 2031. Renunciation—Illustrations of principles. | 2046. Divisible and subsidiary promises in general. |
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| 2033. Right of party to disregard renunciation. | 2048. Breach in failure to perform a vital condition of the contract. |
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| 2036. Voluntary creation of impossibility of performance before performance is due. | 2051. Waiver of breach as ground for damages. |
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| 2039. Creation of impossibility of performance by sale of subject-matter to another. | |

§ 2025. **Meaning and effect of breach of contract in general.**—A breach of contract is the commission of some act, or the omission of some act, which violates the specified or implied conditions of a contract.¹ The breach may occur in any one of three ways: the party may renounce his liability under the contract, or he may by his own act make

¹ *People v. New York Produce Exchange*, 8 Misc. (N. Y.) 552, 29 N. Y. S. 307; *Ashland Coal &c. Co. v. Hull Coal &c. Corp.*, 67 W. Va. 503, 68 S. E. 124; *Thomas v. Richards*, 124 Ga. 942, 53 S. E. 400 (contract to pay instalment notes executed by another).

it impossible for him to fulfill his liabilities under the contract, or he may totally or partially fail to perform his promise. The first two forms of breach may take place while the contract is still executory and before performance can be legally demanded. The third form of breach can only take place at or during the time for performance. The effect of a breach of a contract by one party is to excuse performance by the other and generally, but not always, to discharge the contract.² It is not feasible to illustrate the infinite variety of breach possible under the foregoing classification. It may not be amiss, however, to refer at this time to that class of contracts where the vendor of a business binds himself not to engage in business in the locality in competition with his vendee. Such a contract is broken where the vendor conducts the competitive business in the name of a member of his family,³ or carries on the business as trustee for another;⁴ or furnishes money to a relative to engage in the competing business;⁵ or enters into the same business as a partner of a competitor of his vendee;⁶ or engages in business as a broker in his vendee's line of business;⁷ or takes employment as a traveling man for a rival concern;⁸ or subscribes for stock in a corporation engaged in a business of the character he has sold;⁹ or where an attorney after sale of his practice demands pay for advice given people in the designated territory within

² *Heffington v. Sturgis*, 96 Ark. 647, 132 S. W. 920; *Alachua Phosphate Co. v. Anglo-Continental Guano Works*, 51 Fla. 143, 40 So. 71; *Montgomery v. Hunt*, 99 Ga. 499, 27 S. E. 701; *Pungs v. American Brake-Beam Co.*, 200 Ill. 306, 65 N. E. 645; *Dodge v. Rogers*, 9 Gil. (Minn.) 209; *Wasser v. Western Land Securities Co.*, 97 Minn. 460, 107 N. W. 160; *Pittsburg Steel Foundry v. Pittsburg Steel Co.*, 223 Pa. 430, 72 Atl. 813; *Chapman v. Warden*, 50 Tex. Civ. App. 282, 110 S. W. 533 (well digging contract). Where the facts manifest an intention of a party in default to abandon the contract, or where because of the breach, the object sought to be effected is rendered

impossible of accomplishment, the breach operates as a discharge of the whole contract, unless it is waived. *El Paso & S. W. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922.

³ *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842.

⁴ *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064.

⁵ *C. H. Barrett Co. v. Ainsworth*, 156 Mich. 351, 120 N. W. 797.

⁶ *Blom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293.

⁷ *Jayne & Co. Lumber Co. v. Turner*, 132 Iowa 7, 109 N. W. 307.

⁸ *Clark v. Britton* (N. H.), 79 Atl. 494.

⁹ *Merica v. Burget*, 36 Ind. App. 453, 75 N. E. 1083.

the prohibited time.¹⁰ In all cases of this character the breach must be a substantial breach.¹¹ And a party to a contract is not justified in treating it as broken by the adverse party, unless there has been distinct and unequivocal intention manifested, either by words or conduct of the adverse party, not to perform the contract.¹² As a general rule, where the parties to a contract stipulate what the result of a breach shall be, the courts have no authority to impose other consequences than those agreed upon.¹³ Ordinarily any person has a right to breach his mere executory agreement and submit to legal damages therefor.¹⁴

§ 2026. Election to terminate contract on breach.—On breach of a contract the party not in default generally has the right to elect whether to terminate the contract or not and he may exercise this right where such election does not increase the damages resulting from the breach.¹⁵ Thus, in the case of a building contract, it is held that if the owner knows that the building will not be built according to contract, he must either take it or abandon it to the contractor and he can not let it remain unfinished and increase his damages for deterioration or loss of rentals.¹⁶ "It is well settled," says the Supreme Court of Illinois, "that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies. He may treat the contract as

¹⁰ *Edmundson v. Render*, 74 L. J. Ch. 585.

¹¹ *Brown v. Edsall*, 23 S. Dak. 610, 122 N. W. 658.

¹² *Majestic Milling Co. v. Cope-land*, 93 Ark. 195, 124 S. W. 521.

¹³ *Foxley v. Rich*, 35 Utah 162, 99 Pac. 666. See also, *Haas v. Mutual Life Ins. Co.*, 84 Nebr. 682, 121 N. W. 996; *El Paso & S. W. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922.

¹⁴ *Lincoln v. Chas. Ashular Mfg. Co.*, 142 Wis. 475, 125 N. W. 908.

¹⁵ *Frost v. Knight*, L. R. 7 Exch. 111; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. 112; *Moline Scale Co. v. Beed* 52 Iowa, 307, 3

N. W. 96, 35 Am. Rep. 272; *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575; *Collins v. Delaporte*, 115 Mass. 159; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. 788; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 22 Sup. Ct. 780; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. 33.

¹⁶ *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292.

rescinded, and recover on quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing. In the latter case, the contract would be continued in force for that purpose."¹⁷ The act of bringing an action or taking legal steps to enforce a contract amounts to an election by the party not to rescind the contract on account of anything known to him, and such election is conclusive against him.¹⁸ And where the parties to a contract have repudiated it, and recognized and each accepted the repudiation of the other and conducted litigation on that basis, neither can afterward claim its enforcement.¹⁹ Where a party to whom several notes are payable, under a contract, gives written notice that he "terminates and rescinds" the contract because of the nonpayment of some of the notes, but at the same time

¹⁷ *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33. "The parties to an executory contract have a right to have the contractual relation maintained up to the time for its performance, and, if one of the parties thereto renounces or breaches it before that time, the other may sue on the breach at once. This proposition is supported by the weight of authority. But there are limitations to the rule, one of which is that if one of the contracting parties elects not to accept the breach or renunciation, but continues to insist upon the performance of the contract according to its terms, then the contract remains open or in existence for the benefit of both parties; and if, during such time, anything occurs to discharge or invalidate it, the party seeking to renounce it may take advantage of such discharge. 9 Cyc. (2d ed.) 637; *Smith v. Georgia Loan, Savings & Banking Co.*,

113 Ga. 975, 39 S. E. 410; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Avery v. Bowden*, 5 El. & Bl. 714." *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575.

¹⁸ *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086; *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923. *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693n, per Danforth, J.: "By bringing the first action after knowledge of the fraud . . . plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principles applied in *Equitable & Co. Foundry Co. v. Hersee*, 103 N. Y. 26, 9 N. E. 487, and *Hays v. Midas*, 104 N. Y. 602, 11 N. E. 141, requires this construction."

¹⁹ *Kelly v. Short* (Tex. Civ. App.), 75 S. W. 877.

returns only the notes that are not yet due, it has been held that the notice should be construed as terminating the contract as to the future only, and not as rescinding it so as to cut off the accrued rights on the notes that are due, and that in such a case the word "rescind" is to be regarded as mere tautology and synonymous with the word "terminate."²⁰ Generally where one of the parties to a written executory contract renounces and refuses to perform it, the other party may, at his election, act upon the assumption of a breach before the time of performance arrives and treat it as abandoned for the future.²¹ But, on the other hand, he may elect to keep the contract in force for the purpose for which it was made, and in such case his own obligation, as well as that of the other party, will continue until the time of performance.²² Where a person agrees to sell the furniture in his hotel at an appraisement to be made by a third party, and, while present himself, refuses to allow the purchaser to be present, the latter has the right to abandon the agreement.²³

§ 2027. Renunciation—Anticipatory breach—English rule.

—In England it is well settled that the positive and absolute refusal by one party to carry out the contract is in itself an immediate complete breach of it on his part, and gives an immediate right of action.²⁴ The English doctrine

²⁰ *Hurst v. Trow's Printing Co.*, 2 Misc. (N. Y.) 361, 22 N. Y. S. 371, 51 N. Y. St. 206, 30 Abb. N. Cas. 1, affd. 142 N. Y. 637, 37 N. E. 566.

²¹ *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432; *Richardson v. Woodland Town Co.*, 5 Kans. App. 626, 47 Pac. 556. But see, *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436, 1 *Silvernail Ct. App.* 550; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388. As to what shall be taken as a renunciation of a contract, see *Mutual Reserve Life Assn. v. Taylor*, 99 Va. 208, 37 S. E. 854.

²² *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357, affg. 37 App. Div. (N. Y.) 625. *Bernstein v. Meech*, 130 N. Y. 354, 29

N. E. 255, per Bradley, J.: "Whatever view may have been taken of the right of the defendants to treat the contract . . . as at an end, . . . they disposed of that question by their letter to him. By this it appeared that the defendants elected to keep the contract in force . . . This operated alike upon the rights of both parties, and the plaintiff was justified in so understanding it." *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Frost v. Knight*, L. R. 7 Exch. 111; *Zuck v. McClure*, 98 Pa. St. 541.

²³ *Tibbets v. Sartwell*, 66 N. H. 418, 29 Atl. 411. See also, *Hook v. Philbrick*, 23 N. H. 288.

²⁴ *Frost v. Knight*, L. R. 7 Exch. 111; *Roper v. Johnson*, L. R. 8 C.

of anticipatory breach of contract is summed up by Lord Esher as follows: "I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract can not by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He can not, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."²⁵ In the leading

P. 167; *Rhymney R. Co. v. Brecon &c. R. Co.*, 69 Law J. Ch. 813, 83 L. T. 111, 49 Wkly. Rep. 116; *Hoohster v. De La Tour*, 2 El. & Bl. 678; *Williams Cooperage Co. v. Scofield*, 115 Fed. 119, 53 C. C. A. 23; *Lockport v. Shields*, 87 Ill. App.

150; *Genesee Fruit Co. v. Barrett*, 67 Ill. App. 673; *Murphy v. Black*, 78 Mo. App. 316. See also, *Danube and Black Sea R. &c. Co. v. Xenos*, 13 C. B. (N. S.) 825.

²⁵ *Johnstone v. Milling*, L. R. 16 Q. B. D. 460.

case on this subject in England a party agreed to employ one as a courier, but, before the time of service arrived, refused to perform the agreement, and notified the courier that he would not employ him. It was unequivocally held that an immediate action lay for such renunciation.²⁶ Where a man promised to marry a woman as soon as his father should die, but during the father's lifetime declared absolutely his intention never to fulfill his contract to marry the woman, it was held that this was a breach of contract, and the woman could sue at once.²⁷ Likewise, where a renunciation of a marriage contract to wed in a reasonable time is made before the expiration of the time, there is an immediate breach.²⁸ The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages. Thus, where the seller of personal property repudiates his contract before the time for delivery has arrived, the damages are to be estimated by the difference between the contract price and the market price at the day or days appointed for performance of the contract.²⁹ Where a party, by his agent, agreed with a railway company to receive certain goods on board his ship, to be carried to a port in the Black Sea, and, before the time for the first shipment arrived, he wrote the company that he would not abide by the contract, as the agent had no authority to make it, but offered a substituted contract, it was held that the company could accept such renunciation as a breach, and negotiate with another shipowner for the conveyance of the goods.³⁰ Under the main principle, a renunciation of a contract, before the time for performance arrives, will dispense with the performance, or the offer to perform, conditions precedent or concurrent.³¹ The prom-

²⁶ *Hoohster v. De La Tour*, 2 El. & Bl. 678.

²⁷ *Frost v. Knight*, L. R. 7 Exch. 111.

²⁸ *Cherry v. Thompson*, L. R. 7 Q. B. 573.

²⁹ *Roper v. Johnson*, L. R. 8 C. P. 167; *Brown v. Muller*, L. R. 7 Ex. 319 (The rule laid down in this case was applied to the proceeding of

cy pres.); *Wulff v. Lindsay*, 8 Ariz. 168, 71 Pac. 963; *Gansey v. Orr*, 173 Mo. 532, 73 S. W. 477.

³⁰ *Danube R. Co. v. Xenos*, 13 C. B. (N. S.) 825.

³¹ *Chapman v. Kansas City C. & S. R. Co.*, 146 Mo. 481, 48 S. W. 646; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516

isee need not wait until the day of performance before making new arrangements. He does not lose his remedy against the promisor by providing at once against losses likely to arise.³²

§ 2028. Renunciation—Anticipatory breach—Controlling American rule.—The American courts, with almost practical unanimity, adopt the rule of the English courts and hold that an unqualified and positive refusal to perform a contract before performance is due may be regarded as a complete breach of the contract where the renunciation goes to the whole contract, and the injured party may bring his action at once.³³ "The parties to a contract which is wholly ex-

(In this case, the parties had entered into an engagement to marry "in the fall," and the man told the woman in October that he would not perform the contract. It was held that an action commenced immediately was not prematurely brought. But the court expressly refused to extend this rule to any other case than an engagement to marry.); *Canda v. Wick*, 100 N. Y. 127, 2 N. E. 381; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Ganser v. Weber*, 35 Misc. (N. Y.) 303, 71 N. Y. S. 773; *Gast v. Johnston*, 3 N. Y. St. 258; *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430, 29 N. E. 969; *Parr v. Greenbush*, 112 N. Y. 246, 19 N. E. 684; *Schwab v. Coghlan*, Daily Reg. (N. Y.) Dec. 4th, 1883; *Willis v. Simmonds*, 8 Hun (N. Y.) 189.

³² *Chamber of Commerce v. Sollitt*, 43 Ill. 519. See also, *Mountjoy v. Metzger*, 12 Am. Law Reg. 442; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *Smith v. Lewis*, 26 Conn. 110; *Black v. Woodrow*, 39 Md. 194; *Harkreader v. Eubanks* (Miss.), 12 So. 210; *Casey v. Gunn*, 29 Mo. App. 14; *Buffkin v. Baird*, 73 N. Car. 283; *Haines v. Tucker*, 50 N. H. 307; *Mowry v. Kirk*, 19 Ohio St. 375; *Simmons v. Green*, 35 Ohio St. 104; *Greene v. Haley*, 5 R. I. 260; *Derby v. Johnson*, 21 Vt. 17; *Allen v. Thrall*, 36 Vt. 711; *Curtis v. Smith*, 48 Vt. 116.

³³ *Hancock v. New York Life Ins. Co.*, 13 Am. Law Reg. 103; *Eastern*

Arkansas &c. Fence Co. v. Tanner, 67 Ark. 156, 53 S. W. 886; *Landvoigt v. Paul*, 27 App. D. C. 423; *Sierra Land &c. Co. v. Bricker*, 3 Cal. App. 190, 85 Pac. 665; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Dingley v. Oler*, 11 Fed. 372, revd. in 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850, but upon the ground that there had been no renunciation; *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83, 8 C. C. A. 14; *Edward Hines Lumber Co. v. Alley*, 73 Fed. 603, 19 C. C. A. 599; *Smiley v. Barker*, 83 Fed. 684, 28 C. C. A. 9; *Gray v. Smith*, 83 Fed. 824, 28 C. C. A. 168; *Marks v. Van Eeghen*, 85 Fed. 853, 30 C. C. A. 208; *Northrop v. Mercantile Trust &c. Co.*, 119 Fed. 969; *Sperry & Hutchinson Co. v. O'Neill-Adams Co.*, 185 Fed. 231, 107 C. C. A. 337; *Hall v. Northern & Southern Co.*, 55 Fla. 242, 46 So. 178; *Smith v. Georgia &c. Co.*, 113 Ga. 975, 39 S. E. 410; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Wight v. Gardner*, 66 Ill. 94; *Fallansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *John A. Roebing's Sons Co. v. Lock-stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Chicago Title & Trust Co. v. Sagola Lumber Co.*, 148 Ill. App. 333; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Ballance v. Vanuxem*, 191 Ill. 319, 61 N. E. 85, affg. 90 Ill. App. 232; *Engesette v. McGilvray*, 63 Ill.

ecutory," says the Supreme Court of the United States, "have a right to the maintenance of contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus poenitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of per-

- App. 461; *Shields v. Carson*, 102 Ill. App. 38; *Fox v. Kitton*, 19 Ill. 519; *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Crabtree v. Messersmith*, 19 Iowa 179; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *McCormick v. Basal*, 46 Iowa 235; *Wallingford v. Atkins*, 24 Ky. L. 1995, 72 S. W. 794; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173; *Sullings v. Goodyear & Co.*, 36 Mich. 313; *McGregor v. Estate of Ross*, 96 Mich. 103, 55 N. W. 658; *McGuire v. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130; *Chapman v. Kansas City & Co. R. Co.*, 146 Mo. 481, 48 S. W. 646; *Claes & Lehenbeuter Mfg. Co. v. McCord*, 65 Mo. App. 507; *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 665, 52 Atl. 467, affg. 66 N. J. L. 9, 48 Atl. 606; *Franchot v. Leach*, 5 Cow. (N. Y.) 506; *Traver v. Halsted*, 23 Wend. (N. Y.) 66; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285 (a leading case, containing a review of all the cases); *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Windmuller v. Pope*, 107 N. Y. 674, 1 Silvernail Ct. App. (N. Y.) 550, 14 N. E. 436; *Osborn Co. v. Franklin Mills Co.*, 45 App. Div. (N. Y.) 325, 60 N. Y. S. 1013; *Seymour v. Warren*, 114 App. Div. (N. Y.) 813, 100 N. Y. S. 267, affd. 190 N. Y. 512, 83 N. E. 1131; *Schmitt v. Schnell*, 14 Ohio C. C. 153, 7 Ohio C. D. 657; *Zuck v. McClure*, 98 Pa. St. 541; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836; *Mountjoy v. Metzger*, 9 Phila. (Pa.) 10, 29 Leg. Int. 300; *Kilgore v. Northwest Texas & Co. Soc.*, 90 Tex. 139, 37 S. W. 598; *Carlisle v. Green* (Tex. Civ. App.), 131 S. W. 1140; *Smoot's Case*, 15 Wall. (U. S.) 36, 21 L. ed. 107, 8 Ct. Cl. (U. S.) 96; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 22 Sup. Ct. 780; *Saylor's Case*, 14 Ct. Cl. (U. S.) 453; *Davis v. Grand Rapids School Furniture Co.*, 41 Va. 717, 24 S. E. 630; *Mutual Reserve Fund Life Assn. v. Taylor*, 99 Va. 208, 37 S. E. 854; *Cobb v. Hall*, 33 Vt. 233; *Gibson v. Wheldon*, 82 Vt. 175, 72 Atl. 909; *McCormick v. Tappendorf*, 51 Wash. 312, 99 Pac. 2; *James v. Adams*, 16 W. Va. 245 (action by the seller against the buyer, on his declaration in advance, that he would not accept the goods); *Chapman v. Beltz & Sons Co.*, 48 W. Va. 1, 35 S. E. 1013; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576; *Richards v. Manitowoc & Co. Tract. Co.*, 140 Wis. 85, 121 N. W. 937, 133 Am. St. 1063.

formance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"³⁴

§ 2029. Renunciation — Anticipatory breach — Contrary American view.—A contrary view is taken by some American courts. The Massachusetts courts adopt the doctrine that a renunciation may give cause for treating the contract as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights, but that this does not constitute a present violation of legal right of the other party, or confer upon him a present right of action. Says the court: "Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of nonperformance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed."³⁵ A like rule is recognized in North Dakota. There the holding is that the only effect of the renunciation is to dispense with an offer to perform by the other party if such refusal to stand by the agreement is not withdrawn before the performance is due under the terms thereof.³⁶ A similar doctrine is recognized in Maine³⁷ and Nebraska.³⁸ One of the propositions on which the Massachusetts decision rests is that the adoption of the prevailing rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. This point was noted by the Supreme Court of the United States and was declared to be without controlling force. "In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration

³⁴ *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

³⁵ *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Heard v. Bowers*, 23 Pick. (Mass.) 455; *Collins v. Delaporte*, 115 Mass. 159; *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362.

³⁶ *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760.

³⁷ *South Gardiner Lumber Co. v. Bradstreet*, 97 Maine 165, 53 Atl. 1110.

³⁸ *Carstens v. McDonald*, 38 Nebr. 858, 57 N. W. 757; *King v. Waterman*, 55 Nev. 324, 75 N. W. 830.

has passed; there are no mutual obligations, and cases of that sort do not fall within the reason of the rule."³⁹

§ 2030. Renunciation during performance.—The renunciation may occur during the performance of the contract, in which case the promisee may treat the renunciation as a discharge from further performance on his part and thereupon bring an action, although such performance would otherwise be a condition precedent to the liability of the promisor.⁴⁰ Accordingly, where the owner of a building repudiates the contract for its erection, and refuses to allow the contractor to go on with the work, the contractor has an immediate right of action and is not required to produce certificates of an engineer, which the contract stipulated should be produced as a condition to payment.⁴¹ So, where a contract was made for the sale of a certain quantity of iron to be delivered in specified portions, from time to time, the buyer to give his notes for each portion delivered, and before the completion of the contract he refused to give the notes for the deliveries made and also refused to give notes for future deliveries or to be further bound under the contract, it was held that the seller was thereby absolved from further deliveries under the contract and that he could bring an action at once to recover damages as for a breach of the entire contract.⁴²

³⁹ Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

⁴⁰ Thompson v. Brown, 106 Iowa 367, 76 N. W. 819; Chapman v. Kansas City & C. R. Co., 146 Mo. 481, 48 S. W. 646; Amsden v. Atwood, 68 Vt. 322, 35 Atl. 311; Pancake v. George Campbell Co., 44 W. Va. 82, 28 S. E. 719. See also, Cort v. Ambergate R. Co., 17 Q. B. 127; Hale v. Trout, 35 Cal. 229; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Sullivan v. McMullan, 26 Fla. 543, 8 So. 450; Lake Shore & M. S. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Dugan v. Anderson, 36 Md. 567, 11 Am.

Rep. 509; North v. Mallory, 94 Md. 305, 51 Atl. 89; Foternick v. Watson, 184 Mass. 187, 68 N. E. 215; Parker v. Russell, 133 Mass. 74; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Platt v. Brand, 26 Mich. 173; Smith v. Wetmore, 167 N. Y. 234, 60 N. E. 419; Ferris v. Spooner, 102 N. Y. 10, 5 N. E. 773; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Roehm v. Horst, 91 Fed. 345, 33 C. C. A. 550, affd. 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

⁴¹ Smith v. Wetmore, 167 N. Y. 234, 60 N. E. 419.

⁴² Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561.

§ 2031. **Renunciation—Illustrations of principles.**—A contract payable “in trade,” without time or place for a payment, is payable on demand, or within a reasonable time, and at the residence or place of business of the promisor; and, before the promisee is entitled to a money judgment against the promisor for nonperformance, he must show a demand on his part and a refusal upon the part of the other.⁴³ Thus, where the owner of a stallion agreed to allow him to serve a mare, it was held that it was the duty of the owner of the mare to take her to the stallion within a reasonable time, and a failure to do this precluded an action against the owner of the stallion, where he had not notified the mare’s owner that he would not allow the stallion to serve.⁴⁴ Where a contract provides a penalty for the failure to do an act, the failure to do the act is not a breach; it merely liquidates the penalty.⁴⁵ Where one covenanted not “to engage, directly or indirectly, or concern himself in carrying on or conducting the ice business, either as principal or agent, within ten miles” of a certain place, his riding upon an ice cart, delivering ice for a rival dealer, has been held a breach thereof.⁴⁶ A contract to pay a certain sum upon the receipt of specified funds is not broken by a failure to pay upon the receipt of a part of the funds.⁴⁷ That can not constitute a breach which can not be prevented by the promisor. Thus, an agreement not to appoint any other agent to sell goods in a locality is not broken by a sale by persons without authority.⁴⁸ But if the agreement contains an express or implied term to pre-

⁴³ *Schriner v. Peters*, 39 Ill. App. 309; *Woods v. Dial*, 12 Ill. 72; *Wehrli v. Rehwooldt*, 107 Ill. 60; *Rice v. Churchill*, 2 Denio (N. Y.) 145; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Vance v. Bloomer*, 20 Wend. (N. Y.) 196.

⁴⁴ *Schriner v. Peters*, 39 Ill. App. 309.

⁴⁵ *Ehrlich v. Aetna Ins. Co.*, 103 Mo. 231, 15 S. W. 530 (Where an insurance agent agreed to furnish the company with a certain amount

of insurance each year, and in case of failure to obtain that amount he was to pay a certain sum, his failure to obtain the requisite amount was held to be no breach authorizing his discharge.)

⁴⁶ *Babcock v. Clear*, 63 Hun (N. Y.) 628, 43 N. Y. St. 426, 17 N. Y. S. 664.

⁴⁷ *Fox v. Walker*, 62 N. H. 419.

⁴⁸ *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309, 53 N. W. 501.

vent such sales, then the fact of the sales being unauthorized does not prevent them from constituting a breach.⁴⁹

§ 2032. Character of notice of renunciation.—The renunciation must amount to a clear and distinct repudiation of obligations under the contract; there must be a positive declaration of a fixed purpose not to perform the contract. The declaration may not be equivocal and it must ordinarily deal with entire performance or what is equivalent to entire performance.⁵⁰ The renunciation requires both intent to abandon the contract and external action.⁵¹ A mere threat to abandon a contract does not constitute a breach unless it is carried out.⁵² "A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made."⁵³ Thus, where a party had contracted to deliver ice, and wrote to the buyer: "We can not, therefore, comply with your request to deliver to you the ice claimed,

⁴⁹ *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309, 53 N. W. 501. See the following cases for discussion of what will constitute breach: *Fairbrother v. England*, 40 Wkly. Rep. 220; *Rigdon v. Conley*, 141 Ill. 565; 30 N. E. 1060; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Bates v. Harrick*, 82 Mich. 295, 46 N. W. 376; *Swallow v. Bain*, 7 N. Mex. 102, 32 Pac. 501; *Gray v. Journal Pub. Co.*, 2 Misc. (N. Y.) 260, 50 N. Y. St. 764, 21 N. Y. S. 967; *Teall v. Consolidated Elec. Co.*, 119 N. Y. 654, 2 Silvernail Ct. App. (N. Y.) 557, 23 N. E. 985; *Stewart v. Huntington*, 124 N. Y. 127, 26 N. E. 289; *McDonald v. Liggett*, 146 Pa. St. 460, 23 Atl. 338; *Vance v. Hartzell*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 282, 18 S. W. 88.

⁵⁰ *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *Lundahl v. Hansen*, 147 Ill. 504, 35 N. E. 741; *King v. Waterman*, 55 Nebr. 324, 75 N. W. 830; *National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. (N. Y.) 135, 97 N. Y. S. 92, 35 Civ. Proc. 285;

Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; *Hardeman-King Lumber Co. v. Hampton Bros.* (Tex. Civ. App.), 130 S. W. 647; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850; *Vittum v. Estey*, 67 Vt. 158, 31 Atl. 144; *Bannister v. Victoria Coal Co.*, 63 W. Va. 502, 61 S. E. 338; *Swiger v. Hayman*, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. 899. See also, *Johnstone v. Milling*, 16 Q. B. Div. 460.

⁵¹ *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130.

⁵² *Hardeman-King Lumber Co. v. Hampton Bros.* (Tex. Civ. App.), 142 S. W. 867.

⁵³ *Benjamin on Sales* (7th ed.) § 568, cited with approval in *McIntosh v. Miner*, 37 App. Div. (N. Y.) 483, 55 N. Y. S. 1074; *Benecke v. Haebler*, 166 N. Y. 631, 60 N. E. 1107, affg. 38 App. Div. (N. Y.) 344, 58 N. Y. S. 16; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850, and *Smoot's Case*, 15 Wall. (U. S.) 36, 21 L. ed. 107, 8 Ct. Cl. (U. S.) 96.

and respectfully submit that you ought not to ask this of us in view of the facts stated herein and in ours of the 7th. * * * We will be glad to hear from you in reply, but will be more pleased to have a personal interview, and venture the suggestion that you come here for the purpose," it was held that this was not a final refusal to perform the contract.⁵⁴ Where the government had a contract to purchase cavalry horses, and, subsequent to the contract, adopted a code of rules touching their inspection before purchase, this was held to be no notification that the government would not accept the horses unless the rules were complied with.⁵⁵ A charter-party provided that a ship should lay up at a port forty days for a cargo. When the officers of the ship applied to the agent of the charterer for cargo, he said: "I have no cargo for you; you had better go away." It was held that this did not relieve the ship from the obligation to remain forty days.⁵⁶ So, where one of the parties to a contract reduced to writing, after partial performance by him, claims there was a subsequent oral modification thereof, which is denied by the other party, such denial will not amount to a renunciation of the actual contract and excuse performance on the part of the other party, so as to give immediate cause of action as for a breach of the contract.⁵⁷ A mere assertion of inability to go on with a contract is no notice of repudiation.⁵⁸ And it is doubtful, in case of a lease or other contract containing various stipulations, whether the whole contract can be treated as put to an end upon the wrongful repudiation of one stipulation.⁵⁹ In a case where, prior to the expiration of the full time within which a party had agreed to per-

⁵⁴ *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850.

⁵⁵ *Smoot's Case*, 15 Wall. (U. S.) 36, 21 L. ed. 107, 8 Ct. Cl. (U. S.) 96.

⁵⁶ *Avery v. Bowden*, 5 E. & B. 714, 6 E. & B. 953. See also, *Phillips v. Evans*, 5 M. & W. 475.

⁵⁷ *Bannister v. Victoria Coal &c. Co.*, 63 W. Va. 502, 61 S. E. 338.

⁵⁸ *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460.

⁵⁹ *Johnstone v. Milling*, L. R. 16 Q. B. D. 460. See also, *Borrowman v. Free*, L. R. 4 Q. B. Div. 500; *Mersey Steel Co. v. Naylor*, L. R. 9 App. Cas. 434, holding a mere refusal to pay for one instalment, not being wilful, was not repudiation, but that a wilful refusal to pay would be. See also, *Withers v. Reynolds*, 2 B. & Ad. 882.

form his part of a contract for the purchase and sale of mining stock, he refused to perform either by marketing the stock or paying his share of the price, this was held to constitute such an anticipatory breach as authorized the other party to the contract to treat the contract as at an end.⁶⁰

§ 2033. Right of party to disregard renunciation.—The renunciation does not operate as a breach of the contract unless the other party so elects to consider it and his acquiescence must be patent, for it is not generally allowed one of the parties to rescind a contract without the consent of the other. "There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising."⁶¹ According to a leading English case, the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.⁶² Thus, where a

⁶⁰ *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.

⁶¹ *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599. See also, *Landvoigt v. Paul*, 27 App. D. C. 423; *Guarton v. American Law Book Co.*, 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1n.

⁶² *Frost v. Knight*, L. R. 7 Ex. 111. *Johnston v. Milling*, L. R. 16 Q. B. D. 460. "If the promisee does not elect to treat the promisor's announcement of intent not to perform as a wrongful putting an end to the contract, and treats the con-

tract as still subsisting, he lets in the promisor to claim the benefit of any subsequent contingency under the contract which may prevent a breach from arising." The foregoing is a quotation from counsel's brief, approved by the court. *Scribner v. Schenkel*, 128 Cal. 250, 60 Pac. 860; *Central Coal & Coke Co. v. Good*, 120 Fed. 793, 57 C. C. A. 161; *Rouse v. Western Wheel Works*, 66 Ill. App. 647, affd. 169 Ill. 536, 48 N. E. 495. But see post, § 2035, and Vol. IV, Tit. "Sales," Ch. CLX.

ship, in accordance with the provisions of a charter-party, proceeded to a port to load, and the charterer renounced the contract, but the officers of the ship refused to accept the renunciation and waited at the port for cargo, and war broke out between the two countries, rendering it impossible for the charterer to furnish cargo, this was held a valid defense for the charterer.⁶³ And, in accordance with this principle, "it is not competent for the purchaser of property which is to be delivered in the future to impose upon the vendor the legal duty to take such steps with reference to the subject of the contract, as by at once reselling the property on the market on the buyer's account or making a forward contract for the purchase of other property of like amount, to be delivered at the same time, as shall most effectually mitigate the damages to be paid by the buyer in consequence of his refusal, though no loss would thereby result to the vendor."⁶⁴

§ 2034. Withdrawal of renunciation.—A refusal before it operates as an anticipatory breach may be retracted; but such refusal unretracted, down to and inclusive of the time when the promisee is bound to perform a condition, is evidence of a continuing refusal, and a waiver of any conditions precedent. Thus, when there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor may, without manufacturing or tendering

⁶³ Reid v. Hoskins, 6 El. & Bl. 953. See also, Barrick v. Buba, 2 C. B. (N. S.) 563.

⁶⁴ Sutherland on Damages (3d ed.) § 648, citing Leigh v. Paterson, 8 Taunt. 540; Phillpotts v. Evans, 5 M. & W. 475; Ripley v. McClure, 4 Exch. 345; Stewart v. Cauty, 8 M. & W. 160; Boorman v. Nash, 9 B. & C. 145; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Kadish v. Young, 108 Ill. 170, 43 Am. Rep.

548; Clement & Hawkes Mfg. Co. v. Meserole, 107 Mass. 362; Haines v. Tucker, 50 N. H. 307; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436, 1 Silvernail Ct. App. 550. "The original contract was in no way modified by the notice, and the plaintiffs were not bound then to sell in order to reduce the damages." Lord Abinger, C. B., in Phillpotts v. Evans, 5 M. & W. 474. But see, Vol. 4, Tit. Sales, ch. CLX.

the rest of the goods, maintain an action against the purchaser for breach of contract.⁶⁵ Where a buyer wrote to the seller, that unless he sent word at once (being before the time performance was due) that he intended to keep his contract he would purchase elsewhere, and later wrote again that he had bought, and on the day fixed for delivery the buyer demanded delivery, it was held that as the seller had not acted on the communications of the buyer, he was bound to deliver the article.⁶⁶ Where the renunciation is treated as a breach, the party renouncing is not at liberty to withdraw his renunciation and offer to perform the contract, although the time for actual performance has not arrived.⁶⁷ And where the act of the party in renouncing a contract is relied on to excuse the performance of conditions precedent, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to induce the belief that performance was waived, or if attempted would not be accepted.⁶⁸ Thus, in a sale of bonds, the mere fact that the vendor denied having made the contract and refused to deliver the bonds was held no such evidence of an intention to break the contract as released the buyer from a tender of payment when the day for performance arrived.⁶⁹ It seems that one party has no right to exact from the other, before performance is due, a declaration, either formal or informal, that he expects to keep his contract.⁷⁰

§ 2035. No right to increase damages by performance after notice of renunciation.—It is not, in many jurisdictions at least, allowed a manufacturer or dealer after notice of renunciation to go on and by full performance on

⁶⁵ *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Davis Sewing Machine Co. v. McGinnis*, 45 Iowa 538; *Southwestern Stage Co. v. Peck*, 17 Kans. 271; *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384.

⁶⁶ *Westlake v. Bostwick*, 35 N. Y. Super. Ct. 256.

⁶⁷ *Quarton v. American Law Book Co.*, 143 Iowa 517, 121 N. W. 1009; *Ault v. Dustin*, 100 Tenn. 366, 45 S.

W. 981; *Cochran v. Toho*, 34 Wash. 238, 75 Pac. 815.

⁶⁸ *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

⁶⁹ *Mowry v. Kirk*, 19 Ohio St. 375.

⁷⁰ *Ripley v. McClure*, 4 Ex. 345. See also, *Coffin v. Reynolds*, 21 Minn. 456; *Pennell v. New York*, 14 N. Y. S. 376; *Zuck v. McClure*, 98 Pa. St. 541; *Benavides v. Hunt*, 79 Texas 383, 15 S. W. 396.

his part to increase the damages and then recover these increased damages.⁷¹ Thus, in a case where the defendant had refused to perform a contract for the erection of a creamery by plaintiffs before they had entered upon the performance of the contract, it was held that an action to recover the contract price would not lie, although plaintiffs had, notwithstanding defendant's refusal to perform, completed the creamery according to contract. The plaintiffs had no right to go on with the contract under the circumstances and recover the contract price. His remedy was an action for damages for breach of the contract.⁷²

§ 2036. Voluntary creation of impossibility of performance before performance is due.—It is well settled that when one of the parties to a contract before the time for performance makes it impossible for him to perform his promise, the other party may treat the contract as broken and sue at once on the breach.⁷³ There is an example of the application of this principle in the case of one who binds himself to execute a lease to one person and before the time for the fulfilment of the promise he leases the

⁷¹ *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263, revd. 79 Md. 413, 29 Atl. 1036; *Collins v. Delaporte*, 115 Mass. 159; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80n; *Lord v. Thomas*, 64 N. Y. 107; *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655; *Danforth v. Walker*, 37 Vt. 239; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992. See also, *Trinidad Asphalt & Co. v. Buchstaff & Co.*, 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710.

⁷² *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655.

⁷³ *Wolf v. Marsh*, 54 Cal. 228; *Holzheier v. Hayes*, 133 Cal. 456, 65 Pac. 968; *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985; *Lee v. Pennington*, 7 Ill. App. 247; *Dill v. Pope*, 29 Kans. 289; *German American Security Co. v. McCulloch*, 28 Ky. L. 133, 89 S. W. 5; *Smith v.*

Stoughton, 185 Mass. 329, 70 N. E. 195; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 107 N. W. 130; *Teachenor v. Tibbals*, 31 Utah, 10, 86 Pac. 483; *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494. See also, *Synge v. Synge*, L. R. (1894) 1 Q. B. Div. 466; *Short v. Stone*, 8 Q. B. D. 358; *Ford v. Tiley*, B. & C. 325; *Lovelock v. Franklyn*, 8 Q. B. 371; *Crabtree v. Messersmith*, 19 Iowa 179; *Fort Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Weaver v. Aitcheson*, 65 Mich. 285, 32 N. W. 436; *Meyers v. Markham*, 90 Minn. 230, 96 N. W. 335, 787; *James v. Burchell*, 7 Daly (N. Y.) 531, 82 N. Y. 108. One is not bound by a contract which obligates him to perform an act at a date prior to the signing of the contract. *LeRoy v. Jacobosky*, 136 N. Car. 443, 48 S. E. 796, 67 L. R. A. 977.

premises to another.⁷⁴ But whether merely temporarily disabling one's self, the time for performance not having arrived, constitutes a breach, is doubtful; from language used by Lord Kenyon, it is to be inferred that it would not.⁷⁵ The rule in Massachusetts is, however, otherwise.⁷⁶ The party who disables himself from performing his contract before default by the other party thereby waives the performance of acts by the latter which he would be required to perform as condition precedent to recovery on the contract, such, for example, as a demand⁷⁷ or tender of performance.⁷⁸ Accordingly, it has been held that if one agree to convey land to another, and convey the land to a third person, such other has a cause of action, although there has been no tender on his part; and it is no defense that such party was unable to pay the money.⁷⁹ So, the winding up of an insurance company, and transferring all its assets and obligations to a new company, gives a policyholder a right to consider his contract terminated, and to demand what is justly due him in that exigency.⁸⁰ Likewise, an order for winding up a company is notice of discharge to all the persons in the employment of the company, who are entitled at once to their salary for the full

⁷⁴ *Ford v. Tiley*, 6 B. & C. 325; *Lovelock v. Franklyn*, 8 Q. B. 371. Where the promisor agreed to furnish the promisee a show case and shelving with which to conduct a stationery business, leased part of the store for a dyeing establishment and put up a partition so the show case could not be seen, it was held a breach. *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. 801, affg. 50 N. Y. St. 504, 21 N. Y. S. 307.

⁷⁶ *Lovelock v. Franklyn*, 8 Q. B. 371; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402.

⁷⁸ *Heard v. Bowers*, 23 Pick. (Mass.) 455; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128.

⁷⁷ *Boyle v. Guysinger*, 12 Ind. 273; *Bassett v. Bassett*, 55 Maine 127;

Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. 579; *Smith v. Jordan*, 13 Gil. (Minn.) 246, 97 Am. Dec. 232; *Delamater v. Miller*, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512.

⁷⁸ *Newcomb v. Brackett*, 16 Mass. 161; *Hart v. Summers*, 38 Mich. 399; *Hawley v. Kesler*, 53 N. Y. 114; *Packer v. Steward*, 34 Vt. 127.

⁷⁹ *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Newcomb v. Brackett*, 16 Mass. 161; *Buttrick v. Holden*, 8 Cush. (Mass.) 233; *Farrington v. Hodgdon*, 119 Mass. 453. But this may affect the amount of damages and perhaps authorize only nominal damages.

⁸⁰ *In re Albert Life Assur Co.*, L. R. 9 Eq. 703; *Holdrich's Case*, L. R. 14 Eq. 72; *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. ed. 423.

time.⁸¹ It has also been held that an agreement to make a will of a certain kind is broken at once when another kind of will is executed, although the testator has not deceased.⁸² The marrying of another by a person engaged to be married is a breach, although the time has not yet arrived for performance and the promisee has made no request to marry.⁸³ Where a telegraph company agreed to maintain a telegraph office at a certain place, but subsequently leased their lines to another company which offered to maintain the office, this was held a breach.⁸⁴ And where a party by dissipation renders himself incompetent to perform his contract, the contract may be rescinded by the other party.⁸⁵

§ 2037. Creation of impossibility of performance in course of performance.—Where the act which renders completed performance impossible occurs in the course of the performance, the other party may usually treat the act as a discharge from further performance and claim compensation for the part he has performed,⁸⁶ or he may sue for the damages he has sustained.⁸⁷ Thus, where the owner of a building in course of construction wrongfully prevents the contractor from completing the structure and the contractor elects to treat this as a rescission of the contract and there is no provision in the contract for an apportionment of the

⁸¹ *In re Oriental Bank Corporation*, L. R. 32 Ch. Div. 366.

⁸² *Jenkins v. Stetson*, 9 Allen (Mass.) 128; *Johannes v. Martian*, 22 App. Div. (N. Y.) 561, 48 N. Y. S. 102.

⁸³ *Short v. Stone*, 8 Q. B. 358.

⁸⁴ *Tufts v. Atlantic Tel. Co.*, 151 Mass. 269, 23 N. E. 844.

⁸⁵ *Rector v. McDermott* (Ark.), 13 S. W. 334.

⁸⁶ *Planche v. Colborn*, 8 Bing. 14; *Allen v. D. H. Ranck Publishing Co.*, 98 Ill. App. 44; *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *O'Brien v. Sexton*, 140 Ill. 517, 30 N. E. 461; *Western Union Telegraph Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Canada v. Canada*, 6 Cush. (Mass.) 15; *Hemminger v. Western Assurance Co.*, 95 Mich. 355, 54 N. W. 949; *M. Wineburgh Adv. Co. v.*

Bloom, 128 N. Y. S. 562; *Chicago v. Tilley*, 103 U. S. 146, 26 L. ed. 371; *Chamberlin v. Scott*, 33 Vt. 80; *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, 47 Atl. 406; *Newhall Engineering Co. v. Daly*, 116 Wis. 256, 93 N. W. 12.

⁸⁷ *Stanton v. New York & C. R. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110; *Chemical Nat. Bank of Chicago v. Exposition*, 170 Ill. 82, 48 N. E. 331; *Jewett v. Brooks*, 134 Mass. 505; *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Jones v. Judd*, 4 N. Y. 411; *Bussard v. Hibler*, 42 Ore. 500, 71 Pac. 642; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710; *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. 390.

compensation, the contractor may recover the reasonable value of the work performed by him before the interference of the owner of the premises.⁸⁸ "A party who engages to do work has a right to proceed free from any let or hinderance of the other party, and if such other party interferes, hinders and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."⁸⁹

§ 2038. Creation of impossibility of performance by destruction of subject-matter.—The general rule is that where the performance of a contract depends upon the continued existence of a thing, which is assumed as a basis of the agreement, the destruction of the thing terminates the obligation.⁹⁰ "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the

⁸⁸ Newhall Engineering Co. v. Daly, 116 Wis. 256, 93 N. W. 12.

⁸⁹ Anvil Mining Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. 876.

⁹⁰ Taylor v. Caldwell, 3 B. & S. 826; Siegel v. Eaton & Prince Co., 165 Ill. 550, 46 N. E. 449; Walker v. Tucker, 70 Ill. 527; Knight v. Bean, 22 Maine 531; Gilbert & Barker Mfg. Co. v. Butler, 146 Mass. 82, 15 N. E. 76; Eliot National Bank v. Beal, 141 Mass. 566, 6 N. E. 742; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Powell v. Dayton, S. & G. R. Co., 12 Ore. 488, 8 Pac. 544; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578. See also, Western Hardware & Co. v. Bancroft-Charnley Steel Co., 116 Fed. 176, 53 C. C. A. 548; Schwartz v. Saunders, 46 Ill. 18; Walker v. Tucker, 70 Ill. 527; Krause v. Crothersville, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203; Womack v. McQuarry, 28 Ind. 103,

92 Am. Dec. 306; Jamieson v. Indiana & Co. Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Lord v. Wheeler, 1 Gray (Mass.) 282; Jernee v. Simonson, 58 N. J. Eq. 282, 43 Atl. 370; Logan v. Consolidated Gas Co., 107 App. Div. (N. Y.) 384, 95 N. Y. S. 163; Niblo v. Binsee, 44 Barb. (N. Y.) 54, revd. 40 N. Y. 476, 3 Abb. Dec. (N. Y.) 375; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; Dixon v. Breon, 22 Pa. Super. Ct. 340. And see Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271; Brumby v. Smith, 3 Ala. 123; Haynes v. Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; Hall v. School Dist. No. 10, 24 Mo. App. 213; People v. Globe Mut. Life Ins. Co., 91 N. Y. 174, 64 How. Pr. (N. Y.) 485; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; Cook v. McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."⁹¹ But this principle is without application to a case where the thing destroyed is the thing which one of the parties has expressly contracted to produce and deliver.⁹² And yet in a case where a contractor agreed to build an annex to a building, and after the work was nearly completed the building was destroyed by fire, it was held that the contract was terminated and that the owner could not impose on the contractor an obligation to complete the work by offering to restore the old building.⁹³ It was the holding of another case that a contractor who has furnished labor and material in installing a heating plant, destroyed before completed, can recover from the owner the value of the labor and material furnished, measured by the terms of the contract, where the units of the plant became a part of the owner's land when put in place. Under these conditions, the measure of recovery is not limited to the benefit to the owner by the labor and material furnished.⁹⁴ An obligation in a contract providing for the organization of a corporation, and that defendant shall have the management of it, and in consideration shall guarantee plaintiff a dividend of not less than seven per cent. per annum for seven years, terminates *prima facie* with the dissolution of the corporation.⁹⁵ The doctrine is

⁹¹ Taylor v. Caldwell, 3 B. & S. 826.

⁹² Milske v. Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. 354; Logan v. Consolidated Gas Co., 107 App. Div. (N. Y.) 384, 95 N. Y. S. 163; Vogt v. Hecker, 118 Wis. 306. 95 N. W. 90.

⁹³ Krause v. Crothersville, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203.

⁹⁴ Dame v. Wood, 75 N. H. 38, 70 Atl. 1081.

⁹⁵ Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113.

well established that when a party voluntarily undertakes to do a thing without qualification, performance is not excused because, by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing he agreed to do.⁹⁶ It is a general rule, also, that if, after a contract is made, the law interferes, and makes subsequent performance impossible, the party is held to be excused.⁹⁷ The rule just laid down is the more readily applied where such interference of the law is at the suit of the opposing party. Thus, where the corporation above referred to was dissolved in an action brought nominally by the people, but really instituted by plaintiff, on the ground of technical breaches of corporate duty, in which plaintiff himself participated, and which would have been corrected if made known to the corporation, and which plaintiff was under no obligation to the state to disclose, the act of plaintiff, as between the parties, must be deemed to have been the cause of the dissolution, and defendant is not estopped to set it up as a defense.⁹⁸

§ 2039. Creation of impossibility of performance by sale of subject-matter to another.—Where a party, having contracted to do a thing upon a given day, repudiates his contract before the day of performance arrives, or voluntarily puts it out of his power to perform, the other party to the contract may treat it as rescinded, and bring his action for the breach immediately and without awaiting the stipulated day.⁹⁹ It has, however, been held in California that a con-

⁹⁶ *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113, per Andrews, C. J.: "This doctrine protects the integrity of the contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane*, Aleyn, 26, is that, as against such contingencies, the party could have provided by his contract." See *Ford v. Cotesworth*, L. R. 4 Q. B. 127, affd. L. R. 5 Q. B. 544; *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988, 69 Am. St. 542; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Jones v.*

United States, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (U. S.) 524.

⁹⁷ *Jones v. Judd*, 4 N. Y. 411; *Burkhardt v. Georgia School Tp.*, 9 S. Dak. 315, 69 N. W. 16; *Board v. Young*, 59 Fed. 96, 108; *Baily v. DeCrespigny*, L. R. 4 Q. B. 180; *Avery v. Bowden*, 5 El. & Bl. 714.

⁹⁸ *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113.

⁹⁹ *Vandiver v. Robertson*, 125 Mo. App. 307, 102 S. W. 659. See also, *Meyers v. Markham*, 90 Minn. 230, 96 N. W. 335, 787; *Lovelock v. Franklyn*, 8 Q. B. 371.

veyance of land to a third person by one bound by an executory contract to convey it to another at a future date is not a breach of such contract, and does not entitle such other to treat the contract as abandoned before the time of performance arrives, since, when the time of performance comes, the vendor may be able to furnish a good title.¹ In the sale of specific goods, to be delivered on request, a sale of the goods to a third person has been held a breach.² The weight of authority is to the effect that such disability dispenses with the performance of all conditions precedent or concurrent.³

§ 2040. Creation of impossibility of performance by death of party.—There is said to be a legal presumption that the parties to a contract bind not only themselves, but their personal representatives.⁴ Where, however, the contract shows that it was the intention of the parties that the service should be performed by the contractor in person, then the contract

¹ Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857. See also, Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Webb v. Stephenson, 11 Wash. 342, 39 Pac. 952.

² Bowdell v. Parsons, 10 East 359.

³ Ruesens v. Mexican Nat. Constr. Co., 20 Central Law Jour. 34; Ford v. Tiley, 6 B. & C. 325; In re Imperial Wine Co., 42 L. J. Ch. 5; Rhodes v. Forwood, L. R. 1 App. Cas. 256 (holding that where one party agrees to employ another as agent at a certain place, for a fixed time, there is no implied condition that the business itself shall continue to be carried on during the period named); Maclure, Ex parte, L. R. 5 Ch. 737; Caines v. Smith, 15 M. & W. 189; Stirling v. Maitland, 5 B. & S. 840; Reid v. Explosives Co., L. R. 19 Q. B. D. 264; Charney v. Winstanley, 5 East 266; Bowdell v. Parsons, 10 East 359; Lovelock v. Franklyn, 8 Q. B. 371; Christy v. Stafford, 22 Ill. App. 430, affd. 123 Ill. 463, 14 N. E. 680; Northwestern &c. Metal Co. v. Hirsch, 94 Ill. App. 579; Buttrick v. Holden, 8 Cush. (Mass.) 233; Heard v. Bowers, 23 Pick. (Mass.) 455; Newcomb v. Brackett, 16 Mass.

161; Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538; McNish v. Coon, 13 Wend. (N. Y.) 26; Smith v. United Traction &c. Co., 168 N. Y. 597, 61 N. E. 1134; Carrington v. Waff, 112 N. C. 115, 16 S. E. 1008; De Peyster v. Pulver, 3 Barb. (N. Y.) 284; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710.

⁴ Where the contract with deceased is executory, and the personal representative can sufficiently execute all that the deceased could have done, he may do so and enforce the contract. 1 Parson on Contracts (9th ed.) 131; Mecartney v. Carbine's Estate, 108 Ill. App. 282; Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683; Bramlette's Admx. v. Boyce, 4 Ky. L. 196. If a purchaser orders goods and dies before the time of delivery, his executors must receive and pay for them, although the particular purpose of the purchase was defeated by the purchaser's death. Martin v. Hunt, 1 Allen (Mass.) 418; White v. Allen, 133 Mass. 423; Cox v. Martin, 75 Miss. 229, 21 So. 611, 36 L. R. A. 800, 65 Am. St. 604.

will terminate with the death of the contractor.⁵ There is not a discharge of liability for the services by reason of the death of the party, and there may be a recovery of the value of the part performance, not exceeding the rate of compensation provided in the contract less the damages, if any, which result from the termination of the contract.⁶ Thus, a servant's death would operate to end the contract and excuse its performance, as the servant alone could perform it, but his representatives could recover for services performed.⁷ A contract for hiring for a year to do ordinary farm work is not terminated by the employer's death before the year expires, and, where the employé continues to do work without objection by the executors, he may recover of them the full contract-price for the year's work when completed.⁸

§ 2041. Creation of impossibility of performance where promisor is disabled by act of promisee.—There is a breach of contract where the promisee prevents performance by the promisor.⁹ Thus, where there was a contract to ex-

⁵ Robinson v. Davison, 6 Eq. 269; Janin v. Browne, 59 Cal. 37; Baxter v. Billings, 83 Fed. 790, 28 C. C. A. 85; Howell v. City Gas &c. Co., 159 Ill. App. 311; Smith v. Preston, 170 Ill. 179, 48 N. E. 688; Singleton v. Carroll, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. 370; Powell v. Newell, 59 Minn. 406, 61 N. W. 335; Dow v. State Bank, 88 Minn. 355, 93 N. W. 121; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. 821; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.) 914n.

⁶ Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618; Leopold v. Salkey, 89 Ill. App. 412, 31 Am. Rep. 93; Fuller v. Brown, 11 Metc. (Mass.) 440; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Wolfe v. Howes, 20 N. Y. 197,

75 Am. Dec. 388; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; Hubbard v. Bilden, 27 Vt. 645; Patrick v. Putnam, 27 Vt. 759; Green v. Gilbert, 21 Wis. 395.

⁷ Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7. "Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform becomes extinguished." People v. Manning, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451; Jones v. Judd, 4 N. Y. 411; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Gray v. Murray, 3 Johns. Ch. (N. Y.) 167.

⁸ Lacy v. Getman, 35 Hun (N. Y.) 46.

⁹ Northrop v. Mercantile Trust & Deposit Co. of Baltimore, 157 Fed. 497, 85 C. C. A. 89; Matson v.

change land for a homestead right and the party owning the land abandoned the contract and refused to perform it before the time at which the other was required to procure the homestead right, and in consequence of which the homestead right could not be procured, it was held that the landowner should comply with his contract, even though he got nothing for his land, and specific performance was decreed.¹⁰ A creditor holding a life insurance policy on the life of his debtor, thinking the widow would obstruct him in its collection, contracted with her that "she is to do all within her power in aid of the collection of the policy;" in consequence of her voluntarily making an affidavit to the effect that at the time the creditor took out his policy the debt was much less than the policy, he was compelled to compromise with the company; she was held precluded from recovering by her action in making the affidavit.¹¹ In accordance with this principle the promisor may always recover the value of his work done before the act of the promisee rendered it impossible to proceed, as in case of mechanics hindered and delayed in the further prosecution of their work.¹² When an act of the promisee disables the promisor, he may abandon his contract at once and sue. Thus, where the promisor agreed to saw a certain number of feet of lumber according to specifications to be furnished by the promisee, the failure to furnish the specifications is

Stewart (Tex. Civ. App.), 124 S. W. 736; Fuller v. Kaminsky, 41 Tex. Civ. App. 549, 95 S. W. 655; Hahl v. Deutsch, 42 Tex. Civ. App. 1, 94 S. W. 443; Pass Packing Co. v. Torsch, 87 Miss. 694, 40 So. 228. In cases where promise is performable on the occurrence of a future event, the contract becomes absolute, for there is an implied agreement that the promisor will place no obstacle in the way of performance. Marvin v. Rogers, 53 Tex. Civ. App. 423, 115 S. W. 863.

¹⁰ Dulin v. Prince, 124 Ill. 76, 16 N. E. 242. See also, McClure v. Otrich, 118 Ill. 320, 8 N. E. 784; Towner v. Tickner, 112 Ill. 217;

Cohn v. Mitchell, 115 Ill. 124, 3 N. E. 420; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

¹¹ Alexander v. Sanders, 93 Ala. 345, 9 So. 521.

¹² Gilbert & Barker Mfg. Co. v. Butler, 146 Mass. 82, 15 N. E. 76; Cleary v. Sohler, 120 Mass. 210; Lord v. Wheeler, 1 Gray (Mass.) 282; Niblo v. Binsee, 44 Barb. (N. Y.) 54, revd. 40 N. Y. 476, 3 Abb. Dec. 375. See also, Applebee v. Percy, L. R. 9 C. P. 647; Rawson v. Clark, 70 Ill. 656; Garretty v. Brazell, 34 Iowa 100; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Whelan v. Ansonia Clock Co., 27 Hun (N. Y.) 557, affd. 97 N. Y. 293.

a breach, warranting the promisor in abandoning the contract and enabling him to recover *pro tanto*.¹³

§ 2042. Creation of impossibility by bankruptcy or insolvency of party.—Ordinarily, the fact that the promisor becomes insolvent or bankrupt does not of itself constitute any breach of contract in the absence of provisions to this effect in the law or contract.¹⁴ Thus, where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used is not a breach of the contract.¹⁵ Where a person who had contracted for a certain quantity of oil, to be delivered to him at a future day, became bankrupt before that day arrived and obtained his certificate, it was held he was nevertheless liable to an action for not accepting and paying for the oil.¹⁶ Insolvency does not excuse performance;¹⁷ nor can a contract ordinarily be rescinded on the ground of insolvency.¹⁸ As to what the rights of a party to a contract are, in case of insolvency of the other, the following language of Mellish, L. J., speaking in reference to a sale, is pertinent: "I am of opinion that the result of the authorities is this—that in such a case

¹³ *DeLoach v. Smith*, 83 Ga. 665, 10 S. E. 436; *Branch v. Palmer*, 65 Ga. 210. For cases showing that he need not demand further specifications, see *Gray v. Wells*, 118 Cal. 11, 50 Pac. 23; *Chandler v. Thompson*, 30 Fed. 38; *Poole Bros. v. Marquis*, 68 Ill. App. 466; *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963; *Gates v. National Bldg. Co.*, 46 Minn. 419, 49 N. W. 232; *Soderberg v. Crockett*, 17 Nev. 409, 30 Pac. 826.

¹⁴ *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435. See ante Ch. 45, on Discharge by Operation of Law—Merger and Bankruptcy. But see *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308, where

it is held that a building contractor is entitled to compensation for the part performance where completion is prevented by the insolvency of the owner.

¹⁵ *In re Agra Bank*, L. R. 5 Eq. Cas. 160.

¹⁶ *Boorman v. Nash*, 9 B. & C. 145.

¹⁷ *Jones v. Anderson*, 82 Ala. 302, 2 So. 911; *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

¹⁸ *Ex parte Chalmers*, L. R. 8 Ch. 289; *Southern Lumber Co. v. Mercantile Lumber & Supply Co.*, 89 Mo. App. 141; *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. 822. But it may excuse the other party. *Raplye v. Racine Seeder Co.*, 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531.

the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more until he is paid the debt due for those already delivered, as well as the price of those still to be delivered."¹⁹ While insolvency of itself is no breach of contract and does not authorize rescission, there may be such an admission of the insolvency as amounts to a declaration of intention not to abide by a contract, and it may operate as a renunciation.²⁰ A trustee of a bankrupt, who has elected to perform a continuing contract of the bankrupt, does not adopt the contract personally.²¹ A party may, upon discovering the insolvency of his debtor, make such arrangements as will likely prevent losses arising therefrom, and he need not await the day to see whether the insolvency will prevent the other party from performing.²²

§ 2043. Creation of impossibility of performance by ill treatment.—In all cases of contracts for personal services the treatment of the promisee by the promisor in such a manner that he can not reasonably be required to submit is a breach. This principle is most frequently invoked in cases of parents conveying property to their children in consideration of being supported, nursed and attended during life. Any treatment of the parent which he can not reasonably be required to endure is a breach of the condi-

¹⁹ Ex parte Chalmers, L. R. 8 Ch. 289. See also, Bloxam v. Saunders, 4 B. & C. 941; Fulton v. Gibian, 98 Ga. 224, 25 S. E. 431; Brassel v. Troxel, 68 Ill. App. 131; Pacey v. Troxel, 68 Ill. App. 367; Clark v. Munroe Co., 127 Mich. 300, 86 N. W. 816.

²⁰ In re Phoenix Bessemer Steel Co., L. R. 4 Ch. Div. 108; Ex parte Stapleton, L. R. 10 Ch. Div. 586; McKenzie v. Weinman, 116 Ala. 194, 22 So. 508; Freeman v. Topkis, 1 Mar. (Del.) 174 40 Atl. 948; Claster Bros. v. Katz, 6 Pa. Super. Ct.

487; Dorman v. Weakly (Tenn.), 39 S. W. 890; Hallacher v. Henlien (Tenn.), 39 S. W. 869.

²¹ In re Sneezum, L. R. 3 Ch. Div. 463.

²² Chamber of Commerce v. Sol-litt, 43 Ill. 519. See also, Morgan v. Bain, L. R. 10 C. P. 15; Bingham v. Mulholland, 25 U. C. C. P. 210; Follansbee v. Adams, 86 Ill. 13; Fox v. Kitton, 19 Ill. 519; Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538; Heilbronn v. Herzog, 33 App. Div. (N. Y.) 311, 165 N. Y. 98, 58 N. E. 759.

tion in the deed and ejectment can be brought.²³ But contracts of this kind are often improvidently made on both sides, and their general policy has been doubted,²⁴ and probably there never was a case in which some breach of the contract, more or less important, might not be proved. But these are usually overlooked or excused. It would be a violation of correct principles to hold in those cases that a breach of which no serious notice was taken at the time is sufficient to enable the parent to maintain ejectment.²⁵

§ 2044. Nonperformance on failure to perform conditions precedent.—The breach may consist in the failure to perform a condition precedent. There is a condition precedent within this principle where one of two mutual acts must necessarily precede the other and the former act is a condition precedent. The principle is capable of simple illustration by the case of one who agrees to manufacture an article from materials furnished by another. Here the furnishing of the materials necessarily precedes the act of

²³ *Andrews v. Andrews*, 122 N. C. 352, 29 S. E. 351. See also, *Winch v. Bean*, 62 N. H. 427; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Center v. Center*, 38 N. H. 318; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Barker v. Cobb*, 36 N. H. 344; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Holmes v. Fisher*, 13 N. H. 9; *Rhoades v. Parker*, 10 N. H. 83; *Flanders v. Lamphear*, 9 N. H. 201; *Dearborn v. Dearborn*, 9 N. H. 117; *Hartshorn v. Hubbard*, 2 N. H. 453; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43. See also, *Pettee v. Case*, 2 Allen (Mass.) 546; *Gilson v. Gilson*, 2 Allen (Mass.) 115; *Marsh v. Austin*, 1 Allen (Mass.) 235; *Robinson v. Robinson*, 9 Gray (Mass.) 447, 69 Am. Dec. 301; *Gibson v. Taylor*, 6 Gray (Mass.) 310; *Wales v. Mellen*, 1 Gray (Mass.) 512; *Fiske v. Fiske*, 20 Pick. (Mass.) 499; *Thayer v. Richards*, 19 Pick. (Mass.) 398; *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299; *Wilder v. Whittemore*, 15 Mass. 262; *Fales v. Hemenway*, 64 Maine

373; *Bryant v. Erskine*, 55 Maine 153; *Sibley v. Rider*, 54 Maine 463; *Philbrook v. Burgess*, 52 Maine 271; *Lamb v. Foss*, 21 Maine 240; *Norton v. Webb*, 35 Maine 218; *Brown v. Leach*, 35 Maine 39; *Allen v. Parker*, 27 Maine 531; *Hoyt v. Bradley*, 27 Maine 242; *Clinton v. Fly*, 10 Maine 292; *Tucker v. Tucker*, 24 Mich. 426; *Hawkins v. Clermont*, 15 Mich. 511; *Daniels v. Eisenlord*, 10 Mich. 454; *Ferguson v. Kimball*, 3 Barb. ch. (N. Y.) 616; *Chase v. Peck*, 21 N. Y. 581; *Ferguson v. Ferguson*, 2 N. Y. 360; *Henry v. Tupper*, 29 Vt. 358; *Frizzle v. Dearth*, 28 Vt. 787; *Dunklee v. Adams*, 20 Vt. 415; *Olcott v. Dunklee*, 16 Vt. 478; *Briggs v. Beach*, 18 Vt. 115; *Crane v. Stickles*, 15 Vt. 252; *Austin v. Austin*, 9 Vt. 420; *Smith v. Smith*, 34 Wis. 320.

²⁴ *Soper v. Guernsey*, 71 Pa. St. 219.

²⁵ *Smith v. Smith*, 34 Wis. 320 (holding refusal to serve the parent at table no breach warranting ouster).

manufacture and constitutes a condition precedent.²⁶ So, in cases of ordinary contracts for services for a certain length of time, the full performance of the service is generally considered a condition precedent and the employé is not entitled to any payment where he voluntarily and without legal excuse abandons the service before the expiration of the time.²⁷ In some of the states, however, an employé for a definite term who abandons his service after part performance without legal excuse may recover as upon a quantum meruit after the expiration of the time, where account is taken of the damages, if any, which result from a breach of the contract.²⁸ In a case where one agrees to construct a machine for another, pursuant to the ideas and subject to the approval of the other party, the failure of the latter to supply such ideas constitutes a breach of a condition precedent and amounts to a breach of the contract.²⁹

§ 2045. Nonperformance on failure to perform conditions concurrent.—There may be a breach by reason of a failure to perform a condition concurrent. "There is also a third sort of covenants," says Lord Mansfield, "which are mutual conditions to be performed at the same time; and in these if one party was ready and offered to perform his

²⁶ *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Cadwell v. Blake*, 6 Gray (Mass.) 402.

²⁷ *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337; *Eldridge v. Rowe*, 2 Gilm. (Ill.) 91, 43 Am. Dec. 41; *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161; *Thrift v. Payne*, 71 Ill. 408; *Miller v. Goddard*, 34 Maine 102, 56 Am. Dec. 638; *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; *Davis v. Maxwell*, 12 Metc. (Mass.) 286; *Nelichka v. Esterly*, 29 Minn. 146, 12 N. W. 457; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Timberlake v. Thayer*, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231; *Earp v. Tyler*, 73 Mo. 617; *Beach v. Mullin*, 34 N. J. L. 343; *McMillan v. Vanderlip*, 12 Johns. (N. Y.) 165; *Reab v. Moor*, 19

Johns. (N. Y.) 337; *Tipton v. Feitner*, 20 N. Y. 423; *Eden v. Silberberg*, 89 App. Div. (N. Y.) 259, 85 N. Y. S. 781; *Larkin v. Buck*, 11 Ohio St. 561; *Ripley v. Chipman*, 13 Vt. 268; *Mullen v. Gilkinson*, 19 Vt. 503; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719.

²⁸ *Ricks v. Yates*, 5 Ind. 115; *McClay v. Hedge*, 18 Iowa 66; *Byerlee v. Mendel*, 39 Iowa 382; *Powers v. Wilson*, 47 Iowa 666; *Duncan v. Baker*, 21 Kans. 99; *Parcell v. McComber*, 11 Nebr. 209, 7 N. W. 529, 38 Am. Rep. 366; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Bedow v. Tonkin*, 5 S. Dak. 432, 59 N. W. 222.

²⁹ *Hydraulic Engineering Works v. Wittenberg Matzoh Co.*, 141 Ill. App. 180.

part, and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."³⁰ Thus, upon a sale of goods for cash, payment of the purchase-money and the delivery of the property are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. The case is one of mutual conditions precedent and neither can enforce the contract against the other without showing performance or readiness or willingness to perform his own promise.³¹ So, there is a condition concurrent in the case of ordinary contracts for the sale of land to be conveyed upon payment of the purchase-money.³² So, there is a case of concurrent conditions where the contract for the sale of stock provides for its transfer upon payment of the amount specified in the contract.³³

§ 2046. Divisible and subsidiary promises in general.—Where a contract is entire, in the sense that each and all its parts are interdependent, so that one part can not be

³⁰ *Kingston v. Preston*, 2 Doug. 690.

³¹ *Morton v. Lamb*, 7 T. R. 125; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Hammond v. Gilmore's Admr.* 14 Conn. 479; *Hough v. Rawson*, 17 Ill. 588; *Metz v. Albrecht*, 52 Ill. 491; *Stoolfire v. Royse*, 71 Ill. 223; *Summers v. Sleeth*, 45 Ind. 598; *Hedge v. Gibson*, 58 Iowa, 656, 12 N. W. 713; *Haskins v. Warren*, 115 Mass. 514; *Stephenson v. Cady*, 117 Mass. 6; *Dana v. King*, 2 Pick. (Mass.) 155; *Hapgood v. Shaw*, 105 Mass. 276; *Sanborn v. Shipherd*, 59 Minn. 144, 60 N. W. 1089; *Walter v. Reed*, 34 Nebr. 544, 52 N. W. 682; *Leslie v. Casey*, 59 N. J. L. 6, 35 Atl. 6; *Porter v. Rose*, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; *Dunham v. Pettee*, 8 N. Y. 508, Seld. Notes (N. Y.) 154; *Lester v. Jewett*, 11 N. Y. 453; *Simmons v. Green*, 35 Ohio St. 104; *Robison v. Tyson*, 46 Pa. 286; *Phelps v. Hubbard*, 51 Vt. 489.

³² *Hunt v. Livermore*, 5 Pick. (Mass.) 395; *Cook v. Doggett*, 2 Allen (Mass.) 439; *Green v. Reynolds*, 2 Johns. (N. Y.) 207; *Williams v. Healey*, 3 Denio (N. Y.) 363; *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 455, 7 L. ed. 219; *Bohall v. Diller*, 41 Cal. 532; *Hill v. Grigsby*, 35 Cal. 656; *Smith v. Lewis*, 26 Conn. 110; *Clark v. Weis*, 87 Ill. 438, 29 Am. Rep. 60; *Goodwine v. Morey*, 111 Ind. 68, 12 N. E. 82; *Berryhill v. Byington*, 10 Iowa 223; *Nelson v. Wilson*, 75 Iowa 710, 38 N. W. 134; *Frenzer v. Dufrene*, 58 Nebr. 432, 78 N. W. 719; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636; *McCoy's Admrs. v. Bixbee's Admrs.*, 6 Ohio 310, 27 Am. Dec. 258; *Raudabaugh v. Hart*, 61 Ohio St. 73, 55 N. E. 214, 76 Am. St. 361; *Powell v. Dayton, S. & G. R. Co.*, 14 Ore. 356, 12 Pac. 665; *Cobb v. Hall*, 33 Vt. 233.

³³ *Summers v. Sleeth*, 45 Ind. 598.

violated without violating the whole, a breach by one party of a material part will discharge the whole at the option of the other party; but if the contract is severable—susceptible of division or appointment—the amount to be paid by one party depending upon the extent of performance of the other, the mere failure to perform a part of the contract in strict compliance with its terms will not of itself necessarily authorize the party injured to refuse performance.³⁴ And where the stipulation does not go to the root of the contract so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what was contracted for, there is ordinarily not such a breach as will authorize an abandonment of the contract by the other party.³⁵ Neither is there a fatal breach in cases where the nonperformance of one of the conditions does not materially impair the benefit from the performance of the others and the loss occasioned by the breach of the particular condition is capable of compensation in damages. It is not the theory of this principle that on failure of performance in an unimportant particular that the party benefited should enjoy these benefits and render no compensation for them.³⁶ This principle is abun-

³⁴ *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Canfield Lumber Co. v. Kint Lumber Co.*, 148 Iowa 207, 127 N. W. 70; *Miller v. Mason City & Ft. D. R. Co.*, 132 Iowa 412, 108 N. W. 302; *Wernli v. Collins*, 87 Iowa 548, 54 N. W. 365; *Hale v. Sheehan*, 52 Nebr. 184, 71 N. W. 1019; *El Paso & c. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922. In a case where a building contract required the owner to pay the contractor certain specified and definite sums of money at stated periods as the work progressed, it was held that the obligation to pay such sums became fixed and absolute when the building reached the required stage, entitling contractor to sue to recover the same, though the contract was entire and had not been fully performed. *Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. 354.

³⁵ *Bettini v. Gye*, 1 Q. B. Div. 183; *Weintz v. Hafner*, 78 Ill. 27; *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699; *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, 47 Atl. 406.

³⁶ *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382; *Nelson v. Oren*, 41 Ill. 18; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Boyle v. Guysinger*, 12 Ind. 273; *Johnson v. Heaton*, 28 Ind. App. 475, 61 N. E. 959; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; *Wagner v. Allen*, 174 Mass. 563, 55 N. E. 320; *Young Bros. Mach. Co. v. Young*, 111 Mich. 118, 69 N. W. 152; *Hunter v. Holmes*, 60 Minn. 496, 62 N. W. 1131; *Miller v. Benjamin*, 142 N. Y. 613, 37 N. E. 631; *Holmes v. Chartiers Oil Co.* 138 Pa. St. 546, 21 Atl. 231, 21 Am. St. 919; *Danville Bridge Co. v. Pom-*

dantly illustrated in cases where contractors for construction of buildings have, in good faith, substantially but not literally complied with the specifications. In these cases where the damages are slight so that an allowance out of the contract price will give the owner substantially what he contracted for, the breach does not discharge the entire contract.⁸⁷

§ 2047. Breach of independent and dependent covenants.

—In the case of numerous stipulations in a contract some may be dependent and others independent, according to their nature and the order of their performance.⁸⁸ Whether the covenants in any case are to be held dependent or independent of each other is determined by the intention and meaning of the parties as it appears from the contract.⁸⁹

eroy, 15 Pa. 151; *Burgi v. Rudgers*, 20 S. Dak. 646, 108 N. W. 253; *Kelly v. Bradford*, 33 Vt. 35; *Drew v. Goodhue*, 74 Vt. 436, 52 Atl. 971; *Foeller v. Heintz*, 118 Wis. 543, 118 N. W. 543.

⁸⁷ *Mitchell v. Caplinger*, 97 Ark. 278, 133 S. W. 1032; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Harlan v. Stuffbeem*, 87 Cal. 508, 25 Pac. 686; *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 172, 68 Am. Dec. 382; *Davis Hotchkiss Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028; *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Christopher & Co. Iron Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Adams v. Cosby*, 48 Ind. 153; *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Phillip v. Gallant*, 62 N. Y. 256; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. 608; *Kane v. Stone Co.*, 39 Ohio St. 1; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. 36; *Gallagher v. Sharpless*, 134 Pa. St. 134, 19 Atl. 491; *Moore v.*

Carter, 146 Pa. St. 492, 23 Atl. 243; *Snedeker v. Torpey*, 41 Pa. Super. Ct. 312. See also, *Aetna Iron & Steel Works v. Kossuth*, 79 Iowa 40, 44 N. W. 215; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

While a contractor for erecting a structure similar to another can recover only if he has substantially performed his contract, yet if defects in the work are not persuasive, do not amount to a deviation from the general plan, and are not so essential that they may not be remedied without difficulty, the contract is substantially performed; and he, having in good faith intended to comply with the contract, may recover the contract price, less the amount requisite to indemnify the owner for the expense of conforming the work to the contract. *Greenberg v. Lumb*, 129 N. Y. S. 182.

⁸⁸ *Knight v. New England Worst- ed Co.*, 2 Cush. (Mass.) 271.

⁸⁹ *Stavers v. Curling*, 3 Bing. N. Cas. 355; *Leonard v. Dyer*, 26 Conn. 183, 10 Atl. 264; *Jones & v. Wiley*, 3 Scam. (Ill.) 234; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Hewitt v. Berryman*, 5 Dana (Ky.) 162; *McClure v. Rush*, 9 Dana (Ky.) 64; *Hunt v. Tibbetts*, 70 Maine 221; *Howland v. Leach*, 11 Pick. (Mass.)

There is an example of these two kinds of conditions in a contract for the sale of land where the purchase-money is to be paid in instalments falling due in different years and the deed is to be executed at the time of the last payment. Here the stipulations to pay the first instalments are independent and the stipulation to pay the last instalment and to execute the deed are mutually dependent conditions.⁴⁰ The courts generally lean toward considering the condition to be dependent or conditional where the thing to be done on one side is the condition for the thing to be done on the other, and this is more especially the case where money is to be paid for something done or delivered when it could not be supposed that the intention of the parties was that the money was to be paid without performance by the other party.⁴¹ Some of the courts hold that where the vendor fails to sue for the prior instalment until the last instalment becomes due, he thereby waives the right to treat the prior instalment as independent, and he can not recover any part of the unpaid purchase-money unless he shows that he is ready and willing to convey the land.⁴²

151; *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128; *Turner v. Mellier*, 59 Mo. 526; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636; *Cunningham v. Morrell*, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332; *Tompkins v. Elliot*, 5 Wend. (N. Y.) 496; *McCrelish v. Churchman*, 4 Rawle (Pa.) 26; *Lippincott v. Low*, 68 Pa. St. 314; *Quigley v. Dehaas*, 82 Pa. 267; *Philadelphia W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307, 14 L. ed. 157; *Pollak v. Brush Elec. Assn.*, 128 U. S. 446, 32 L. ed. 474, 9 Sup. Ct. 119; *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. 928; *New Orleans v. Texas & P. R. Co.*, 171 U. S. 312, 18 Sup. Ct. 875.

⁴⁰ *Duncan v. Charles*, 4 Scam. (Ill.) 561; *Headley v. Shaw*, 39 Ill. 354; *Sheeren v. Moses*, 84 Ill. 448; *Ireland v. Chauncey*, 4 Ind. 224; *Kane v. Hood*, 13 Pick. (Mass.) 281; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; *Biddle v. Coryell*, 18 N. J. L.

377, 38 Am. Dec. 521; *Johnson v. Wygant*, 11 Wend. (N. Y.) 48; *First National Bank v. Agnew*, 45 Wis. 131.

⁴¹ *Mecum v. Peoria & O. R. Co.*, 21 Ill. 533; *Lunn v. Gage*, 37 Ill. 19, 87 Am. Dec. 233n; *Irwin v. Lee*, 34 Ind. 319; *Hamilton v. Thrall*, 7 Nebr. 210; *Powell v. Dayton, S. & G. R. R. Co.*, 14 Ore. 356, 12 Pac. 665; *King Phillip Mills v. Slater*, 12 R. I. 82; *Davis v. Jeffris*, 5 S. Dak. 352, 58 N. W. 815; *Bank of Columbia v. Hagner*, 1 Pet. (U. S.) 455, 7 L. ed. 219; *Williams v. Thrall*, 101 Wis. 337, 76 N. W. 599.

⁴² *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Sheeren v. Moses*, 84 Ill. 448; *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Shelly v. Mikkelsen*, 5 N. Dak. 22, 63 N. W. 210; *First National Bank v. Spear*, 12 S. Dak. 108, 80 N. W. 166; *Dewing v. Crueger*, 7 Wash. 590, 35 Pac. 393.

§ 2048. Breach in failure to perform a vital condition of the contract.—The breach of a contract may consist in a failure to perform in a matter which is vital to the existence of the contract. The principle is illustrated by the case of contracts which expressly state that the time of performance is of the essence of the contract.⁴³ It is not necessary that the contract should expressly set out that time is of the essence,⁴⁴ or that the particular condition is vital. It is enough that this fact should be deduced from a construction of the whole contract.⁴⁵ A statement descriptive of the subject-matter or of some material incident in a mercantile contract, such as the time or place of shipment, is generally regarded as a condition precedent, the failure to perform which will justify the injured party in repudiating the whole contract.⁴⁶ It is to be remembered, however,

⁴³ *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. 17; *Cunningham v. Illinois Cent. R. Co.*, 77 Ill. 178; *Skeen v. Patterson*, 180 Ill. 289, 54 N. E. 196; *McClellan v. Coffin*, 93 Ind. 456; *Thurston v. Arnold*, 43 Iowa 43; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Bullock v. Adams' Exrs.*, 20 N. J. Eq. 367; *Wells v. Smith*, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Miller v. Phillips*, 31 Pa. St. 218; *Hicks v. Aylsworth*, 13 R. I. 562; *Cheney v. Libbey*, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. 498; *Sowles v. Hall*, 62 Vt. 247, 20 Atl. 810, 22 Am. St. 101.

⁴⁴ *Cheney v. Libbey*, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. 498.

⁴⁵ *Hoyt v. Tuxbury*, 70 Ill. 331; *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Goldsmith v. Guild*, 10 Allen (Mass.) 239; *Carter v. Philips*, 144 Mass. 100, 10 N. E. 500; *Grigg v. Landis*, 21 N. J. Eq. 494; *Taylor v. Longworth*, 14 Pet. (U. S.) 172, 10 L. ed. 405; *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. 646; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (U. S.) 524.

⁴⁶ *Behn v. Burness*, 3 B. & S. 751; *Bowes v. Shand*, L. R. 2 App. Cas.

455; *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523; *Tascott v. Rosenthal*, 10 Ill. App. 639; *Coyne v. Avery*, 189 Ill. 378, 59 N. E. 788; *Ellinger v. Comstock*, 13 Ind. App. 696, 41 N. E. 351; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701; *Lefferts v. Weld*, 167 Mass. 531, 46 N. E. 107; *Rommel v. Wingate*, 103 Mass. 327; *Crane v. Wilson*, 105 Mich. 554, 63 N. W. 506; *Hoover v. Maher*, 51 Minn. 269, 53 N. W. 646; *Redlands Orange Growers' Assn. v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718. And see *Hill v. Blake*, 97 N. Y. 216, where *Danforth, J.*, said: "It of course can not be doubted that the omission to furnish iron shipped in December or January authorized the defendants to rescind the contract." *Welsh v. Gossler*, 89 N. Y. 540, 11 Abb. N. Cas. (N. Y.) 452; *Hill v. Blake*, 97 N. Y. 216; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703; *Lowber v. Bangs*, 2 Wall. (U. S.) 728, 17 L. ed. 768; *Norrington v. Wright*, 5 Fed. 768, affd. 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12; *Davison v. Von Lingen*, 113 U. S. 40, 28 L. ed. 885, 5 Sup. Ct. 346; *Cleveland*

that a condition making time of the essence of a contract may be waived by the conduct of the party for whose benefit it is made, and this occurs where such party recognizes the contract as in force after the time of performance has passed,⁴⁷ or where he prevents the performance of the contract within the time limited.⁴⁸ Where there is a written contract by which one of the parties agrees to construct a building for a certain price by a certain time, a waiver of the provision as to the time for its completion is not a waiver or abandonment of other features of the contract.⁴⁹ A condition is vital where a failure of its performance would defeat the main object of the contract.⁵⁰ And likewise, a condition is vital where the failure to perform would render the performance of the remainder of the contract a thing different in substance from what was contracted for.⁵¹ A supplementary written contract which alters the original in respect to delivery only does not abrogate it and does not prevent an action on it for its breach.⁵² Where a contract for the sale of a lumber plant provided for a reduction in price in case of a shortage in the timber, it was held that a further reduction made where the shortage exceeded expectations did not amount to an abandonment of the contract.⁵³

§ 2049. Failure of consideration.—A total failure of consideration for a contract amounts to a breach which will discharge the party without fault from liability on the con-

Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920.

⁴⁷ Watson v. White, 152 Ill. 364, 38 N. E. 902; Monson v. Bragdon, 159 Ill. 61, 42 N. E. 383.

⁴⁸ Stewart v. Keteltas, 36 N. Y. 388; Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815.

⁴⁹ Jacksonville & A. R. Co. v. Woodworth, 26 Fla. 368, 8 So. 177; Cooke v. Murphy, 70 Ill. 96; Stewart v. Keteltas, 36 N. Y. 388; Watson v. DeWitt, 19 Tex. Civ. App. 150, 46 S. W. 1061; Phillips Colby Const. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341.

⁵⁰ Poussard v. Spiers, 1 Q. B. D. 410; Johnson v. Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. 550; Powell v. Newell, 59 Minn. 406, 61 N. W. 335.

⁵¹ Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; Ballance v. Vanuxem, 191 Ill. 319, 61 N. E. 85; Manning v. School District No. 6, 124 Wis. 84, 102 N. W. 356.

⁵² Meylert v. Gas Consumers' Ben. Co., 14 N. Y. S. 148, 26 Abb. N. Cas. (N. Y.) 262.

⁵³ Cartier v. Troy Lumber Co., 35 Ill. App. 449, revd. 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470.

tract. This is a plain case of nonperformance,⁵⁴ and the adversary party may recover what he has paid on the contract.⁵⁵ In the case of a partial failure, where the consideration may be apportioned, the recovery may be had for that portion of the contract for which the consideration has failed.⁵⁶ Generally, however, a partial failure of consideration will not discharge the entire contract if compensation for the failure can be made in damages.⁵⁷ In other words, a breach of an independent covenant which does not go to the whole consideration of the contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages.⁵⁸ But there may be a discharge of the whole contract where the breach, though partial, goes to a vital part of the contract.⁵⁹ Where a contract for the sale of realty is executory on both sides, a failure of title is a failure of consideration, and a rescission of the contract may be had

⁵⁴ *Missouri Pacific R. Co. v. Yarnell*, 65 Ark. 320, 46 S. W. 943; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. 186; *Hays v. Plummer*, 126 Cal. 107, 58 Pac. 447, 77 Am. St. 153; *Ray v. Moore*, 24 Ind. App. 480, 56 N. E. 937; *Sigworth v. Holcomb* (Iowa), 79 N. W. 364; *Fink v. Chamber*, 95 Miss. 508, 55 N. W. 375; *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889; *Clark v. Russell*, 3 Watts (Pa.) 213, 27 Am. Dec. 348. Not a failure of consideration where promise was to repay advances only in case business was successful and evidence showed that it was not successful. *Reagan v. Bruff*, 49 Tex. Civ. App. 226, 108 S. W. 185; *White v. White*, 68 Vt. 161, 34 Atl. 425.

⁵⁵ *Richter v. Union & C. Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Herwig v. Richardson*, 44 La. Ann. 703, 11 So. 135; *Furgerson v. Staples*, 82 Maine 159, 19 Atl. 158, 17 Am. St. 470; *Dennis v. Pabst Brew. Co.*,

80 Minn. 15, 82 N. W. 978; *Slater v. Olson*, 83 Minn. 35, 85 N. W. 825; *Anthony v. Household Sewing Machine Co.*, 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. 117; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604. See also, *Young v. Cole*, 3 Bing. N. Cas. 724 (executed sale of bonds where they were invalid).

⁵⁶ *Smart v. Gale*, 62 N. H. 62.

⁵⁷ *Fort Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804; *Galt v. Provan*, 131 Iowa 277, 108 N. W. 760; *Hudson v. Archer*, 9 S. Dak. 240, 68 N. W. 541.

⁵⁸ *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.

⁵⁹ *Parker v. Bond*, 121 Ala. 529, 25 So. 898; *Missouri, K. & T. R. Co. v. Ft. Scott*, 15 Kans. 435; *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.

and the consideration recovered, but the vendee must restore the possession and the estate to the vendor.⁶⁰ On refusal of the vendor to deliver a deed according to the terms of the contract the vendee may sue for rescission and the recovery of the purchase-price already paid in by him.⁶¹

§ 2050. Waiver of breach of contract as discharge—Essentials of such waiver.—A breach of contract may be waived by the party entitled to raise the question, and where this is done the breach does not operate as a discharge.⁶² The waiver of performance or an extension of time, in the case of a condition precedent, is equivalent to performance at the stipulated time and leaves the original contract in tact.⁶³ The waiver estops the party not in default from claiming that the contract is ended, but it does not prevent a recovery of damages for defective work unless the right is lost by the conduct of the party not in default.⁶⁴ There is ordinarily a waiver by participation in acts done in dis-

⁶⁰ *Hill v. Winn*, 60 Ga. 337; *Marsh v. Thompson*, 102 Ind. 272, 1 N. E. 630. In a case where plaintiff gave defendant an option to sell his land, which was subject to a past-due lien, and the consideration to be paid was more than enough to discharge the lien, it was held that the lien was not such a defect in the title as would make plaintiff unable to carry out his agreement. *Smith v. Howard*, 32 Ky. Law, 211, 105 S. W. 411. *Sayre v. Mohney*, 30 Ore. 238, 47 Pac. 197; *Jackson v. McGinness*, 14 Pa. St. 331; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678.

⁶¹ *Zimmerman v. Branyan*, 62 N. J. L. 478, 41 Atl. 689; *Duncan v. Gisborn*, 17 Utah 209, 53 Pac. 1044.

⁶² *Braddock v. England*, 87 Ark. 393, 112 S. W. 883; *Friar v. Baldridge*, 91 Ark. 133, 120 S. W. 989; *Ellsworth v. Knowles*, 8 Cal. App. 630, 97 Pac. 690; *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Miller v. Mantik*, 116 Md. 279, 81 Atl. 797; *F. H. Mills Co. v. State*, 110 App. Div. (N. Y.) 843, 97 N. Y. S. 676, *affd.*

187 N. Y. 552, 80 N. E. 1109; *Montant v. Moore*, 135 App. Div. (N. Y.) 334, 120 N. Y. S. 556.

⁶³ *Willis Cab & Auto Co. v. The Abbaye*, 67 Misc. (N. Y.) 568, 124 N. Y. S. 756; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638. See also, *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Cadwell v. Smith*, 83 Nebr. 567, 120 N. W. 130. Where the party to a contract limiting the time for performance induces the contractor to proceed after the time has expired, he can not withhold from the contractor the fruits of the contract. *Stiewel v. Lally*, 89 Ark. 195, 115 S. W. 1134. A contract continues in force, notwithstanding default, where the party against whom the default is made affirmatively treats it in that way. *Hibernian Bank, Assn. v. Eckhart & Co.* S. Mill. Co., 140 Ill. App. 479. But see, *Missouri Bridge & Co. v. Stewart*, 134 Mo. App. 618, 114 S. W. 1119; *Reading Hardware Co. v. Pierce*, 129 App. Div. (N. Y.) 292, 113 N. Y. S. 331.

⁶⁴ *Gray v. New Paynesville*, 89 Minn. 258, 94 N. W. 721.

regard of the contract.⁶⁵ An anticipatory breach may be waived by the insistence of the party on having it continued in force.⁶⁶ And, where the breach has been sufficient to cause a forfeiture, a waiver or acquiescence in the breach by the party entitled thereto will preclude the enforcement of the forfeiture.⁶⁷ Forfeitures are not favored in law and a waiver of such forfeiture once made may not be recalled.⁶⁸ It is essential to a valid waiver that the party sought to be charged with the waiver had knowledge of what the other party had done contrary to the terms of the contract and what part thereof he had failed to perform.⁶⁹ Mere silence after notice will not always work a waiver. Thus, the right to liquidated damages for failure to complete a building within the time limited was held not waived by the failure of the owner to answer a letter written by the contractor explaining a cause of delay which would prevent him from completing the work within the time agreed, where he did not ask any extension or modification of the contract.⁷⁰ Furthermore, the waiver, to be effectual, must not be induced by fraud, deception,⁷¹ or threats.⁷² There is a waiver where the party to a contract accepts, without protest, work after the time agreed upon for its completion or in a different way from that contracted for.⁷³ But a

⁶⁵ *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854.

⁶⁶ *Becker v. Seggie*, 130 App. Div. (N. Y.) 463, 124 N. Y. S. 116.

⁶⁷ *Friar v. Baldrige*, 91 Ark. 133, 120 S. W. 989, 1 Pom. Eq. Jur. 452.

⁶⁸ *Williams v. Empire &c. Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

⁶⁹ *Jones v. Thomas*, 11 W. R. 50; *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880; *Stephens v. Essex County*, 143 Fed. 844, 75 C. C. A. 60; *Van Buskirk v. Murden*, 22 Ill. 446, 74 Am. Dec. 163; *Mitchell v. Wiscotta Land Co.*, 3 Iowa 209; *National Bank of Commerce v. Sullivan*, 117 La. 163, 41 So. 480; *Pratt v. Philbrook*, 41 Maine 132; *Veazie v. Bangor*, 51 Maine 509; *Dodge v. Minnesota &c. Roofing Co.*, 14 Minn. 49; *Murray v. Heinze*,

17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Bryant v. Stilwell*, 24 Pa. St. 314.

⁷⁰ *Stephens v. Essex County*, 143 Fed. 844, 75 C. C. A. 60.

⁷¹ *Leslie v. Knickerbocker Life Ins. Co.*, 63 N. Y. 27; *Kumberger v. Hartford*, 114 N. Y. S. 808.

⁷² *Mikolajewski v. Pugell*, 62 Misc. (N. Y.) 449, 114 N. Y. S. 1084.

⁷³ *Casey v. Holmes*, 10 Ala. 776; *Aikin v. Bloodgood*, 12 Ala. 221; *Hall v. Cannon*, 4 Har. (Del.) 360; *Finegan v. L'Engle*, 8 Fla. 413; *Strawn v. Cogswell*, 28 Ill. 457; *Nibbe v. Brauhn*, 24 Ill. 268; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631; *Norris v. School District No. 1*, 12 Maine 293, 28 Am. Dec. 182; *Barry v. Palmer*, 19 Maine 303; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Button v. Russell*, 55 Mich. 478, 21 N. W.

right under a contract is not ordinarily waived by making an honest effort to induce compliance therewith by the party who seeks to avoid such compliance.⁷⁴ The acceptance of commodities on a contract after a breach of a contract for the delivery of such commodities does not necessarily waive the breach of the original contract with a dealer in such commodities, as the subsequent deliveries may not refer to such contract.⁷⁵ A waiver can not be inferred from the mere fact of payment, where the party makes demand for his rights at the time he makes the payment.⁷⁶ Where a party to a contract waives a default in its terms, he can not again establish his right to proceed strictly thereunder, until he has given due notice of his intention to the other party.⁷⁷ As a general rule where a particular objection is made to the manner of performance the party will be deemed to have waived other known objections.⁷⁸

§ 2051. Waiver of breach as ground for damages.—The right to sue for damages for the breach of a contract may be waived by a party not in default himself and this usually occurs where such party yields an unqualified acquiescence in the breach.⁷⁹ This principle rests largely on the doc-

899; *Lee v. Ashbrook*, 14 Mo. 378, 55 Am. Dec. 110; *Marsh v. Richards*, 29 Mo. 99; *State v. Holladay*, 61 Mo. 319; *Neville v. Frost*, 2 E. D. Smith (N. Y.) 62; *Edminister v. Cochrane*, 8 Daly (N. Y.) 138; *Preston v. Finney*, 2 Watts & S. (Pa.) 53. See also, *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *Baldwin v. Farnsworth*, 10 Maine 414, 25 Am. Dec. 252.

⁷⁴ *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575; *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 App. Div. (N. Y.) 568, 94 N. Y. S. 23; *Traub-Ditmar Const. Co. v. Hartman*, 61 Misc. (N. Y.) 173, 112 N. Y. S. 919. Where a breach has accrued, it is not waived by an ineffectual demand for commencement of performance. *Bollogh v. Roof Maintenance Co.*, 112 N. Y. S. 1104.

⁷⁵ *Graves v. Melio*, 81 Ark. 347, 99 S. W. 80.

⁷⁶ *Griffith v. Newell*, 690 S. Car. 300, 48 S. E. 259.

⁷⁷ *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

⁷⁸ *Bucki v. Seitz*, 39 Fla. 55, 21 So. 576; *Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 71 N. E. 1084; *Tilden v. Buffalo Office Bldg. Co.*, 27 App. Div. (N. Y.) 510, 50 N. Y. S. 511; *Wright v. C. S. Graves Land Co.*, 100 Wis. 269, 75 N. W. 1000.

⁷⁹ *Hall v. Cannon*, 4 Har. (Del.) 360; *Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450; *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61, 61 N. E. 332; *Fitts v. Reinhart*, 102 Iowa 311, 71 N. W. 227; *Hansen v. Kirtley*, 11 Iowa 565; *Taylor v. Butters & Co. Lumber Co.*, 103 Mich. 1, 61 N. W. 5; *Brighton v. Lake Shore & M. S. R. Co.*, 103 Mich. 420, 61 N. W. 550; *Stewart v. Fulton*, 31 Mo. 59; *Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Goldsmith*

trine of estoppel and is best illustrated by the cases where the party leads the contractor to believe that he will not insist on a strict performance of the contract, and where he either requests the breach, or makes a strict performance impossible.⁸⁰ Accordingly, one may not recover damages for a breach which an inspection would have disclosed where the party for whom the work is done inspects the work during its progress and accepts it after such inspection.⁸¹ It is essential, however, to the full operation of this principle that the party sought to be charged with the waiver should have knowledge of the facts which constitute the breach or the means of knowledge of such facts.⁸² A party may condone defective workmanship so as to lose a right to recover damages for this cause. Thus, where a contractor called the attention of the superintendent of the owner to a pier which the owner claims was out of line, and he decided not to object on that ground, or claim damages, if the remainder of the work was satisfactory, but did not inform the contractors of his intention, and the defect could then easily have been remedied at small cost, it has been held that the owner can not claim damages after the work is completed because the defect affects the appearance

v. Hand, 26 Ohio St. 101; Laycock v. Moon, 97 Wis. 59, 72 N. W. 372. Although a breach by one party occasions an injury to the other, this does not preclude the former from recovering on the contract where both parties have gone on and performed it for some time thereafter, and the injury was susceptible of compensation in damages. Robinson v. Lake Shore & C. R. Co., 103 Mich. 607, 61 N. W. 1014.

⁸⁰ Young v. Wells Glass Co., 187 Ill. 626, 58 N. E. 605; Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. 680.

⁸¹ Parker v. Palmer, 4 B. & A. 387; Beverley v. Lincoln Gas Light & Coke Co., 6 Ad. & El. 829; United States v. Walsh, 108 Fed.

502; Carleton v. Jenks, 80 Fed. 937, 26 C. C. A. 265; Hirshhorn v. Stewart, 49 Iowa 418; Gorton v. Moeller Bros., 151 Iowa 729, 130 N. W. 910; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; Studer v. Bleistein, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Dounce v. Dow, 64 N. Y. 411; Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358; Montgomery v. New York, 151 N. Y. 249, 45 N. E. 550; Siebert v. Roth, 118 Wis. 250, 95 N. W. 118.

⁸² Monahan v. Fitzgerald, 62 Ill. App. 192, affd. 164 Ill. 525, 45 N. E. 1013; Industrial Works v. Mitchell, 114 Mich. 29, 72 N. W. 25; Spink v. Mueller, 77 Mo. App. 85; Utah Lumber Co. v. James, 25 Utah 434, 71 Pac. 986.

of the building.⁸³ Similarly, a recovery for defective work was denied where the owner of property directed a defaulting contractor to proceed with work in freezing weather which could not be safely performed in such weather.⁸⁴ The acquiescence in the breach must be an active acquiescence in the default and the conduct of the party must usually be such as to show a disinclination to insist upon strict performance of the contract. A right of action for damages is not necessarily waived by the mere fact of payment with knowledge of defects or the taking possession of the subject-matter of the contract, but these facts may be considered on the question of the waiver of this character.⁸⁵ The acquiescence must be an acquiescence free from the compulsion of the party in default.⁸⁶

⁸³ *Gillette v. Young*, 45 Colo. 562, 101 Pac. 766. See also, *Voigtmann v. Wilmington Trust Bldg. Corp.*, 7 Pen. (Del.) 265, 78 Atl. 920.

⁸⁴ *Sun Construction Co. v. Kandel*, 129 N. Y. S. 10.

⁸⁵ *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. 54; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. 40; *Morse v. Moore*, 83 Maine 473, 22 Atl. 362, 13 L. R. A.

224, 23 Am. St. 783; *Johnson v. Henry*, 127 Mich. 548, 86 N. W. 1027; *Redlands Orange Growers' Assn. v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. 814.

⁸⁶ *Payne v. Amos Kent & Co. Lumber Co.*, 110 La. 750, 34 So. 763; *Garfield & Co. Coal Co. v. Fitchburg Co.*, 166 Mass. 119, 44 N. E. 119; *Bucklin v. Davidson*, 155 Pa. St. 362, 26 Atl. 643; *Charley v. Pott-hoff*, 118 Wis. 258, 95 N. W. 124.

CHAPTER XLVIII.

DISCHARGE OF RIGHT OF ACTION.

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§ 2055. Methods of discharge of right of action for breach of contract.—This chapter discusses the various methods for the discharge of the right of action for the breach of a contract and not the discharge of the contract itself, which is a very different matter. The discharge of the right of action for breach of contract may be effectuated by agreement of the parties—by means of a release or an accord and satisfaction—by a judgment on the merits rendered by a court of competent jurisdiction, or by lapse of time.

§ 2056. **Release defined and distinguished.**—A release is the relinquishment, concession or giving up of a right, claim or privilege, by the person in whom it exists, or to whom it accrues, to the person against whom it might have been demanded or enforced.¹ It is “an act or writing by which some claim or interest is surrendered to another person.”² The term, as here used, applies to the discharge of a claim or right of action arising from a breach of contract by the formal consent or dispensation of the promisee. It does not, strictly speaking, apply to the discharge of a contract before breach by the agreement of the parties to that effect, which is more correctly described as a rescission of the contract, or a discharge by a new or substituted agreement.³ The term is not to be confused with an extinguishment, for that is a discharge by law, while a release is a discharge by the act of the parties.⁴ Neither is it, in strictness, synonymous with a receipt; for that, strictly speaking, is the mere evidence of a release,⁵ and it is distinguished from a waiver, for that signifies no more than an intention not to insist on a right.⁶ A bond or covenant not to sue is

¹ Black's Law Dic., tit. Release.

² Anderson's Law Dictionary, tit. Release.

³ Leake on Contracts, 751, 754, 794.

⁴ Baker v. Baker, 28 N. J. L. 13, 75 Am. Dec. 243.

⁵ Middleditch v. Sharland, 5 Ves. Jr. 87; Stocks v. Dobson, 4 De G., M. & G. 11; Gross v. Diller, 33 Minn. 424, 23 N. W. 837; Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; Foster v. Walker, 34 Miss. 365; Baum v. Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441; Price v. Treat, 29 Nebr. 536, 45 N. W. 790; Crane v. Alling, 15 N. J. L. 423; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, 31 N. E. 1104; Allen v. Allen, 13 S. Car. 512, 36 Am. Rep. 716. This does not mean that a paper in the form of a receipt may not amount to a release for it is obvious that the receipt may be so worded as to operate both as a release and a receipt. Cammarata v. Pennsylvania Coal Co., 86 N. Y. S.

787. See post, § 2062. In a case where an actress playing under a contract signs a receipt not under seal for weekly salary, it was held that the receipt could not be considered as a release of damages for breach of contract and this more especially where at the time the receipt was given, the actress was under notice of dismissal, which was not, however, to take effect until after the date of the receipt. Eveson v. Ziegfeld, 22 Pa. Super. Ct. 79. The receipt of a check on which was written the words “account in full,” does not release damages sustained by reason of the rescission of the contract on which the payment was made. Webb v. Novelty Hosiery Co., 231 Pa. St. 297, 80 Atl. 173.

⁶ Equity, it is said, will not treat a mere waiver as tantamount to a release. A waiver is nothing, unless it amounts to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. Stackhouse v. Barnston,

generally regarded equivalent to a release.⁷ A covenant, however, not to sue one of two joint obligors will not discharge the other.⁸ The validity and effect of a release of a cause of action does not depend on the validity of the cause of action.⁹

§ 2057. Form of release.—No set form of words is necessary to constitute a release. Any expressions which denote the intention of one party to discharge the other are sufficient.¹⁰ The release of a simple contract debt need not be in writing, but may be by parol.¹¹ Where legal terms are employed in a release, it must be presumed that the parties fully understood the legal import of the words, and the court will give effect to that understanding,¹² for the construction of a release is a question of law for the court.¹³ Entries and indorsements on obligations have often been held a release in equity. "There is a series of decisions in courts of equity in England and in this country which have established the principle that when a creditor has, by written or parol declarations with regard to a debt, or by con-

10 Ves. Jr. 453. See also, *Maxfield v. Terry*, 4 Del. Ch. 629.

⁷ *Deux v. Jefferies*, Cro. Eliz. 352; *Smith v. Mapleback*, 1 T. R. 441; *Fowell v. Forrest*, 2 Saunders 47dd; *Lacy v. Kynaston*, 2 Salk. 575; *Harvey v. Harvey*, 3 Ind. 473; *Arnold v. Park*, 8 Bush (Ky.) 3; *Line v. Nelson*, 38 N. J. L. 358; *Cuyler v. Cuyler*, 2 Johns. (N. Y.) 186; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514. See *Ford v. Beech*, 11 Q. B. 852. "The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release."

⁸ *Cuyler v. Cuyler*, 2 Johns. (N. Y.) 186; *Miller v. Fenton*, 11 Paige (N. Y.) 18; *Butchers' & Drovers' Bank v. Brown*, 1 N. Y. Leg. Obs.

149; *Frink v. Green*, 5 Barb. (N. Y.) 455; *Bank of Chenango v. Osgood*, 4 Wend. (N. Y.) 607; *Phelps v. Johnson*, 8 Johns. (N. Y.) 54; *Miller v. Fenton*, 11 Paige (N. Y.) 18; *Lysaght v. Phillips*, 5 Duer (N. Y.) 106.

⁹ *Cleveland C. C. St. L. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. 258.

¹⁰ *Co. Lit.* 264b; *Hickmot's Case*, 9 Coke 52; *Lock v. Etherington*, 1 Sid. 264; *Bruce v. Halbert*, 3 B. Mon. (Ky.) 66; *Southwick v. Hopkins*, 47 Maine 362; *Stebbins v. Niles*, 25 Miss. 267; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Morgan v. Smith*, 70 N. Y. 537; *Surgiss v. Westmoreland*, 38 S. Car. 425, 17 S. E. 56.

¹¹ *Hand Lumber Co. v. Hall*, 147 Ala. 561, 41 So. 78.

¹² *Knott v. Burleson*, 2 G. Greene (Iowa) 600.

¹³ *Knott v. Burleson*, 2 G. Greene (Iowa) 600; *Barnes v. American China Dev. Co.*, 131 App. Div. (N. Y.) 40, 115 N. Y. S. 703.

duct tantamount thereto, declared or agreed that a debt shall be relinquished or given up, or that it has been so given up or relinquished, a court of equity will consider this an equitable release, and will not permit his representatives to enforce it."¹⁴ Indorsements of payments made by the mortgagee in the presence of the mortgagor on the mortgage, such indorsements being in accord with a deliberate and expressed intention to make a gift or donation, are sustained as an extinguishment or forgiving of the mortgage debt to the extent of the indorsements.¹⁵ But a writing indorsed on the execution by the judgment creditor to the effect, "I hereby discharge J. C., sheriff, from all liability whatever of the above stated execution, the defendant being dead, and no further proceeding required on the same," was held no release of the debtor.¹⁶ The words "not to be enforced" were indorsed by the holder on a note. This was held to be no discharge or release of the note.¹⁷ And the making of an indorsement on a bond by which the obligee forgives the obligor of the same is no discharge.¹⁸ But where a bond was indorsed, "This bond is never to appear against A, witness, C, D," an action at law on the bond was restrained.¹⁹ An instrument in form a receipt may constitute a release.²⁰ Thus, where a father, holding a bond and mortgage executed by his son, with the intention of releasing to the latter a portion of the mortgage debt, executed and delivered to him a receipt therefor, containing a provision that the sum stated should be indorsed on the mortgage, it was held an equitable release.²¹ A release may be contingent; that is, it may take

¹⁴ *Leddell's Exr. v. Starr*, 20 N. J. Eq. 274; *Cassilly v. Cassilly*, 57 Ohio St. 582, 49 N. E. 795.

¹⁵ *Green v. Langdon*, 28 Mich. 221.

¹⁶ *Batten v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630.

¹⁷ *Peace v. Hains*, 11 Hare 151.

¹⁸ *Tufnell v. Constable*, 8 Simon 69.

¹⁹ *Major v. Major*, 1 Drew. 165.

²⁰ When a release is similar to a receipt the Supreme Court of Indiana applies the rules of evidence applicable to a receipt, and allows it to be explained, qualified or contra-

dicted by parol evidence, and the circumstances and the purposes for which it was executed may be shown. *Scott v. Scott*, 105 Ind. 584, 5 N. E. 397. *Hight v. Taylor*, 97 Ind. 392; *Lash v. Rendell*, 72 Ind. 475; *Stewart v. Chicago & E. I. R. Co.*, 141 Ind. 55, 40 N. E. 67. But not where it is contractual. *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787.

²¹ *Carpenter v. Soule*, 88 N. Y. 251, 42 Am. Rep. 248.

effect upon the happening of some uncertain future event. In other words, it may be conditional.²² Whether a mere written entry or memorandum can of itself always constitute a release is doubtful.²³ But while a paper writing might not of itself constitute a release, it might, nevertheless, contain such statements as to amount to a declaration of trust in favor of the debtor. Equity would then enforce the trust.²⁴

§ 2058. Consideration of release.—A release is a contract and, under the general rule, must be supported by a consideration.²⁵ But an actual consideration is not required to support a release under seal, for a seal imports a consideration.²⁶ There may be a valid release without consideration and this occurs where the holder of an obligation

²² *Belshaw v. Bush*, 11 C. B. 191; *Walker v. Nevill*, 3 H. & C. 403; *Newington v. Levy*, L. R. 6 C. P. 180; *Gibbons v. Vouillon*, 8 C. B. 483; *Corner v. Sweet*, L. R. 1 C. P. 456; *Hall v. Levy*, L. R. 10 C. P. 154; *Johnson v. Philadelphia*, 2 Pa. Dist. 229; *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. 363, 35 Am. St. 815; *Blakemore v. Jones*, 5 Tex. Civ. App. 516, 22 S. W. 779, 24 S. W. 305.

²³ 2 Story on Equity Jurisprudence, § 706. See, *Eden v. Smyth*, 5 Ves. Jr. 341; *Moore v. Darton*, 7 Eng. Law & Eq. 134; *Jennings v. Blocker's Admr.*, 25 Ala. 415; *Stallings v. Finch*, 25 Ala. 518; *Mallett v. Page*, 8 Ind. 364; *Hartwell v. Rice*, 1 Gray (Mass.) 587; *Loring v. Blake*, 106 Mass. 592; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Oller v. Bonebrake*, 65 Pa. St. 338; *In re High's Appeal*, 21 Pa. St. 283; *Crawford v. M'Elvy*, 2 Speer (S. Car.) 225. See also, *Clark v. Warner*, 6 Conn. 355. The above cases are cases of advancements and gifts, but the doctrine is analogous. See Story's Eq. Juris., § 706.

²⁴ *Morgan v. Malleson*, L. R. 10 Eq. Cas. 475.

²⁵ *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370; *Metcalf v. Kent*, 104 Iowa 487, 73 N. W. 1037; *Hendrick v. Boston & A. R. Co.*, 170 Mass. 44, 48 N. E. 835; *Gallo v. New York*, 15 App. Div. (N. Y.) 61, 44

N. Y. S. 143; *Miller v. Fox*, 111 Tenn. 336, 76 S. W. 893; *Missouri, K. & T. R. Co. v. Darlington* (Tex. Civ. App.) 40 S. W. 550; *Triplett v. Woodward*, 98 Va. 187, 35 S. E. 455. See also, *Hey v. Moorhouse*, 6 Bing. N. Cas. 52; *Scharf v. Moore*, 102 Ala. 468, 14 So. 879; *Mobile, J. & K. C. R. Co. v. Owen*, 121 Ala. 505, 25 So. 612; *Swan v. Benson*, 31 Ark. 728; *Mendel v. Davis*, 46 Ark. 420; *Heckman v. Manning*, 4 Colo. 543; *Carter v. Zenblin*, 68 Ind. 436; *Harris v. Boone*, 69 Ind. 300; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Wray v. Chandler*, 64 Ind. 146; *Metcalf v. Kent*, 104 Iowa 487, 73 N. W. 1037; *Averill v. Wood*, 78 Mich. 342, 44 N. W. 381; *Hale v. Dessen*, 76 Minn. 183, 78 N. W. 1045; *Young v. Power*, 41 Miss. 197; *Anthony v. Capel*, 53 Miss. 350; *Northwestern Nat. Bank v. Great Falls Opera-House Co.*, 23 Mont. 1, 57 Pac. 440; *Crawford v. Millsbaugh*, 13 Johns. (N. Y.) 87; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Dockery v. French*, 73 N. Car. 420; *Albert's Exrs. v. Ziegler's Exrs.*, 29 Pa. St. 50; *Allen v. Allen*, 13 S. Car. 512, 36 Am. Rep. 716. But see *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Jersey City v. North Jersey St. R. Co.* (N. J.), 73 Atl. 609.

²⁶ *Singleton v. Thomas*, 73 Ala. 205; *Union Bank v. Call*, 5 Fla. 409; *Braden v. Ward*, 42 N. J. L. 518; *Brown v. Marsh*, 7 Vt. 320.

voluntarily delivers it to the obligor with the intent to cancel the obligation.²⁷ The consideration may be paid by a third person.²⁸ Parol evidence is admissible to show the consideration in cases where the release is silent as to consideration.²⁹ And where a consideration is recited it may usually be contradicted by evidence that the release is not supported by any consideration,³⁰ or that there was an additional consideration.³¹ Where an employé, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employé has paid in advance for an optional contract, and he has the right to have it remain optional.³² Under the Michigan statute providing that a seal is only presumptive evidence of consideration, a sealed release given without consideration does not bar the releasor from bringing an action for damages for injury to the person.³³ Where one consents to pay in

²⁷ *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176; *Beach v. Endress*, 51 Barb. (N. Y.) 570; *Albert's Exrs. v. Ziegler's Exrs.*, 29 Pa. St. 50; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551.

²⁸ *Cook v. Lister*, 13 C. B. (N. S.) 543; *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638; *Tuckerman v. Sleeper*, 9 Cush. (Mass.) 177; *Wheaton v. Newcombe*, 48 N. Y. Super. Ct. 215.

²⁹ *Frink v. Green*, 5 Barb. (N. Y.) 455.

³⁰ *Potter v. Detroit*, G. H. & M. R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; *Hale v. Dreesen*, 76 Minn. 183, 78 N. W. 1045. *Contra*, *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787 (but compare, *Stewart v. Chicago & E. I. R. Co.*, 141 Ind. 55, 40 N. E. 67); *Chicago, B. & Q. R. Co. v. Bell*, 44 Nebr. 44, 62 N. W. 314.

³¹ *Galvin v. Boston El. R. Co.*, 180 Mass. 587, 62 N. E. 961; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393.

³² *Pennsylvania R. Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; *Smith v. St. Paul & D. R. Co.*, 60 Minn. 330, 62 N. W. 392; *Pierce v. Tennessee & C. R. Co.*, 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. 335.

³³ *Wabash Western R. Co. v. Brow*, 65 Fed. 941, 13 C. C. A. 222, rev'd. 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. 126, "With reference to the release, we are very clear that the court was right in charging the jury to disregard it. All the evidence in the case showed that no money was paid, and no employment tendered or received, to fulfill the recited consideration of the release. In the absence of any consideration, the release could not, of course, constitute a bar to the action. It is true that a seal imports consideration, but by section 7520 of Howell's Annotated Statutes of Michigan it is only presumptive evidence, and may be rebutted. *Green v. Langdon*, 28 Mich. 221-225. As the evidence here conclusively established that there was no consideration, the seal had no effect." First

full a bill, the correctness of which he in good faith disputes, only on condition that certain other demands against him shall be released, such payment constitutes a good consideration for the release.³⁴

§ 2059. Necessity for seal on release.—Whether a release requires a seal depends somewhat on the nature of the obligation to be released, or the law in the particular jurisdiction as to the use and effect of seals. It was an old maxim of the common law that an obligor could only be released by an instrument of as high a nature as that by which he was bound; being obligated by a seal, he could be released only by an instrument under seal. Technically, this may be the rule of modern times, but practically it is not enforced.³⁵ The chief office of the seal is to dispense with proof of consideration, for the seal itself imports a consideration. An unsealed release without consideration to support it is void.³⁶

Presbyterian Church v. Swanson, 100 Ill. App. 39.

³⁴ *Lehigh Valley Transp. Co. v. Miller*, 8 C. C. A. 188, 59 Fed. 483; *Bofinger v. Tuyes*, 120 U. S. 198, 30 L. ed. 649, 7 Sup. Ct. 529; *United States v. Child*, 12 Wall. (U. S.) 232, 20 L. ed. 360, 7 Ct. Cl. (U. S.) 209.

³⁵ *Thomason v. Dill*, 30 Ala. 444; *Union Bank v. Call*, 5 Fla. 409; *White v. Walker*, 31 Ill. 422; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260 (holding that a release of a debt secured by mortgage need not be under seal, nor need it be under seal when prospective damages are released); *Benjamin v. McConnell*, 4 Gilm. (Ill.) 536 (holding that a release of contract, not under seal, but made part of a decree of court, is valid); *Leviston v. Junction R. Co.*, 7 Ind. 597 (to the effect that even if a release is supported by a consideration, it must be under seal to convey an easement); *First Nat. Bank v. Marshall*, 73 Maine 79; *Pratt v. Morrow*, 45 Mo. 404, 100 Am. Dec. 381; *Farmer's Bank v. Blair*, 44 Barb. (N. Y.) 641; *Smithwick v. Ward*, 52 N. Car. 64, 75 Am. Dec. 453; *Olston v. Oregon &c. R. Co.*,

52 Ore. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915n. A writing to be valid as a technical release must be under seal. *Russ v. Harper*, 156 N. Car. 444, 72 S. E. 570.

³⁶ *Harman v. Harman*, Comb. 35; *Brooks v. Stuart*, 9 Ad. & El. 854; *Preston v. Christmas*, 2 Wils. 86; *Kaye v. Wagborne*, 1 Taunt. 428; *Governor v. Daily*, 14 Ala. 469; *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Teague v. Russell*, 2 Stew. (Ala.) 420; *Armstrong v. Hayward*, 6 Cal. 183; *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121; *Richmond &c. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604; *Murphy v. Halleran*, 50 Ill. App. 594; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; *Dillingham v. Estill*, 3 Dana (Ky.) 21; *Handley v. Moorman*, 4 Bibb. (Ky.) 1; *Gibson v. Weir*, 1 J. J. Marsh. (Ky.) 446; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *Dunham v. Branch*, 5 Cush. (Mass.) 558; *Gold Medal Sewing Mach. Co. v. Harris*, 124 Mass. 206; *Davis v. Bowker*, 1 Nev. 487; *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380;

§ 2060. **Delivery and acceptance of release.**—It is essential to a valid release that it should be delivered and accepted, but this does not call for formal action. A delivery and acceptance will be presumed from acts and slight circumstances showing such an intention by the parties.³⁷ The release may be delivered in escrow.³⁸ There can be no release of a cause of action without unequivocal acts of plaintiff showing expressly or by necessary implication that he intended to release.³⁹ One who believes he is signing a release is usually bound thereby though he does not read it.⁴⁰

§ 2061. **Construction of releases in general.**—Releases must be construed according to the intent of the parties if it can be gathered from the instrument itself.⁴¹ General words are to be limited and restrained to the particular words in the recital.⁴² Where a release is contractual and general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol; the instrument itself is the only competent evi-

Suydam v. Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *Bronson v. Fitzhugh*, 1 Hill (N. Y.) 185; *Hon-egger v. Wettstein*, 47 N. Y. Super. Ct. 125, revd. 94 N. Y. 252, 13 Abb. N. C. (N. Y.) 393; *Redmond v. Coffin*, 17 N. Car. 437; *Smithwick v. Ward*, 52 N. Car. 64, 75 Am. Dec. 453; *In re Campbell*, 7 Pa. St. 100, 47 Am. Dec. 503; *Kidder v. Kidder*, 33 Pa. St. 268; *Hope v. Johnston*, 11 Rich. L. (S. Car.) 135; *Smith v. Harris*, 3 Sneed (Tenn.) 553.

³⁷ *Buck v. Sanders*, 1 Dana (Ky.) 187; *Foerster's Succession*, 43 La. Ann. 190, 9 So. 17; *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155; *Crager v. Reis*, 16 Dal. (N. Y.) 450, 35 N. Y. St. 30; 12 N. Y. S. 729; *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692, 36 L. R. A. (N. S.) 1147n; *Fitch v. Formen*, 14 Johns. (N. Y.) 172; *Daves v. Haywood*, 1 Jones Eq. (N. Car.) 253; *Walker v. Ferrin*, 4 Vt. 523.

³⁸ *Wolcott v. Coleman*, 1 Conn. 375; *Davison v. Tams*, 30 Misc. (N. Y.) 156, 63 N. Y. S. 828; *Walter v. Wal-*

ter, 9 Ohio Dec. 351, 12 Wkly. L. Bul. 212.

³⁹ *Mensforth v. Chicago Brass Co.*, 142 Wis. 546, 126 N. W. 41, 512, 135 Am. St. 1084.

⁴⁰ *Schenfeld v. Hochman*, 100 N. Y. S. 1020.

⁴¹ *In re Russell*, 176 Fed. 253, 100 C. C. A. 77.

⁴² Likewise a release of all demands, in general words, is restrained to the particular occasion, and is often construed as qualified by the recitals. *Cole v. Knight*, 3 Mod. 277. *Texas & P. R. Co. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150, 25 Sup. Ct. 737. *In Union Pac. R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, approved in the last case above cited, the rule was applied and a release of damages for certain injuries, and from all claims, demands, and causes of action from the beginning of the world, was held not to cover personal injuries from the same accident not therein specified and not known at the time.

dence of the agreement of the parties, unless avoided for fraud, mistake, duress or some like cause. So, also, if the words of a release fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand;⁴³ but it is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recitals, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties, and for the purpose of ascertaining that intent, every part of the instrument is to be considered. The general words in a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was given;⁴⁴ but a dispute that has not

⁴³ *Whiting v. Plumes Co.*, 64 Cal. 65, 28 Pac. 445; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Battle v. McArthur*, 49 Fed. 715; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611; *Ohio & M. R. Co. v. Crumbo*, 4 Ind. App. 456, 30 N. E. 434; *Henas v. Henas*, 5 Ind. App. 100, 31 N. E. 832; *Frost v. Brigham*, 139 Mass. 43, 29 N. E. 217; *Hitchcock v. Davis*, 87 Mich. 629, 49 N. W. 912; *Pratt v. Castle*, 91 Mich. 484, 52 N. W. 52; *Loth v. Friedrich*, 95 Mich. 598, 55 N. W. 369; *Taylor v. Horst*, 52 Minn. 300, 54 N. W. 734; *Hart v. Taylor*, 70 Miss. 665, 12 So. 553; *Robinson v. McPaul*, 19 Mo. 549; *Murphy v. Kastner*, 50 N. J. Eq. 224, 24 Atl. 564; *In re Reynolds*, 48 N. Y. St. 627, 21 N. Y. S. 592; *Kirchner v. New Home Sewing Mach. Co.*, 62 Hun (N. Y.) 620, 42 N. Y. St. 907, 16 N. Y. S. 761, revd. 135 N. Y. 182, 31 N. E. 1104; *Richards v. Angell*, 66 Hun (N. Y.) 636, 50 N. Y. St. 280, 21 N. Y. S. 646;

Pierce v. Sweet, 33 Pa. St. 151 (holding that a release of the personal liability of a debtor will not, unless so intended, discharge a lien for the same claim); *Fidelity Title & Trust Co. v. Peoples Nat. Gas Co.*, 150 Pa. St. 8, 24 Atl. 339; *In re Naglee's Estate*, 10 Pa. Co. Ct. 525; *Currier v. Bilger*, 149 Pa. 109, 24 Atl. 168.

⁴⁴ *Turner v. Turner*, L. R. 14 Ch. D. 829; *Barclay v. Lucas*, 1 T. R. 292, note; *Lindo v. Lindo*, 1 Beav. 496; *Miller v. Craig*, 6 Beav. 433; *Cole v. Knight*, 3 Mod. 277; *Wright v. Russell*, 3 Wils. 530; *Butcher v. Butcher*, 4 Bos. & P. (N. R.) 113; *Lyman v. Clarke*, 9 Mass. 235; *Farewell v. Coker*, cited in 2 Merr. 353; *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182, 31 N. E. 1104; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Piereson v. Hooker*, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Mumford v. Murray*, 6 Johns. Ch. (N.

emerged, or a question which has not at all arisen, can not be considered as bound and concluded by the anticipatory words of a general release,⁴⁵ as where general words of release are immediately connected with a proviso, restraining their operation.⁴⁶ So, a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties.⁴⁷ So, where it is recited that various controversies are subsisting between the parties, and actions pending, and that it had been agreed that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was held that, though general in terms, the releases were qualified by the recital and limited to actions pending.⁴⁸ A release of the principal releases an accessory,⁴⁹ and hence, a release of covenants operates to discharge a bond given for the performance of those covenants.⁵⁰ A release which expressly excepts from its operation all legal claims of the contractor under his contract does not operate to discharge his claims against his principal for delay growing out of breach of one of the implied conditions of the contract by the principal.⁵¹

§ 2062. Release implied from conduct of obligee—Destruction of obligation—Surrender of obligation—Voluntary declarations.—The voluntary and intentional destruction of the evidence of the debt, done for the purpose of releasing the obligor, works a release. Thus, where the holder of certain notes destroyed them and afterwards stated that as she did not expect to live long she did not want the maker to be

Y.) 452; *Parsons v. Hughes*, 9 Paige (N. Y.) 591.

⁴⁵ *Turner v. Turner*, L. R. 14 Ch. Div. 829; *Rich v. Lord*, 18 Pick. (Mass.) 322.

⁴⁶ *Solly v. Forbes*, 2 Br. & B. 38.

⁴⁷ *Payler v. Homersham*, 4 M. & S. 423.

⁴⁸ *Simons v. Johnson*, 3 B. A. 175;

Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

⁴⁹ *Thompson v. Harrison*, 2 Bro. C. C. 164; *Blackwood v. Borrowes*, 2 Con. & L. 459.

⁵⁰ *Reade v. Bullocke*, 1 Dyer 56b.

⁵¹ *Mairs v. New York*, 30 Misc. (N. Y.) 384, 62 N. Y. S. 351, revd. 52 App. Div. 343, 65 N. Y. S. 160.

compelled to pay them after her death, this was construed a release.⁵² A debt owing by the wife was held to be discharged, by gift *causa mortis*, by the husband's destroying the bond, the evidence of the debt, and declaring that the money was hers.⁵³ The destruction must, however, be actual; an intention to destroy will not suffice.⁵⁴ In like manner the delivery by the creditor to the debtor of the obligation or the evidence thereof may operate as a release.⁵⁵ So, also, the delivery or surrender of a note by the payee to the maker is *prima facie* a satisfaction or release of the debt.⁵⁶ The cases are not in accord upon the question whether voluntary declarations of release will work a release. The court of errors and appeals of New Jersey, in a very elaborate opinion, has reached the conclu-

⁵² *Darland v. Taylor*, 52 Iowa 503.

⁵³ *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340. See also, *Gilbert v. Wetherell*, 2 Sim. & S. 259; *Burney v. Ball*, 24 Ga. 505; *Blasdel v. Locke*, 52 N. H. 238; *Silvers v. Reynolds*, 17 N. J. L. 275; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293; *Rees v. Rees*, 11 Rich. Eq. (S. Car.) 86; *Hillebrant v. Brewer*, 6 Texas 45, 55 Am. Dec. 757.

⁵⁴ *Chew's Admr. v. Chew's Admx.* 23 N. J. Eq. 471; *In re Campbell's Estate*, 7 Pa. St. 100, 47 Am. Dec. 503. See also, *Nelson v. Cartmel's Admr.*, 6 Dana (Ky.) 7; *Harley v. Harley*, 57 Md. 340. The erasure of a signature with intent to release from a joint obligation would, as to the party released, have the same effect as the destruction of the instrument. *First Nat. Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338.

⁵⁵ *Lee's Exr. v. Boak*, 11 Grat. (Va.) 182.

⁵⁶ *Sherman v. Sherman*, 3 Ind. 337, a case showing the distinctions between a release and a gift. The court said: "We shall not inquire whether the delivery of the note and mortgage in this case can be supported as a *donatio mortis causa*; nor whether the support of Benoni and wife constitute a consideration that will uphold their surrender. There are other principles upon which, in equity, the case can be determined.

'Acts and declarations may amount to what, in the court of chancery, will be equivalent to a release of a debt.' 2 Spence Eq. Jur. 912. A court of equity will order the delivery up and cancellation of instruments, where they are clearly established by the proofs to have become *functus officio* according to the original intent and understanding of both parties; and, also, 'where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instrument, that he has treated it as released, or otherwise dead in point of effect.'" See also, *Wekett v. Raby*, 3 Bro. P. C. 16; *Hurst v. Beach*, 5 Madd. 356; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Edwards v. Campbell*, 23 Barb. (N. Y.) 423; *Bridgers v. Hutchins*, 33 N. Car. 68. Also, see the following cases on gifts, to show an executed gift, *Trow v. Shannon*, 78 N. Y. 446; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Doty v. Willson*, 47 N. Y. 580; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293; *Vass v. Hicks*, 3 Murphy (N. Car.) 493; *Sutton v. Hollowell*, 13 N. Car. 185; *Lance v. Lance*, 5 Jones L. (N. Car.) 413, 72 Am. Dec. 555; *Davis v. Davis' Exr.*, 1 Nott & McCord (S. Car.) 224; *Pitts v. Mangum*, 2 Bailey (S. Car.) 588.

sion that no voluntary declaration by a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will work an equitable release.⁵⁷ This seems, also, to be the rule in Pennsylvania,⁵⁸ Indiana,⁵⁹ Kentucky,⁶⁰ Mississippi,⁶¹ Connecticut,⁶² and Vermont.⁶³ The New York courts likewise recognize the rule that a debt can not be released or transformed into a gift by a mere parol declaration subsequent to its creation, but the distinction is drawn that where money is delivered by one person to another, under circumstances rendering it uncertain as to whether it was intended as a loan or gift, a distinct declaration made afterward by the one who delivered the money may have the effect of determining which it was.⁶⁴ And under the English authorities it would seem that any declaration made by a creditor to his debtor of his release of the debt, which the debtor acts upon to the material alteration of his position, would operate as a release.⁶⁵

§ 2063. Effect of release—At law and in equity.—Generally speaking, the effect of the release is to discharge from liability for the breach.⁶⁶ At common law, releases are conclusive; no evidence is admissible to contradict them, at least where contractual, and the parties are estopped by their recitals;⁶⁷ but in admiralty, releases are not conclu-

⁵⁷ *Irwin v. Johnson*, 36 N. J. Eq. 347 (overruling *Leddel's Exr. v. Starr*, 20 N. J. Eq. 274).

⁵⁸ *McNutt v. Loney*, 153 Pa. St. 281, 25 Atl. 1088 (where it was a promise to release); *Kreider v. Boyer*, 10 Watts (Pa.) 54.

⁵⁹ *Denman v. McMahon*, 37 Ind. 241.

⁶⁰ *Clarke v. Clarke*, 17 B. Mon. (Ky.) 698.

⁶¹ *Wheatley v. Abbott*, 32 Miss. 343.

⁶² *Johnson v. Belden*, 20 Conn. 322.

⁶³ *Carpenter v. Dodge*, 20 Vt. 595.

⁶⁴ *Doty v. Willson*, 47 N. Y. 580. See also, *Chew's Admr. v. Chew's Admx.*, 23 N. J. Eq. 471; *Haverstock v. Sarbach*, 1 Watts & S. (Pa.) 390; *McGuire v. Adams*, 8 Pa. St. 286; *Bradley v. Long*, 2 Strob. (S. Car.) 160.

⁶⁵ *Yeomans v. Williams*, L. R. 1 Eq. 184.

⁶⁶ *Chicago & N. W. R. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A. 147; *McGuire v. Lawrence Mfg. Co.*, 156 Mass. 324, 31 N. E. 3; *McFarland v. Missouri Pac. R. Co.*, 125 Mo. 253, 28 S. W. 590; *Hawkins v. Collins*, 61 S. Car. 537, 39 S. E. 768.

⁶⁷ *Green v. Chicago & N. W. R. Co.*, 92 Fed. 873, 35 C. C. A. 68; *Wallace v. Chicago St. P., M. & O. R. Co.*, 67 Iowa 547, 25 N. W. 772; *Sherburne v. Goodwin*, 44 N. H. 271; *Stearns v. Tappin*, 12 N. Y. Super. Ct. 294; *Perkins v. Fourniquet*, 14 How. (U. S.) 313, 14 L. ed. 435; *Jackowski v. Illinois Steel Co.*, 103 Wis. 448, 79 N. W. 757. That parol evidence, to contradict the terms or legal effect of such a release, is inadmissible, and evidence to show that it was founded upon any other consideration than that which it states

sive, especially when executed by seamen.⁶⁸ Releases by guardians, however, are effectual and binding on the ward.⁶⁹ A deed of release may be explained by recitals, or other matter, contained in the same deed; but no extraneous evidence is admissible to explain or contradict it, unless also under seal.⁷⁰ A court of equity, on the other hand, is not restrained by the conclusiveness of the release. It will look into the consideration,⁷¹ and if it were obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, the release will either be set aside altogether or the use of it will be restrained.⁷² The delivery to the obligor of a bond is a release in equity.⁷³ And where a creditor, by a letter or other writing, plainly admits that he has released his debtor from the payment of a particular debt, the writing may furnish sufficient evidence of a release to justify a court of equity in holding that the debt is discharged, although no formal release is produced.⁷⁴ Where a contractor, having filed a lien for materials furnished for thirty houses, released fifteen houses upon being paid the full value of the materials which went into those houses, the court held that in equity his lien upon the remaining fifteen houses for the balance of his account was not affected by the release.⁷⁵ A court of equity will grant relief and set aside a release where there is a mistake of a plain, well set-

must be rejected, see *Sawyer v. Haley*, 6 Gray (Mass.) 243. See also, *Baker v. Dewey*, 1 B. & C. 704; *Rowntree v. Jacob*, 2 Taunt. 141; *Langworthy v. Woodworth*, 13 Iowa 530; *Atchison T. & S. F. R. Co. v. Vanordstrand*, 67 Kans. 386, 73 Pac. 113.

⁶⁸ *The Belvedere*, 100 Fed. 498; *The Alexander M. Lawrence*, 101 Fed. 135; *The David Pratt*, 1 Ware (U. S.) 509.

⁶⁹ *Torry v. Black*, 58 N. Y. 185 (a release of a claim for trespass upon the lands of the ward).

⁷⁰ *Cocks v. Nash*, 9 Bing. 341; *Davey v. Prendergrass*, 5 B. & A. 187; *Countess of Rutland's Case*, 5

Coke 26; *Goodtitle v. Bailey*, 2 Cowp. 597.

⁷¹ *Featherstone v. Betlejewski*, 75 Ill. App. 59; *Winter v. Kansas City Cable R. Co.*, 73 Mo. App. 173.

⁷² *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9, 57 N. E. 864, affg. 85 Ill. App. 407; *Barnes v. Ward*, 45 N. Car. 93, 57 Am. Dec. 590; *Adams v. Cowen*, 177 U. S. 471, 44 L. ed. 851, 20 Sup. Ct. 668.

⁷³ *Albert's Exrs. v. Ziegler's Exrs.*, 29 Pa. St. 50.

⁷⁴ *Reeves v. Brymer*, 6 Ves. 516; *Eden v. Smyth*, 5 Ves. 341; *Trappahagen v. Voorhees*, 44 N. J. Eq. 21, 12 Atl. 895.

⁷⁵ *Hall v. Sheehan*, 69 N. Y. 618.

tled principle of law, and under such a mistake one parts with a right of which he is wholly ignorant to one not acting in good faith.⁷⁶ But when a court of equity sets aside a release, it ordinarily requires a rescission in toto, the returning of the consideration and the restoring the status quo of the parties.⁷⁷ The general rule, however, is that where there is no release at law, there is none in equity. But there may be considerations which would prevent the debt from being enforced in equity, although subsisting at law. Thus, where a parol release is upheld by a valuable consideration, equity will grant relief and enjoin proceedings at law.⁷⁸

§ 2064. Effect of release of one joint debtor.—The unconditional release of one joint or joint and several promisors is, generally speaking, a release of all,⁷⁹ provided the release is without the consent of the cosureties or joint obligors.⁸⁰ But the release of an infant who is a codebtor, which is not valid as to him because of lack of consideration, will not release the others.⁸¹ So, also, the agreement

⁷⁶ *Mellon v. Webster*, 5 Mo. App. 449 (a case of lawyer dealing with a client).

⁷⁷ *Bull v. Bull*, 43 Conn. 455; *Bisbee v. Ham*, 47 Maine 543; *McMichael v. Kilmer*, 76 N. Y. 36; *Hogan v. Weyer*, 5 Hill (N. Y.) 389; *Degraw v. Elmore*, 50 N. Y. 1; *Pullman v. Alley*, 53 N. Y. 637; *Lesster v. Union Mfg. Co.*, 1 Hun (N. Y.) 288; *Bedell v. Bedell*, 3 Hun (N. Y.) 580; *Ludington v. Miller*, 38 N. Y. Super. Ct. 478; *McGlynn v. Brooklyn &c. R. Co.*, 93 N. Y. 655; *Cleary v. Municipal Co.*, 65 Hun (N. Y.) 621, 47 N. Y. St. 172, 19 N. Y. S. 951, *affd.* 139 N. Y. 643, 35 N. E. 206; *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182, 31 N. E. 1104.

⁷⁸ *Taylor v. Manners*, L. R. 1 Ch. App. 48; *Cross v. Sprigg*, 6 Hare 552.

⁷⁹ *Elliott v. Holbrook*, 33 Ala. 659 (holding a release of one partner only *prima facie* a release of all); *Vandever v. Clark*, 16 Ark. 331; *Ayer v. Ashmead*, 31 Conn. 447, 83

Am. Dec. 154; *Campbell v. Brown*, 20 Ga. 415; *Benjamin v. McConnel*, 4 Gilm. (Ill.) 536; *Kirby v. Cannon*, 9 Ind. 371; *Walls v. Baird*, 91 Ind. 429; *Taylor v. Galland*, 3 G. Greene 17 (Iowa); *Dawies v. Jones*, 61 Kans. 602, 60 Pac. 314; *Irwin v. Scribner*, 15 La. Ann. 583; *Houston v. Darling*, 16 Maine 413; *Hall v. Gray*, 54 Maine 230; *Booth v. Campbell*, 15 Md. 569; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. 475; *Tuckerman v. Newhall*, 17 Mass. 581; *Gould v. Gould*, 4 N. H. 173; *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Dudley v. Bland*, 83 N. Car. 220; *Crawford v. Roberts*, 8 Ore. 324; *The United States v. Thompson*, Gilpin (U. S.) 614; *Brown v. Marsh*, 7 Vt. 320; *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240; *Maslin's Exrs. v. Hiatt*, 37 W. Va. 15, 16 S. E. 437.

⁸⁰ *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770.

⁸¹ *Tryon v. Hart*, 2 Conn. 120; *Small v. Older*, 57 Iowa 326, 10 N.

to wait on a joint debtor for his part of a debt is no release of the others.⁸² But where one is liable in contract to two persons jointly, and settles with one of them individually, so that the latter has no longer any real interest in the matter, the debtor is still liable to the other of the two creditors.⁸³ By an express provision to that effect, a creditor may release one codebtor and reserve his rights against others.⁸⁴ But in Illinois the courts have rejected this rule, and the reservation is held void.⁸⁵ Some of the states have enacted laws authorizing one or more of several joint debtors to compound or compromise for their joint indebtedness in discharge of their liability and without affecting the liability of the other joint debtors. These statutes are liberally construed, and all joint debtors seem to be within their meaning; inasmuch as it is held that a creditor of a partnership may release one member without discharging the others.⁸⁶ Nothing short of a technical release under seal, however, can operate as a discharge of two joint and several debtors, where it was not so intended and a part only of the debt is paid by one.⁸⁷ Upon similar grounds,

W. 734; *McNeal's Admr. v. Blackburn*, 7 Dana (Ky.) 170; *McLellan v. Cumberland Bank*, 24 Maine 566; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534; *Ward v. Johnson*, 13 Mass. 148; *Smith v. Bartholemew*, 1 Metc. (Mass.) 276, 25 Am. Dec. 365; *American Bank v. Doolittle*, 14 Pick. (Mass.) 123; *Coonley v. Wood*, 36 Hun (N. Y.) 559; *Alexander v. Alexander*, 3 Pa. St. 56; *Clifton v. Foster* (Tex. Civ. App.) 20 S. W. 1005; *Bridges v. Phillips*, 17 Tex. 128; *McIlhenny Co. v. Blum*, 68 Tex. 197, 4 S. W. 367.

⁸² *Pinney v. Bugbee*, 13 Vt. 623.

⁸³ *Boston & M. R. Co. v. Portland S. & P. R. Co.*, 119 Mass. 498, 20 Am. Rep. 338; *Crafts v. Sweeney*, 18 R. I. 730, 30 Atl. 658. See also, *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. 475; *Clapp v. Pawtucket Institution*, 15 R. I. 489, 8 Atl. 697, 2 Am. St. 915.

⁸⁴ *North v. Wakefield*, 13 Q. B. 536; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Schier v. Loring*, 6 Cush. (Mass.) 537; *Potter v. Green*, 6

Allen (Mass.) 442; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132; *First Nat. Bank v. Marshall*, 73 Maine 79; *McAllester v. Sprague*, 34 Maine 296; *Benton v. Mullen*, 61 N. H. 125, and cases cited; *Irvine v. Milbank*, 56 N. Y. 635, 15 Abb. Pr. (N. S.) 378; *Burke v. Noble*, 48 Pa. St. 168; *Greenwald v. Kaster*, 3 Wkly. Notes Cas. (Pa.) 327, revd. 86 Pa. St. 45, 5 Wkly. Notes Cas. (Pa.) 140.

⁸⁵ *Rice v. Webster*, 18 Ill. 331; *Parmelee v. Lawrence*, 44 Ill. 405.

⁸⁶ *Starr v. Stiles*, 2 Ariz. 436, 19 Pac. 225; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Grant v. Holmes*, 75 Mo. 109; *Bolen v. Crosby*, 49 N. Y. 183.

⁸⁷ *Haney & Campbell Mfg. Co. v. Adaza Creamery Co.*, 108 Iowa 313, 79 N. W. 79; *Bradford v. Prescott*, 85 Maine 482, 27 Atl. 461. "This matter has been settled too long, and ratified too often, to admit of any question in this state. It was first declared in *Walker v. McCulloch*, 4 Maine 421, and reaffirmed in *McAl-*

the release of one joint tort-feasor is ordinarily the release of all, but may be restricted in some jurisdictions where there is no satisfaction of the claim or the instrument is in reality a mere covenant not to sue.⁸⁸

§ 2065. Release by a cocreditor.—A release by a cocreditor may bind all the creditors.⁸⁹ Thus, one partner of a firm may sign a deed of composition and release a debt due the firm.⁹⁰ But in Ohio the courts reject the rule that the action of a creditor binds his cocreditors, and in that state all a cocreditor can release is his own aliquot share.⁹¹

listerv. Sprague, 34 Maine 296; Drinkwater v. Jordan, 46 Maine 432, and in First Nat. Bank v. Marshall, 73 Maine 79. Formerly a more strict and technical rule prevailed; but the weight of authority now is more liberal, and, though technical words of release are used * * * the circumstances of the case and the relations of the parties being taken into consideration; and if it is found that it was not intended as a release of the whole debt it will be construed as only an agreement not to charge the party to whom the release is given, and will not be permitted to have the effect of a technical release. In such case it has no greater effect than an agreement or covenant to discharge, or not to sue, which is never regarded as a release, and when given to one of several joint debtors is never construed as a release to the others. Lacy v. Kynaston, 2 Salk. 575; Dean v. Newhall, 8 T. R. 168; Bank of Catskill v. Messenger, 9 Cow. (N. Y.) 37; Walker v. McCulloch, 4 Maine 421; McAllister v. Sprague, 34 Maine 296; Durell v. Wendell, 8 N. H. 369, 372; Benton v. Mullen, 61 N. H. 125; Shaw v. Pratt, 22 Pick. (Mass.) 305; Pond v. Williams, 1 Gray (Mass.) 630; Burke v. Noble, 48 Pa. St. 168; Bonney v. Bonney, 29 Iowa 448; Parmelee v. Lawrence, 44 Ill. 405, 410, 413; 1 Parsons on Contracts 28. And the remedy of the party to whom such an agreement is given, if afterwards molested on account of the debt, is by a special action founded upon such

agreement. It can not be pleaded in bar of an action against all, or set up in defense. Drinkwater v. Jordan, 46 Maine 432; Walker v. McCulloch, 4 Maine 421; McAllister v. Sprague, 34 Maine 296; Berry v. Gillis, 17 N. H. 13; Benton v. Mullen, 61 N. H. 125, 128."

⁸⁸ Rodgers v. Cox, 66 N. J. L. 432, 50 Atl. 143; Abb v. Northern Pacific R. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. 364. See also, O'Shea v. New York C. & St. L. R. Co., 105 Fed. 559, 44 C. C. A. 601; Long v. Long, 57 Iowa 497, 10 N. W. 875; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Knickerbocker v. Colver, 8 Cow. (N. Y.) 111; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Ruble v. Turner, 2 Hen. & M. (Va.) 38. Where there were joint tortfeasors a covenant not to sue one of them was not the same in legal effect as a release, and did not bar an action against the other. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

⁸⁹ Austin v. Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376.

⁹⁰ Myrick v. Dame, 9 Cush. (Mass.) 248; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372; Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342; Fitch v. Forman, 14 Johns. (N. Y.) 172; Bruen v. Marquand, 17 Johns. (N. Y.) 58; Wells & Spring v. Evans, 20 Wend. (N. Y.) 251; Eisenhart v. Slaymaker, 14 S. & R. (Pa.) 153.

⁹¹ Upjohn v. Ewing, 2 Ohio St. 13.

§ 2066. Release obtained through fraud and mistake.—A release must be fairly entered into and may be set aside where it is procured through fraud,⁹² or mistake, or in some instances, ignorance of the law,⁹³ or through threats amounting to duress,⁹⁴ but the party must usually first return the amount received for the release.⁹⁵ There is such fraud as will vitiate a release where the signer is led into giving formal assent to a paper different from his understanding as to the scope of the agreement which he intended actually to make thereby.⁹⁶ In case of fraudulent representations it is necessary to show that they were the inducement to the execution of the release.⁹⁷

§ 2067. Pleading release.—A release, relied upon as a defense, must be pleaded.⁹⁸ But in case a release is pro-

⁹² *Rockwell v. Capital Traction Co.*, 25 App. D. C. 98; *Gurley v. People*, 31 Ill. App. 465; *Wray v. Chandler*, 64 Ind. 146; *Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kans. 663, 39 Pac. 189; *Beatson v. Harris*, 60 N. H. 83; *Hearn v. Hearn*, 24 R. I. 328, 53 Atl. 95; *Womack v. Austin*, 1 S. Car. 421; *Kowalke v. Milwaukee Electric & Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. 877.

⁹³ *In re Garnett*, L. R. 31 Ch. Div. 1; *Rauen v. Prudential Ins. Co.*, 129 Iowa 725, 106 N. W. 198; *Collier v. Field*, 2 Mont. 205; *Schmidt v. Herfurth*, 28 N. Y. Super. Ct. 124; *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182, 31 N. E. 1104.

⁹⁴ *Peat v. Powell*, Amb. 387. *San Antonio & A. P. R. Co. v. Barnett* (Tex.) 44 S. W. 20.

⁹⁵ *Lyons v. Allen*, 11 App. D. C. 543; *Colorado City v. Liafe*, 28 Colo. 468, 65 Pac. 630; *Hill v. Northern Pac. R. Co.*, 113 Fed. 914, 51 C. C. A. 544; *Johnson v. Merry Mount Granite Co.*, 53 Fed. 569; *Louisville & N. R. Co. v. McElroy*, 100 Ky. 153, 18 Ky. L. 730, 37 S. W. 844; *Mullen v. Old Colony R. Co.*, 127 Mass. 86, 34 Am. Rep. 349; *Jenkins v. Covenant Life Ins. Co.*, 79 Mo. App. 55; *Lutjen v. Lutjen*, 63 N. J. Eq. 391, 51 Atl. 790, revd. 64 N. J. Eq. 773, 53 Atl. 625; *Levister v.*

Southern R. Co., 56 S. Car. 508, 35 S. E. 207.

⁹⁶ *Chesapeake & C. R. Co. v. Howard*, 14 App. D. C. 262, affd. 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. 880; *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621; *Atchison T. & S. F. R. Co. v. Cunningham*, 59 Kans. 722, 54 Pac. 1055; *Williams v. Wilson*, 18 Misc. (N. Y.) 42, 40 N. Y. S. 1132, 75 N. Y. St. 451; *Ferris v. Ferris*, 22 Misc. (N. Y.) 577, 49 N. Y. S. 593; *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 668; *Houston & C. R. Co. v. Burns* (Tex.), 63 S. W. 1035; *Missouri K. & T. R. Co. v. Smith*, 28 Tex. Civ. App. 565, 68 S. W. 543; *Union Pac. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. 843; *Albrecht v. Milwaukee & C. R. Co.*, 94 Wis. 397, 69 N. W. 63.

⁹⁷ *Rockwell v. Capital Trac. Co.*, 25 App. D. C. 98; *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121; *Kane v. Chester Traction Co.*, 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. 846.

⁹⁸ *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384; *Meka v. Brown*, 84 Iowa 711, 45 N. W. 1041; 50 N. W. 46; *Freedley v. French*, 154 Mass. 339, 28 N. E.

cured by fraud it has been held that the releasor need not go into equity to annul the release; he may sue on his original cause of action, and if the release is pleaded he may then reply the fraud.⁹⁹ And, under the code, it is held that a party may, in the same action, by means of different counts in the same complaint, sue to have the release set aside and also on the original cause of action.¹ But it is said that if the releasor asks to have the release set aside this makes it a question for the court, while a mere replication of fraud is for the jury.² There is considerable difference in the law and practice in different jurisdictions. But the tendency now in the code states is to permit the plaintiff to attack the release in his complaint or reply without having it first set aside in equity. Many courts make a distinction and hold that where the instrument is intentionally executed and merely voidable because of misrepresentation or the like, it must be avoided in equity, but if void for fraud in its execution, it need not be first set aside in equity.^{2a}

§ 2068. Definition and characteristics of accord and satisfaction.—An agreement between two parties to give and accept something in satisfaction of a right of action which

272; Spitze v. Baltimore & O. R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. 378; Doty v. Chicago & C. R. Co., 49 Minn. 499, 52 N. W. 135; Rivers v. Blom, 163 Mo. 442, 63 S. W. 812; Rosenthal v. Rudnick, 84 App. Div. (N. Y.) 611, 82 N. Y. S. 1004. Contra, Frank v. Cobban, 20 Mont. 168, 50 Pac. 423. But see, Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910.

⁹⁹ Girrard v. St. Louis Car-Wheel Co., 46 Mo. App. 79.

¹ Blair v. Chicago & A. R. Co., 89 Mo. 334, 1 S. W. 367.

² Girard v. St. Louis Car-Wheel Co., 46 Mo. App. 79. See also, Wild v. Williams, 6 M. & W. 490; Chicago v. Lewis, 109 Ill. 120; Ryan v. Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302; O'Donnell v. Clinton, 145 Mass. 461, 14 N. E. 747; Peterson v. Chicago & C. R. Co., 38 Minn. 511, 39 N. W.

485; Vautrain v. St. Louis & C. R. Co., 8 Mo. App. 538; Webb v. Steele, 13 N. H. 230; Hoitt v. Holcomb, 23 N. H. 535; Dixon v. Brooklyn City & C. R. Co., 100 N. Y. 170, 3 N. E. 65; Bussian v. Milwaukee, Lake Shore & W. R. Co., 56 Wis. 325, 14 N. W. 452; Lusted v. Chicago & C. R. Co., 71 Wis. 391, 36 N. W. 857.

^{2a} George v. Tate, 102 U. S. 564, 26 L. ed. 232; Koszteknik v. Bethlehem Iron Co., 91 Fed. 606; Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910; Atchison & C. R. Co. v. Vanordstrand, 67 Kans. 386, 73 Pac. 113; Homuth v. Metropolitan & C. R. Co., 129 Mo. 629, 31 S. W. 903. So, the question as to restoring the consideration is often made to depend upon the same distinction. See note in Ann. Cas., 1912D, 1084. See also, 3 Elliott R. R. (2nd ed.) § 1377.

one has against the other is an accord, and the execution of this agreement is a satisfaction. The completed transaction is an accord and satisfaction and is a bar to all action on the original contract.³ There must be an offer by one party and an acceptance by the other. The accord and satisfaction must be mutually agreed to and accepted.⁴ And there must be a consideration for the promise of the party entitled to sue.⁵ And this consideration must be legal consideration.⁶ "There can be no accord and satisfaction of a claim unless something of legal value has been received in full payment thereof, to which the creditor had no previous right."⁷ But the fact that the accord is supported by a consideration is not enough of itself either to constitute a new contract, or to do away with the necessity of perform-

³ 3 Bl. Comm. 15; *Lynn v. Bruce*, 2 H. Bl. 317; *Allen v. Harris*, 1 Ld. Ray. 122; *Cock v. Honychurch*, T. Ray. 203; *Peytoe's Case*, 9 Coke 78; *Cobb v. Malone*, 86 Ala. 571, 6 So. 6; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Goodrich v. Stanley*, 24 Conn. 613; *Way v. Russell*, 33 Fed. 5; *Troutman v. Lucas*, 63 Ga. 466; *Kingsville Preserving Co. v. Frank*, 87 Ill. App. 586; *Simmons v. Clark*, 56 Ill. 96; *Ogilvie v. Hallam*, 58 Iowa 714, 12 N. W. 730; *Flack v. Garland*, 8 Md. 188; *Petty v. Allen*, 134 Mass. 265; *Browning v. Crouse*, 43 Mich. 489, 5 N. W. 664; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476; *Jordan v. Great Northern R. Co.*, 80 Minn. 405, 83 N. W. 391; *Biglane v. Hicks* (Miss.), 33 So. 413; *Pulliam v. Taylor*, 50 Miss. 251; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Pettis v. Ray*, 12 R. I. 344; *Hemingway v. Stansell*, 106 U. S. 399, 27 L. ed. 245, 1 Sup. Ct. 473; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243. See also, *Lynn v. Bruce*, 2 H. Bl. 317; *Bayley v. Homan*, 3 Bing. N. Cas. 915; *Heath v. Vaughn*, 11 Colo. App. 384, 53 Pac. 229; *Probst v. Ehrat*, 140 Ill. App. 309; *Costello v. Cady*, 102 Mass. 140; *Childs v. Littlefield*, 206 Mass. 113, 91 N. E. 1017; *Hennessy v. St. Paul City R. Co.*, 65 Minn. 13, 67 N. W. 635;

Carter v. Chicago, B. & O. R. Co., 136 Mo. App. 719, 119 S. W. 35; *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774; *Story v. Maclay*, 6 Mont. 492, 13 Pac. 198; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Coch-enour v. Rieser*, 58 Misc. (N. Y.) 521, 109 N. Y. S. 807; *Houston Bros. v. Wagner*, 28 Okla. 367, 114 Pac. 1106; *Deming Inv. Co. v. McLaughlin*, 30 Okla. 20, 118 Pac. 380; *Hosler v. Hursh*, 151 Pa. 415, 25 Atl. 52; *Preston v. Grant*, 34 Vt. 201; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606.

⁴ *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774; *Deming Inv. Co. v. McLaughlin*, 30 Okla. 20, 118 Pac. 380.

⁵ *Pinnel's Case*, 5 Coke 117A; *Warren v. Skinner*, 20 Conn. 559; *Rusk v. Gray*, 83 Ind. 589; *Works v. Hershey*, 35 Iowa 340; *Hinckley v. Arey*, 27 Maine 362; *White v. Jordan*, 27 Maine 370; *Maddux v. Bevan*, 39 Md. 485; *Tuckerman v. Newhall*, 17 Mass. 581; *Watson v. Elliott*, 57 N. H. 511; *Clark v. Bowen*, 22 How. (U. S.) 270, 16 L. ed. 337.

⁶ *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Gordon v. Mitchell*, 68 Ga. 11; *Green v. Frank*, 63 Ga. 78; *Rogers v. Ball*, 54 Ga. 15; *Smith v. Grable*, 14 Iowa 429.

⁷ *Ness v. Minnesota &c. Co.*, 87 Minn. 413, 92 N. W. 333.

ance; and likewise reducing the accord to the form of a sealed instrument does not change its effect.⁸ A compromise is not a prerequisite of an accord and satisfaction.⁹ There is a distinction between an accord and a condition; in an accord the debtor engages to do something, but in the case of a condition the creditor may impose it without the debtor engaging to do it.¹⁰ Thus, a mortgage given and accepted in satisfaction of a claim on which an action is pending against another person, who is liable as a tortfeasor equally with the mortgagor, constitutes an accord and satisfaction; but if the acceptance of the mortgage is conditional on an executory agreement which is not complied with, it has no such effect.¹¹

§ 2069. Accord and satisfaction of contracts under seal.

—In England it was questioned in the common-law courts whether accord and satisfaction was a good plea to a sealed instrument. If the accord and satisfaction was after breach it was a good plea,¹² but a satisfaction before a breach, not made through the instrumentality of a deed, was a bad plea.¹³ This distinction, however, was rejected in equity and an accord and satisfaction before breach was a ground to stay proceedings at law.¹⁴ It would seem that the common law went to the extreme, that a debt in a sum certain,

⁸ *Hosler v. Hursh*, 151 Pa. St. 415, 25 Atl. 52.

⁹ *Goodrich v. Sanderson*, 35 App. Div. (N. Y.) 546, 55 N. Y. S. 881.

¹⁰ *Francis v. Deming*, 59 Conn. 108, 21 Atl. 1006.

¹¹ *Cobb v. Malone*, 86 Ala. 571, 6 So. 6.

¹² *Smith v. Trowsdale*, 3 El. & Bl. 83.

¹³ *Spence v. Healey*, 8 Exch. 668, holding that a covenant for payment of a sum certain, although the payment does not accrue until after notice given, can not be discharged by parol before breach. *Martin, B.*, said: "I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons upon which the rule is founded." The

following cases sustain the proposition that a satisfaction and discharge before breach by parol can not be set up as an answer to an action for the breach of a covenant under seal: *Snow v. Franklin*, 1 Lutw. 358; *Blake's Case*, 6 Coke 44; *Alden v. Blague*, Cro. Jac. 99; *Neal v. Sheaf-field*, Cro. Jac. 254; *Kaye v. Wag-horne*, 1 Taunt. 428; *Covill v. Gef-fery*, 2 Roll. 96; *Berwick-upon-Tweed Corp. v. Oswald*, 1 El. & Bl. 295.

¹⁴ *Steeds v. Steeds*, L. R. 22 Q. B. D. 537. See also, *Webb v. Hew-itt*, 3 K. & J. 438; *Taylor v. Man-ners*, L. R. 1 Ch. 48; *Yeomans v. Williams*, L. R. 1 Eq. 184; *Wallace v. Kelsall*, 7 M. & W. 264; *Nichol-son v. Revill*, 4 A. & E. 675; *Cross v. Sprigg*, 6 Hare 552.

covenanted to be paid presently, could not in any wise be gotten rid of by an accord and satisfaction.^{14a}

§ 2070. Subject-matter of an accord.—Anything may constitute the subject-matter of an accord and satisfaction, but, in general, it may be said, it must be such as might be advantageous to the party and of some value,¹⁵ and not illegal.¹⁶ The accord and satisfaction may be founded on an untenable claim, if it be not illegal.¹⁷ But a dispute as to a moral obligation to pay can not be made a basis for an accord and satisfaction.¹⁸ The acceptance of a collateral thing, without regard to its value, is a good accord and satisfaction; and the promissory note of the debtor is such collateral thing.¹⁹ Thus, where the holder of a promissory note surrenders it to the maker, and takes one of less amount in satisfaction, it is a full discharge, and no action can be maintained for the unpaid portion.²⁰ But if the note is not delivered up, it is not extinguished by a less payment agreed to be accepted in full.²¹ A mere proposal to give a note, although money is paid to cover part of the proposed note, is no accord and satisfaction.²² Where a creditor held a note against copartners, and it was agreed by all that, in consideration of the transfer by one partner to the others of all his interest in the partnership property, the latter would pay the note, this was held a valid accord and satisfaction.²³ Ordinarily, there is no presump-

^{14a} Blake's Case, 6 Coke 44; Massey v. Johnson, 1 Exch. 241.

¹⁵ Keeler v. Neal, 2 Watts (Pa.) 424; National Duck Mills v. Catlin, 10 Ga. App. 240, 73 S. E. 418 (part of demand where breach distinct); Hicks Printing Co. v. Wisconsin Central R. Co., 138 Wis. 584, 120 N. W. 512 (transportation for railroad advertising); South Side Coal Co. v. Gross, 157 Ill. App. 218 (immaterial whether it is one of law or one of fact); In re Freeman, 117 Fed. 680.

¹⁶ Alvord v. Marsh, 12 Allen (Mass.) 603; Tuttle v. Tuttle, 12 Metc (Mass.) 551, 46 Am. Dec. 701; Walan v. Kerby, 99 Mass. 1.

¹⁷ Goodrich v. Sanderson, 35 App. Div. (N. Y.) 546, 55 N. Y. S. 881.

¹⁸ Cornell v. Taylor, 137 App. Div. (N. Y.) 496, 122 N. Y. S. 157.

¹⁹ Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292.

²⁰ Pearson v. Thomson, 15 Ala. 700, 50 Am. Dec. 159; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289; 51 N. E. 986.

²¹ Rising v. Cummings, 47 Vt. 345.

²² Rusk v. Gray, 83 Ind. 589.

²³ Nassoij v. Tomlinson, 65 Hun (N. Y.) 491, 48 N. Y. St. 182, 20 N. Y. S. 384; Looby v. West Troy, 24 Hun (N. Y.) 78; Hills v. Sommer, 53 Hun (N. Y.) 392, 25 N. Y. St. 1003, 6 N. Y. S. 469. See also, McKeen v. Morse, 49 Fed. 253, 1 C. C. A. 237, 1 U. S. App. 7.

tion that the cashing of a check sent in payment is a consent to its being in full,²⁴ and the acceptance in silence of a sum of money, declared to be all that was due, has been held no accord and satisfaction, where the creditor needed the money, and was afraid that a receipt in full would be demanded.²⁵ The fact that the debtor is insolvent, and the creditor thinks he will lose all unless he accepts a part, is not such consideration as will uphold an accord.²⁶ There may be an accord and satisfaction of a right of action for usury paid, even though the sum advanced on such an agreement be less than the usury received. The agreeing not to bid on property sold at auction is a good accord and satisfaction of a debt;²⁷ and any claim which can be urged under color of right may either form the subject-matter of an accord and its foregoing, the satisfaction, or it may itself constitute a good consideration to uphold an accord.²⁸

§ 2071. Illegal claims.—An illegal claim can not be the consideration of an accord and satisfaction. Thus, if a purchaser of intoxicating liquors sold in violation of law, in settling mutual accounts with the seller, credits him with the price thereof, receiving from him payment of the balance found due after such an allowance, and gives him a receipt in full settlement of the accounts, such payment and receipt do not have the effect of an accord and satisfaction

²⁴ *Lincoln Sav. Bank etc. Co. v. Allen*, 82 Fed. 148, 27 C. C. A. 87; *Myers v. Green*, 21 Ind. App. 138, 51 N. E. 942, 69 Am. St. 344; *Wellington v. Monroe & Co.*, 90 Maine 495, 38 Atl. 543. See also, *Hills v. Sommer*, 53 Hun (N. Y.) 392, 25 N. Y. St. 1003, 6 N. Y. S. 469; *Sicotte v. Barber*, 83 Wis. 431, 53 N. W. 697.

²⁵ *Vance v. Lukenbill*, 9 B. Mon. (Ky.) 249.

²⁶ *Rogers v. Ball*, 54 Ga. 15.

²⁷ *Jones v. Wilson*, 104 N. Car. 9, 10 S. E. 79.

²⁸ *Edgcombe v. Rodd*, 5 East 294; *Gordon v. Mitchell*, 68 Ga. 11; *Richelieu Hotel Co. v. International Military Encampment Co.*, 41 Ill. App. 268; *Mains v. Mintle*, 86 Iowa 742, 53 N. W. 256; *Twitchell v. Shaw*, 10

Cush. (Mass.) 46, 57 Am. Dec. 80; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Hanselman v. Doyle*, 90 Mich. 142, 51 N. W. 195; *Clifton v. Litchfield*, 106 Mass. 34; *Strong v. Comer*, 48 Minn. 66, 50 N. W. 936; *Looby v. West Troy*, 24 Hun (N. Y.) 78; *People v. Cayuga County*, 63 Hun (N. Y.) 625, 17 N. Y. S. 314; *Bradt v. Scott*, 63 Hun (N. Y.) 632, 44 N. Y. St. 727, 18 N. Y. S. 507; *Brooks v. Moore*, 67 Barb. (N. Y.) 393; *Mitchell v. Knight*, 3 Ohio C. D. 729, 7 Ohio C. C. 204; *Hayes v. Davidson*, 70 N. Car. 573; *Loan & Exch. Bank v. Miller*, 39 S. Car. 175, 17 S. E. 592; *Wilder v. St. Johnsbury & L. C. R. Co.*, 65 Vt. 43, 25 Atl. 896.

to bar an action to recover the amount so credited.²⁹ And the reverse is equally true; an illegal accord and satisfaction will not extinguish a legal claim, as where a contract was made by an aged man with his grandson, that if the latter would aid the grandfather in inducing a young lady to marry him, the latter would deliver to the grandson a note held against him, this was held not to extinguish the note.³⁰

§ 2072. Necessity for execution of accord.—The accord agreement must be fully executed, and the thing to be taken must have been received and accepted in satisfaction, in order to constitute a bar to recovery.³¹ In other words, an

²⁹ *Walan v. Kerby*, 99 Mass. 1; *Alvord v. Marsh*, 12 Allen (Mass.) 603; *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551, 46 Am. Dec. 701; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, 57 Am. Dec. 80.

³⁰ *Johnson's Admr. v. Hunt*, 87 Ky. 321. See also, *Cole v. Gibson*, 1 Ves. Sr. 503; *Drury v. Hooke*, 1 Vern. 442.

³¹ *Ballard v. Noaks*, 2 Ark. 45; *First Nat. Bank v. Leech*, 94 Fed. 310, 36 C. C. A. 262; *Sanford v. Abrams*, 24 Fla. 181, 2 So. 373; *Horwich v. Western Brewery Co.*, 95 Ill. App. 162; *Hart v. National Masonic Acc. Assn.*, 105 Iowa 717, 75 N. W. 508; *Bragg v. Pierce*, 53 Maine 65; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 43 N. W. 476; *Goff v. Mulholland*, 28 Mo. 397; *Shaw v. Burton*, 5 Mo. 478; *German Bank v. Mulhall*, 8 Mo. App. 558; *Wilkerson v. Bruce*, 37 Mo. App. 156; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Dalrymple v. Craig*, 70 Mo. App. 149; *Gowing v. Thomas*, 67 N. H. 399, 40 Atl. 184; *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342; *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749; *Piper v. Kingsbury*, 48 Vt. 480. In *Bayley v. Homan*, 3 Bing. N. Cas. 915, the court said: "It appears by a long train of authorities, commencing with that in *Dyer* 356. that a plea of accord, to be a good plea, must show an accord which is not executory at a future day, but

which ought to be executed and has been executed before the action brought. * * * In *Allen v. Harris* [Ld. Raym. 122] the court say, 'the books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the books, but if it had been a new point, it might have been worthy of consideration. * * * We think, therefore, if this plea amounted to a plea of an accord executory made upon mutual promises, it must, upon the authorities above referred to, be held to be bad.'" *Lynn v. Bruce*, 2 H. Bl. 317; *James v. David*, 5 T. R. 141; *Case v. Barber*, Sir T. Jones 158 (where the rule is doubted and it is held a plea of accord executory is good); *Good v. Cheeseman*, 2 Barn. & Ad. 328; *Gabriel v. Dresser*, 15 C. B. 622; *North State Fire Ins. Co. v. Dillard*, 88 Ark. 473, 115 S. W. 154; *Hogan v. Burns*, 98 Cal. XVIII, 33 Pac. 631; *First Nat. Bank v. Leech*, 94 Fed. 310, 36 C. C. A. 262; *Brauninger v. National Light & Co.*, 147 Ill. App. 4; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1020, 35 L. R. A. (N. S.) 820; *Burr's & Co. Tool Works v. Peninsular Tool Mfg. Co.*, 142 Mich. 417, 105 N. W. 858; *Omaha Fire Ins. Co. v. Thompson*, 50 Nebr. 580, 70 N. W. 30; *Arnett v. Smith*, 11 N. Dak. 55, 88 N. W. 1037; *Manley v. Vermont Mut. Fire Ins. Co.*, 78 Vt. 331, 62 Atl. 1020. The giving of notes is no satisfaction, even although endorsed by third parties; if the notes are not paid at maturity the debtor

accord without satisfaction is not a bar to an action on the original liability.³² "The essence of an accord and satisfaction is that it should be executed as agreed."³³ A part performance of an accord, and readiness to perform the rest, is held not to take the place of performance within the rule.³⁴ Neither is a tender of satisfaction the equivalent of satisfaction.³⁵ The payment of money into court, or the depositing property with an officer of the law, is held no satisfaction.³⁶ No action can be brought on the unexecuted accord by either party.³⁷ "An accord is executory as long as something remains to be done in the future. It is sufficiently executed only when all is done which the party agrees to accept in satisfaction of the pre-existing obligation."³⁸ There is a sufficient execution of the accord, when all is done, which the party agrees to accept in satisfaction

can not plead accord and satisfaction. *Dolsen v. Arnold*, 10 How. Pr. (N. Y.) 528.

³² *Boston & M. R. R. Co. v. Union Mut. Fire Ins. Co.*, 83 Vt. 554, 77 Atl. 874; *Mayo v. Leighton*, 101 Maine 63, 63 Atl. 298; *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246; *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. App. 719, 119 S. W. 35; *Goffe v. Jones*, 132 App. Div. (N. Y.) 864, 117 N. Y. S. 407.

³³ *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246.

³⁴ *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472, where the court said: "Mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not do. Such is the law between debtor and creditor." *Carter v. Wormald*, 1 Exch. 81; *McKean v. Read*, *Littell's Select Cases* (Ky.) 395, 12 Am. Dec. 318; *Bragg v. Pierce*, 53 Maine 65; *Flack v. Garland*, 8 Md. 188; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Noe v. Christie*, 51 N. Y. 270; *Tilton v. Alcott*, 16 Barb. (N. Y.) 598; *Dolsen v. Arnold*, 10 How. Pr. (N. Y.) 528; *Russell v. Lytle*, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; *Brooklyn Bank v. DeGrauw*, 23 Wend. (N. Y.) 342; *Houston Bros. v. Wagner*, 28 Okla. 367, 114 Pac. 1106.

³⁵ *Brennan v. Ostrander*, 50 N. Y. Super. Ct. 426; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Noe v. Christie*, 51 N. Y. 270. See also, *Carpenter v. Chicago, M. & St. P. R. Co.*, 7 S. Dak. 584, 64 N. W. 1120. The mere setting apart certain securities and notifying the creditor is no execution of an accord to give security. *Geary v. Page*, 9 Bosw. (N. Y.) 290. The adjustment of the amount of a claim for fire insurance between the insured and the insurer is a mere accord, not binding on the insured, (*Giboney v. German Ins. Co.*, 48 Mo. App. 185), but it is intimated in this case that a tender of the amount found due would be a satisfaction.

³⁶ *Cannon River Co. v. Rogers*, 46 Minn. 376, 49 N. W. 128; *Lenane v. Mayer*, 18 Misc. (N. Y.) 454, 75 N. Y. S. 1336, 41 N. Y. S. 960.

³⁷ *Brennan v. Ostrander*, 50 N. Y. Sup. Ct. 426.

³⁸ *Arnett v. Smith*, 11 N. Dak. 55, 88 N. W. 1037, citing *Edwards v. Bryan*, 88 Ga. 248, 14 S. E. 595; *Bragg v. Pierce*, 53 Maine 65; *Line v. Nelson*, 38 N. J. L. 358; *Tilton v. Alcott*, 16 Barb. (N. Y.) 598; *Russell v. Lytle*, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; *Memphis v. Brown*, 20 Wall. (U. S.) 289, 22 L. ed. 264; *Babcock v. Hawkins*, 23 Vt. 561.

of the obligation. This is ordinarily a matter of intention and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose.³⁹ It would seem that performance would be waived in cases where it is prevented by the creditor.⁴⁰

§ 2073. Satisfaction before and after breach.—The technical distinction between a satisfaction before and after breach seems to be generally disregarded in this country, and a new agreement by parol, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. And likewise a new agreement by parol, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such.⁴¹ In North Carolina the distinction is taken that while generally accord and satisfaction before breach is no defense, yet where the covenant sounds altogether in damages, although secured by a penalty, accord and satisfaction in parol is a good defense.⁴²

§ 2074. New promise as satisfaction.—The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates

³⁹ *Fuller v. Smith*, 107 Maine 161, 77 Atl. 706; *Laughhead v. H. C. Frick Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. 1014; *Babcock v. Hawkins*, 23 Vt. 561. Compare, *Mount v. De Haven*, 29 Ind. App. 127, 63 N. E. 330, with *Wilson v. Wilson* (Ind. App.), 96 N. E. 791.

⁴⁰ *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Cary v. McIntyre*, 7 Colo. 173, 2 Pac. 916.

⁴¹ *McCreary v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793. See also, *Countess of Rutland's Case*, 5 Coke 26; *Bell v. Pitman*, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820n; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528; *Lattimore v. Harsen*, 14 Johns. (N. Y.) 330; *Dear-*

born v. Cross, 7 Cow. (N. Y.) 48; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179, *affd.* 46 N. Y. 310, 7 Am. Rep. 335; *Mitchell v. Hawley*, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366 (holding that a judgment can not be discharged by accord and satisfaction); *Cabe v. Jameson*, 32 N. Car. 193, 51 Am. Dec. 386; *Hosler v. Hursh*, 151 Pa. St. 415, 25 Atl. 32; *Sharp v. Mauston*, 92 Wis. 629, 66 N. W. 803.

⁴² *Logan v. Ausfin*, 1 Stew. (Ala.) 476; *Davis v. Noaks*, 3 J. J. Marsh. (Ky.) 494.

as such, and bars the action.⁴³ An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for the breach of it.⁴⁴ Whether the creditor agreed to accept the promise itself, and not its performance, as a satisfaction for his debt, is often one of fact for the jury.⁴⁵ But when all the facts are admitted, whether they show an agreement to accept the promise in satisfaction is one of law for the court.⁴⁶ In every case, where one security, or contract, is agreed to be received in lieu of another, whether the substituted contract be of the same or higher grade, the action, in case of failure to perform, must be upon the substituted contract.⁴⁷ Where two persons, each having a cause of action against the other, met to adjust their differences, and the damages of one was agreed upon and paid and a receipt was given in full in addition thereto, this was held a new agreement canceling the claims on both sides.⁴⁸ But where a note was given for a certain sum, and afterwards a written agreement was entered into by the maker and payee to the effect that the note should be paid by instalments, it was held that this subsequent agreement was not a new promise canceling the note, inasmuch as it was not founded on any valuable consideration.⁴⁹ A claim on notes may be canceled and discharged by a new agreement, and it is not necessary that there should be any formal or written promise; all that is required is a distinct contract to that effect.⁵⁰ In Kentucky one note can not be discharged by another note for the same sum, signed by

⁴³ *Evans v. Powis*, 1 Exch. 601; *Kromer v. Heim*, 75 N. Y. 574, 31 Am. St. 491; *Kinsler v. Pope*, 5 Strob. (S. Car.) 126.

⁴⁴ *Cartwright v. Cooke*, 3 B. & Ad. 701; *Billings v. Vanderbeck*, 23 Barb. (N. Y.) 546; *Sharp v. Maus-ton*, 92 Wis. 629, 66 N. W. 803.

⁴⁵ *Evans v. Powis*, 1 Exch. 601.
⁴⁶ *Vedder v. Bedder*, 1 Denio (N. Y.) 257.

⁴⁷ *Thatcher v. Dudley*, 2 Root (Conn.) 169; *Price's Admx. v. Price*, 111 Ky. 771, 23 Ky. L. 1086,

64 S. W. 746, 66 S. W. 529; *Marshall v. Larkin*, 82 Mo. App. 635; *Babcock v. Hawkins*, 23 Vt. 561.

⁴⁸ *Vedder v. Vedder*, 1 Denio (N. Y.) 257.

⁴⁹ *McManus v. Bark*, L. R. 5 Ex. 65.

⁵⁰ *Whitney v. Cook*, 53 Miss. 551; *Barnes' Admr. v. Lloyd*, 1 How. (Miss.) 584; *Guion v. Doherty*, 43 Miss. 538; *Heirn v. Carron*, 11 Smedes & M. (Miss.) 361, 49 Am. Dec. 65; *Pulliam v. Taylor*, 50 Miss. 251.

the same party and due at the same time.⁵¹ Where it is claimed that an agreement, with promises on the one side to pay, and on the other to accept payment of an obligation, in a mode other than according to its tenor, is a satisfaction or extinguishment of such obligation, it should explicitly appear that such was the intention of the parties.⁵²

§ 2075. Presumption that note covers all matters in dispute.—It has been laid down as law that when a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled therein; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement.⁵³ This may not be strictly accurate, but it indicates the general rule that where there is a stated and settled account, the presumption is that all items of difference between the parties, at least, if due at the time, were included.

§ 2076. Satisfaction by payment of less sum than due.—Under the common law, a liquidated and undisputed debt can not be satisfied by the payment of a less sum than the face of the debt, though accepted as such by the creditor.⁵⁴

⁵¹ Bank of Commonwealth v. Fletcher, 3 J. J. Marsh. (Ky.) 195.

⁵² Goodrich v. Stanley, 24 Conn. 613. See also, Henderson v. Stobart, 5 Exch. 99; Plevins v. Downing, L. R. 1 C. P. D. 220 (discussing the distinction between the alteration of a contract and a mere arrangement as to time or mode of performing it); Molyneaux v. Collier, 13 Ga. 406; Hall v. Smith, 15 Iowa 584; Levi v. Karrick, 13 Iowa 344; Haskins v. Newcomb, 2 Johns. (N. Y.) 405; Billings v. Vanderbeck, 23 Barb. (N. Y.) 546; Kromer v. Heim, 75 N. Y. 574, 31 Am. St. 491; McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. 793.

⁵³ Wagner v. Ladd, 38 Nebr. 161, 56 N. W. 891; McKinster v. Hitchcock, 19 Nebr. 100, 26 N. W. 705. See, however, and compare, Shea v. Kerr, 1 Pennw. (Del.) 198, 40 Atl. 241; Charlotte Oil & Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56; Johnson v. Redwine, 98 Ga. 112, 25 S. E. 924; American Brewing Co. v. Berner-Mayer Co., 83 Ill. App. 446; Gibson v. Smith, 77 Mo. App. 233; Davis v. Boswell, 77 Mo. App. 294; Jorgenson v. Kingsley, 60 Nebr. 44, 82 N. W. 104; Tully v. Felton, 177 Pa. St. 344, 36 Atl. 285.

⁵⁴ For part or less sum not good, see Worth Huskey Coal Co. v. Parker-Washington Co., 157 Ill. App. 199, and Scott v. Rawls, 159

The reason is that there is no consideration for the relin-

Ala. 399, 48 So. 710; *Peachy v. Witter*, 131 Cal. 316, 63 Pac. 468; *Beach v. Schroeder*, 47 Colo. 312, 107 Pac. 271; *Wood v. Bangs*, 2 Pennw. (Del.) 435, 48 Atl. 189; *Humphrey v. Thorp*, 89 Fed. 66; *Missouri American Electric Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 283, 91 C. C. A. 251; *Jordy v. Maxwell* (Fla.) 56 So. 946; *Stewart v. Stephens*, 7 Ga. App. 453, 67 S. E. 199; *Morrill v. Baggott*, 57 Ill. App. 530; *Economy Coal & Min. Co. v. Bracewell*, 78 Ill. App. 335; *Bingham v. Browning*, 97 Ill. App. 442, affd. 197 Ill. 122, 64 N. E. 317; *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84, 84 N. E. 640; *Pottlitzer v. Westson*, 8 Ind. App. 472, 35 N. E. 1030; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. 249; *Sheets v. Russell*, 12 Ind. App. 677, 40 N. E. 30; *Swope v. Bier*, 10 Ind. App. 613, 38 N. E. 340; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12; *Mannakee v. McCloskey*, 23 Ky. L. 515, 63 S. W. 482; *Specialty Glass Co. v. Daley*, 172 Mass. 460, 52 N. E. 633; *Reinhold v. Kerrigan*, 85 Mo. App. 256; *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738; *Barrett v. Kern*, 141 Mo. App. 5, 121 S. W. 774; *Crawford v. Darrow*, 87 Nebr. 494, 127 N. W. 891; *McKinnon v. Holden*, 85 Nebr. 406, 123 N. Y. 439; *Amer v. Folk*, 28 Misc. (N. Y.) 508, 59 N. Y. S. 532; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *Dorman v. Arkin*, 120 N. Y. S. 757; *Mt. Holly Water Co. v. Mt. Holly Springs*, 10 Pa. Super. Ct. 162; *Philadelphia, B. & W. R. Co. v. Walker*, 45 Pa. Super. Ct. 524; *Ex parte Ziegler*, 83 S. Car. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005n; *Parker v. Mayes*, 85 S. Car. 419, 67 S. E. 559, 137 Am. St. 912; *Hagen v. Townsend* (S. Dak.), 131 N. W. 512; *Eggland v. South*, 22 S. Dak. 467, 118 N. W. 719; *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500; *Rettinghouse v. Ashland*, 106 Wis. 595, 82 N. W. 555. In *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703, 13 Ct. Cl. (U. S.) 561, the court said: "It is, no doubt, true that the payment by a debtor of a part of his liquidated debt is not

a satisfaction of the whole, unless made and accepted upon some new consideration." *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, 4 Silvernail Ct. App. (N. Y.) 315. The court said: "This simple question was presented to the English court in 1602, when it was resolved, if not decided, in *Pinnel's Case*, 5 Coke 117, 'that payment of a lesser sum on the day in satisfaction of a greater can not be any satisfaction for the whole,' and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticise and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's Case*, 5 Coke, 117." *Cumber v. Wane*, 1 Str. 426, 1 Smith Lead. Cas. (11th ed.) 338; *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377; *Cavaness v. Ross*, 33 Ark. 572; *Warren v. Skinner*, 20 Conn. 559; *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, 18 Am. St. 268; *Troutman v. Lucas*, 63 Ga. 466; *Capital City Mut. Fire Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Swope v. Bier*, 10 Ind. App. 613, 38 N. E. 340; *Fletcher v. Wurgler*, 97 Ind. 223; *Smith v. Tyler*, 51 Ind. 512; *Keller v. Strong*, 104 Iowa 585, 73 N. W. 1071; *Loney v. Bailey*, 43 Md. 10; *Geiser v. Kershner*, 4 Gill & Johns. (Md.) 305, 23 Am. Dec. 566; *Hardey v. Coe*, 5 Gill (Md.) 189; *Jones v. Ricketts*, 7 Md. 108; *Curran v. Rummell*, 118 Mass. 482; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2; *Helling v. United Order*, 29 Mo. App. 309; *Line v. Nelson*, 38 N. J. L. 358; *Daniels v. Hatch*, 21 N. J. L. 391, 27 Am. Dec. 169; *Allen v.*

quishment of the excess beyond the sum paid.⁵⁵ Accordingly, where a claim is undisputed, payment of a part thereof furnishes no consideration for a promise by the creditor to wholly discharge the debtor; and it is held that the creditor need not, before bringing suit for the unpaid balance of the claim, tender a return of the part paid on the attempted settlement.⁵⁶ The steadfast adherence to this doctrine by the courts, in spite of a current of condemnation by individual judges, and in the face of the demands and conveniences of business, demonstrates the force of the doctrine of *stare decisis*, and the doctrine is further illustrated by the course of judicial decision upon this subject; for, although the courts still hold to the doctrine, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form, create or sanction a defense to the action brought upon the old agreement.⁵⁷ Generally a very slight consideration, such as a slight benefit to the promisor or a slight detriment to the promisee, is sufficient to support the satisfaction of a claim by the payment of a less sum

Roosevelt, 14 Wend. (N. Y.) 100; Mitchell v. Sawyer, 71 N. Car. 70; Bryan v. Foy, 69 N. Car. 45; Commonwealth v. Cummins, 155 Pa. St. 30, 25 Atl. 996; Tucker v. Murray, 2 Pa. Dist. 497; Rose v. Daniels, 8 R. I. 381; ante, Vol. 1, § 217.

⁵⁵ Fitch v. Sutton, 5 East 230; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95.

⁵⁶ Bright v. Coffman, 15 Ind. 371, 77 Am. Dec. 96; American Bridge Co. v. Murphy, 13 Kans. 35; Bailey v. Day, 26 Maine 88; Headley v. Hackley, 50 Mich. 43, 14 N. W. 693, Leeson v. Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. 597; Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; Wheeler v. Wheeler, 11 Vt. 60; Smith v. Schulenberg, 34 Wis. 41.

See also, note to Cumber v. Wane, 1 Str. 426, 1 Smith Lead. Cas. (11th ed.) 338; Abelson v. Gordon, 36 Misc. (N. Y.) 812, 74 N. Y. S. 863.

⁵⁷ Walds Pollock Cont. (3d ed.) p. 210; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, 4 Silvernail Ct. App. (N. Y.) 315. "The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it upon slight distinctions." Kellogg v. Richards, 14 Wend. (N. Y.) 116. See also, ante, Vol. 1, § 218.

than the demand.⁵⁸ There is such consideration, according to some of the cases, where the payment is made in advance,⁵⁹ or where property is taken in satisfaction of an overdue demand,⁶⁰ or where security is given for an unsecured claim.⁶¹ So, there is consideration where the debtor is insolvent and the payment of the less sum, in satisfaction, is good compromise.⁶²

§ 2077. Satisfaction by payment of less sum than due—Checks, drafts, receipts.—It is necessary to a good accord and satisfaction that the money should be offered in satisfaction of the claim, and be accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to

⁵⁸ *Donahue v. Brooks*, 143 Ill. App. 188; *Scheffenacker v. Hoopes* (Md.), 77 Atl. 130; *H. C. Pollman & Bros. & Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Henson v. Stever*, 69 Mo. App. 136; *Tucker v. Dolan*, 109 Mo. App. 442, 84 S. W. 1126; *Roberts v. Banse*, 78 N. J. L. 57, 72 Atl. 452; *Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586.

⁵⁹ *Weiss v. Marks*, 206 Pa. St. 513, 56 Atl. 59; *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724; *Russell v. Stevenson*, 34 Wash. 166, 75 Pac. 627.

⁶⁰ *Pinnel's Case*, 5 Coke, 117a; *Bush v. Abraham*, 25 Ore. 336, 35 Pac. 1066, Lord, C. J.: "For instance, £1,000 by the payment of a peppercorn." *Cumber v. Wane*, 1 Str. 426, 1 Smith Lead. Cas. (11th ed.) 338. Although a money demand, liquidated and not doubtful, can not be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value. *Bull v. Bull*, 43 Conn. 455. In such case the court will not inquire into the adequacy of the consideration. *Fisher v. May's Heirs*, 2 Bibb. (Ky.) 448, 5 Am. Dec. 626; *Reed v. Bartlett*, 19 Pick. (Mass.) 273.

⁶¹ *In re Black Diamond Copper Min. Co.*, 11 Ariz. 415, 95 Pac. 117; *Kemmerer v. Kokendifer*, 65 Ill. App. 31. Where one indebted on an open account gave to his creditor his notes for one-half of his debt secured by a chattel mortgage under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, it was held that the new agreement was a valid accord and satisfaction and supported by a sufficient consideration, and estopped the creditor from bringing action to recover the balance of the debt. *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, 4 Silvernail Ct. App. (N. Y.) 315.

⁶² *Hanson v. McCann*, 20 Colo. App. 43, 76 Pac. 983; *Engbretson v. Seiberling*, 122 Iowa 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. 279; *Seegmiller v. Kelley* (Iowa), 99 N. W. 1131; *In re Carter*, 70 Minn. 77, 72 N. W. 826; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Ex parte Zeigler*, 83 S. Car. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005n; *Ward v. Young*, 40 Tex. Civ. App. 294, 89 S. W. 456.

such condition.⁶³ Accordingly, it is the effect of numerous decisions that the acceptance and retention of a check for a less amount than the debt will bar an action where it is given on condition that, if accepted, it shall be in full satisfaction of the debt,⁶⁴ and this is the holding, though the acceptance is under protest.⁶⁵ In Connecticut, the payment of a less sum to extinguish a liquidated greater one is an accord and satisfaction if a receipt in full is also given.⁶⁶ Where a draft for part of an indebtedness was sent by letter, both draft and letter stating that it was to be in full payment of the debt, the creditor, by converting the draft into money, was held to have elected to accept the compromise, and the debt was thereby discharged in full.⁶⁷ The retention by the creditor of money to which he is entitled absolutely will not amount to an accord and satisfaction, although tendered or transmitted to him as payment in full.⁶⁸ The acceptance by a creditor of a dividend, under

⁶³ *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Strock v. Brigantine Transp. Co.*, 23 Misc. (N. Y.) 358, 51 N. Y. S. 327; *Preston v. Grant*, 34 Vt. 201. See also, *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407; *Brigham v. Dana*, 29 Vt. 1; *Gasett v. Andover*, 21 Vt. 342.

⁶⁴ *Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569; *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717; *Michigan Leather Co. v. Foyer*, 104 Ill. App. 268; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857; *Harrison v. Henderson*, 67 Kans. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. 386; *Golden v. Bartlett Illuminating Co.*, 114 Mich. 625, 72 N. W. 622; *Goodloe v. Empson Packing Co.* (Mo. App.), 122 S. W. 771; *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S. W. 981; *Andrews v. Stubbs Contracting Co.*, 100 Mo. App. 599, 75 S. W. 178; *Aydlett v. Brown*, 153 N. Car. 334, 69 S. E. 243; *Olson v. Burton* (Tex. Civ. App.), 141 S. W. 549. But see, *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500.

⁶⁵ *Bass Dry Goods Co. v. Roberts Coal Co.*, 4 Ga. App. 520, 61 S. E.

1134; *Canton Union Coal Co. v. Parlin*, 215 Ill. 244, 74 N. E. 143, 106 Am. St. 162; *Neely v. Thompson*, 68 Kans. 193, 75 Pac. 117; *H. C. Pollman & Bros. & Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *Logan v. Davidson*, 18 App. Div. (N. Y.) 353, 45 N. Y. S. 961, affd. 162 N. Y. 624, 57 N. E. 1115. But see, *Hodges v. Truax*, 19 Ind. App. 651, 49 N. E. 1079; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12.

⁶⁶ *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, 18 Am. St. 268; *Buell v. Flower*, 39 Conn. 462, 12 Am. Rep. 414; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Beam v. Barnum*, 21 Conn. 200; *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677; *Canfield v. Eleventh School District*, 19 Conn. 529.

⁶⁷ *Petit v. Woodlief*, 115 N. Car. 120, 20 S. E. 208; *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407.

⁶⁸ *Hodges v. Tennessee Implement Co.*, 123 Ala. 572, 26 So. 490; *Rio Grande County v. Hobkirk* (Colo.), 56 Pac. 993; *Duluth Chamber of Commerce v. Knowlton*, 42

a voluntary assignment made by a debtor, without the concurrence of his creditor, is no bar to an action for the balance.⁶⁹ When the payment is before the sum is due, in order to constitute a good discharge, the whole sum agreed to be paid must be paid; a part payment of the stipulated sum is no defense.⁷⁰ A receipt in full is not necessarily an accord and satisfaction merely because it purports to be in full payment of the claim in issue.⁷¹

§ 2078. Satisfaction of unliquidated or disputed demands by payment of less than claim.—The general rule is that where the claim is unliquidated or in dispute, the acceptance of a less sum than the claim operates as an accord and satisfaction. Here the compromise is the consideration for the concession.⁷² Where there is an honest difference, the

Minn. 229, 44 N. W. 2; Jones v. Rice, 19 Misc. (N. Y.) 357, 43 N. Y. S. 491; Prairie Grove Cheese Mfg. Co. v. Luder, 115 Wis. 20, 89 N. W. 133, 90 N. W. 1085.

⁶⁹ Loney v. Bailey, 43 Md. 10; Allen v. Roosevelt, 14 Wend. (N. Y.) 100.

⁷⁰ Troutman v. Lucas, 63 Ga. 466. See also, McKenzie v. Culbreth, 66 N. Car. 534; Bryan v. Foy, 69 N. Car. 45; Hayes v. Davidson, 70 N. Car. 573; Mitchell v. Sawyer, 71 N. Car. 70. But see, Cavaness v. Ross, 33 Ark. 572.

⁷¹ Ahrens v. United Growers' Co., 11 Misc. (N. Y.) 108, 65 N. Y. St. 91, 31 N. Y. S. 997.

⁷² Andrews v. Haller Wall Paper Co., 32 App. D. C. 392; Cunningham v. Standard Const. Co., 134 Ky. 198, 119 S. W. 765; Castelli v. Jereissati (N. J.), 78 Atl. 227. See also, Hand Lumber Co. v. Hall, 147 Ala. 561, 41 So. 78; Potter v. Douglass, 44 Conn. 541; Bull v. Bull, 43 Conn. 455; Rumsey v. Barber, 78 Ill. App. 88; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110; Lapp v. Smith, 183 Ill. 179, 55 N. E. 717; Wallner v. Chicago Consol. Traction Co., 245 Ill. 148, 91 N. E. 1053; Brick v. Plymouth Co., 63 Iowa 462, 19 N. W. 304; Beaver v. Porter, 129 Iowa 41, 105 N. W. 346; Chapman v. First African Bapt.

Church, 52 La. Ann. 1508, 27 So. 952; Donohue v. Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777; Reed v. Boardman, 20 Pick. (Mass.) 441; Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. 687; Hinkle v. Minneapolis & C. R. Co., 31 Minn. 434, 18 N. W. 275; Hillestad v. Lee, 91 Minn. 335, 97 N. W. 1055; Chicago, R. I. & P. R. Co. v. Buckstaff, 65 Nebr. 334, 91 N. W. 426; Hilliard v. Noyse, 58 N. H. 312; Komp v. Raymond, 42 App. Div. (N. Y.) 32, 58 N. Y. S. 909; Freeman v. Tiffany Studios, 128 App. Div. (N. Y.) 868, 113 N. Y. S. 64; Hills v. Sommer, 53 Hun (N. Y.) 392, 25 N. Y. St. 1003, 6 N. Y. S. 469; Looby v. West Troy, 24 Hun (N. Y.) 78; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Angel v. Angel, 127 N. Car. 451, 37 S. E. 479; Hussey v. Crass (Tenn.), 53 S. W. 986; Laughman v. Sun Pipe Co., 52 Tex. Civ. App. 485, 114 S. W. 451; Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. 924; McDaniels v. Lapham, 21 Vt. 222; Preston v. Grant, 34 Vt. 201; Townslee v. Healy, 39 Vt. 522; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 551, 5 Atl. 407. In Baird v. United States, 96 U. S. 430, 24 L. ed. 703, 13 Ct. Cl. (U. S.) 561, a claimant presented an

payment of a less sum than that claimed, which is accepted in full of a claim, bars the right to insist upon a recovery of the amount originally claimed by the party.⁷³ But where the demand is liquidated and the debtor's liability is not in good faith disputed, a different rule has been applied. In such cases the acceptance of a less sum than is due will not of itself discharge the debt even if a receipt in full is given. The element of a consideration is lacking and the debtor's obligation to pay the entire debt is not satisfied.⁷⁴ And the mere fact that the creditor received from the debtor less than the amount of his claim in silence, and with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not conclusively and as a matter of law establish an accord and satisfaction.⁷⁵ But it has often been held that where a debtor sends a certain sum in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim

unliquidated claim for \$151,000, which was audited by the accounting officers and allowed for \$97,000. He was informed of this adjustment and a draft for the \$97,000 payable to his order was sent to him which he received and collected without objection. It was held that his receipt of the money was equivalent to an acceptance of it in satisfaction of the claim.

⁷³ *The Katie M. Hagan*, 98 Fed. 995; *Howard v. Georgia Home Ins. Co.*, 102 Ga. 137, 29 S. E. 143; *Bingham v. Browning*, 197 Ill. 122, 64 N. E. 317, affg. 97 Ill. App. 442; *Schmidt v. Demple*, 7 Kans. App. 811, 52 Pac. 906; *Schultz v. Schultz*, 113 Mich. 502, 71 N. W. 854; *Henson v. Stever*, 69 Mo. App. 136; *Home Fire Ins. Co. v. Bredehoft*, 49 Nebr. 152, 68 N. W. 400; *Slade v. Swedeburg Elevator Co.*, 39 Nebr. 600, 58 N. W. 191; *Davis Provision Co. v. Fowler Brothers*, 163 N. Y. 580, 57 N. E. 1108, 20 App. Div. (N. Y.) 626; *Pruden v. Ashboro & M. R. Co.*, 121 N. Car. 509, 28 S. E. 349; *Taylor v. Taylor* (Tex. Civ. App.), 54 S. W. 1039; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct.

924; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

⁷⁴ *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785. Where sales agents hold a note of a corporation under an agreement that they are to pay themselves from collections which they make and the collections are to be applied on the note until it is paid, and they thereafter remit a balance to the corporation after deducting a commission which the corporation notifies them is illegal, the receipt by the corporation of such money in partial payment, together with its statement that such sums would be received on account, do not amount to an accord and satisfaction and do not estop the corporation from recovering the sums withheld by the agents. *Eames Vacuum Brake Co. v. Prosser*, 88 Hun (N. Y.) 343, 68 N. Y. St. 388, 34 N. Y. S. 398, affd. 157 N. Y. 289, 51 N. E. 986.

⁷⁵ *Huff v. Logan*, 22 Ky. L. 1314, 60 S. W. 483; *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192; *Perkins v. Headley*, 49 Mo. App. 556; *McKenzie v. Sifford*, 52 S. Car. 270, 29 S. E. 736.

is canceled, and no protest, declaration or denial on his part, so long as the condition is insisted on by the debtor, can vary the result.⁷⁶

§ 2079. Accord and satisfaction by acceptance of obligation of third person.—The law is well settled that the acceptance by a creditor of the liability of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness. But properly to be called "accord and satisfaction," as distinguished from payment or purchase, the third person must become a party to a valid contract to that effect.⁷⁷ Also the liability of the debtor must be completely canceled and discharged. The reservation of any right by the creditor against his original debtor will destroy the effect of the acceptance of the third party's liability as an accord and satisfaction.⁷⁸ But the acceptance in full satisfaction by a creditor of the note of a third person is an accord and satisfaction.⁷⁹ Where, however, the note of a third person is taken in full satisfaction of a debt, on condition that such note shall be paid at maturity, and not otherwise, if the note is not paid when due, the creditor may insist that the contract is broken, and claim the whole amount of the original debt.⁸⁰ Where a note is

⁷⁶ *Hamilton v. Stewart*, 105 Ga. 300, 31 S. E. 184; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182. See also, *Wilson v. Wilson* (Ind. App.), 96 N. E. 791.

⁷⁷ *Henderson v. Stobart*, 5 Exch. 99. "We are satisfied that this is an agreement which would have been broken if the Company had gone on with the original action; for, a new person being made a party to the contract, it becomes a binding engagement, and not a mere accord." *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537; *Stagg v. Alexander*, 55 Barb. (N. Y.) 70.

⁷⁸ *Cuxon v. Chadley*, 3 B. & C. 591.

⁷⁹ *Brassell v. Williams*, 51 Ala. 349; *Lee v. Oppenheimer*, 32 Maine 253; *Mehan v. Thompson*, 71 Maine

492; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Goodnow v. Smith*, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; *Webb v. Goldsmith*, 2 Duer (N. Y.) 413; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Conkling v. King*, 10 Barb. (N. Y.) 372, Seld. notes (N. Y.) 86, affd. 6 N. Y. 440, Sel. notes (N. Y.) 86; *Currie v. Kennedy*, 78 N. Car. 91; *Hunter v. Moul*, 98 Pa. St. 13, 42 Am. Rep. 610; *Dryden v. Stephens*, 19 W. Va. 1. The note of a third person may be taken in payment of a judgment. *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85. But it seems that the presumption is that such note is subject to an implied condition of its payment, and default in payment will warrant an execution on the judgment. *Sanders v. Branch Bank*, 13 Ala. 353.

⁸⁰ *Conkling v. King*, 10 Barb. (N.

not negotiable the onus of proving that it was taken in full satisfaction is on the debtor.⁸¹ And it has been held that the liability of the third person must be enforceable.⁸² Thus, where the note of an infant is taken, the agreement to receive it in satisfaction is without consideration and void.⁸³ An attorney at law to whom a claim has been sent for collection, and who has obtained judgment thereon, can not, without special authority, receive, by way of accord and satisfaction, notes of third persons in satisfaction of the judgment.⁸⁴ The acceptance by a creditor of the sole and separate liability of one of two or more joint debtors is a good consideration for an agreement to discharge all the other debtors from liability.⁸⁵ An accord and satisfaction may be made by a debtor taking up his own note and giving another made by him and endorsed by a third party,⁸⁶ but there must be the liability of a third person accepted. The fact that the third person advances money to assist the debtor to pay is not an acceptance of payment from such third party.⁸⁷

§ 2080. Composition with creditors.—A. composition agreement by several creditors, although by parol, so as to

Y.) 372, Seld. notes (N. Y.) 86, affd. 10 N. Y. 440, Seld. notes (N. Y.) 86.

⁸¹ Smith v. Bettger, 68 Ind. 254, 34 Am. Rep. 256.

⁸² Where a creditor received several notes held by his debtor against third persons, and one of them was worthless, it was held that the creditor could return all the notes and sue on his original debt, although his debtor supposed all the notes to be good and the creditor agreed to accept them in satisfaction. Wiswal v. Harriman, 62 N. H. 671.

⁸³ Wentworth v. Wentworth, 5 N. H. 410; Wright v. First Crocker-Ware Co., 1 N. H. 281; Crawford v. Millspaugh, 13 Johns. (N. Y.) 87.

⁸⁴ Jones v. Ransom, 3 Ind. 327. See also, Jennings v. South Whitley Hoop Co. (Ind. App.), 98 N. E. 194;

Letcher v. Bank of Commonwealth, 1 Dana (Ky.) 82.

⁸⁵ Lyth v. Ault, 7 Exch. 669; Thompson v. Percival, 5 B. & Ad. 925; Hart v. Alexander, 2 M. & W. 484.

⁸⁶ Boyd v. Hitchcock, 20 Wend. (N. Y.) 76, 11 Am. Dec. 247; Bliss v. Schwartz, 64 Barb. (N. Y.) 215, 7 Lans. (N. Y.) 186.

⁸⁷ Bunge v. Koop, 5 Robt. (N. Y.) 1. See also, Wagner v. Union Stock Yards &c. Co., 41 Ill. App. 408; Bullen v. McGillicuddy, 2 Dana (Ky.) 90; Guild v. Butler, 127 Mass. 386; Stagg v. Alexander, 55 Barb. (N. Y.) 70; Coonley v. Anderson, 1 Hill (N. Y.) 519; Cadens v. Teasdale, 53 Vt. 469, 38 Am. Rep. 697 (holding that insolvency of the third party does not warrant recurring to the original debt).

be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, is a good answer to an action by the creditor for the original debt, if he accepted the new agreement in satisfaction thereof, the consideration of the agreement being the undertaking by the other creditors to give up a part of their claim.⁸⁸ Mutuality between the creditors as respects the consideration is therefore essential to the validity of an agreement for a composition. The creditors must join together—they must stipulate one with the other.⁸⁹ At common law, where a body of creditors accepts a composition, they may either agree to take the promise of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it and that is the only hold which the creditors have upon him.⁹⁰ Generally speaking, it is impossible for a composition to be made between the debtor and a single creditor. There is no consideration for the release.⁹¹ But it seems to have been held

⁸⁸ *Boyd v. Hind*, 1 H. & N. 938; *Good v. Cheeseman*, 2 B. & Ad. 328; *Norman v. Thompson*, 4 Exch. 755; *Renard v. Tuller*, 4 Bosw. (N. Y.) 107.

⁸⁹ *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Sage v. Valentine*, 23 Minn. 102.

⁹⁰ *In re Hatton*, L. R. 7 Ch. App. 723. See also, *McFarland v. Garber*, 10 Ind. 151. In all compositions, the creditors are moved by some advantage to be obtained in a distribution of the property of the debtor, or by fixed payments to be made securing to each a certain proportion of his

assets, and therefore a mere agreement by creditors to grant an extension of time and not to sue is no valid composition. *Henry v. Patterson*, 57 Pa. St. 346.

⁹¹ *Norman v. Thompson*, 4 Exch. 755; *Pierson v. Cahill*, 21 Cal. 122; *Renard v. Tuller*, 4 Bosw. (N. Y.) 107. Where the creditors of a failing debtor contract with a third person to sell and assign to him their claims at a certain percentage, in the absence of proof that such third person was acting merely as agent of the debtor, the transaction is to be considered as a purchase and sale,

in Indiana that a debtor may compound with a single creditor.⁹² It is not necessary that a composition deed should express the mutuality of all the signers. It is sufficiently implied from the nature of the agreement.⁹³ Where the payment of the composition debt is made a condition precedent to the canceling of the original debt, the cause of action on the original debt is suspended until default is made in paying the composition.⁹⁴ It is not necessary that the debtor be a party to the composition; his acting upon it is sufficient to bind the creditors.⁹⁵ A creditor who has signified his assent to a composition between his debtor and the other creditors can not subsequently withdraw his assent without the consent of the debtor.⁹⁶ When the creditors have resolved upon a composition, if the debtor complies with the conditions of that resolution, or rather, until he fails to comply with them—for which purpose he must have a reasonable time—the resolution is binding upon the creditors.⁹⁷ But when default is made,

not a composition; and a creditor who has received the percentage agreed upon, and has assigned his claim, can not enforce the balance of the indebtedness upon proof simply that some of the creditors received more than the stipulated per cent. for their claims. *Goldenbergh v. Hoffman*, 69 N. Y. 322. See also, *Blair v. Wait*, 69 N. Y. 113. ⁹²*Devou v. Ham*, 17 Ind. 472. *Kahn v. Gumberts*, 9 Ind. 430 (By the terms "compound" and "composition" is meant a parol agreement by a creditor to accept less of a liquidated debt than is due him.).

⁹³*Horstman v. Miller*, 35 N. Y. Super. Ct. 29, where the deed, purporting that the creditors "severally and each for himself agree," was held to be good, the court saying: "Whatever may be the nature of the obligation in terms, it must, necessarily, in all cases be several. Each creditor must agree for himself with the debtor, and his several agreement is joint, or his joint agreement is several, only so far as it is mutual with the others sign-

ing." See also, *Hall v. Merrill*, 5 Bosw. (N. Y.) 266, where the agreement was joint.

⁹⁴*Slater v. Jones*, L. R. 8 Ex. 186; *Edwards v. Coombe*, L. R. 7 C. P. 519.

⁹⁵*Eaton v. Lincoln*, 13 Mass. 424.

⁹⁶*Fellows v. Stevens*, 24 Wend. (N. Y.) 294. See also, *Greenwood v. Lidbetter*, 12 Price 183; *Good v. Cheeseman*, 2 B. & Ad. 328; *Steinman v. Magnus*, 11 East 390; *Pflegger v. Browne*, 28 Beav. 391; *Parkerson v. Sessions*, 40 Ga. 171; *Gillfillan v. Farrington*, 12 Ill. App. 101; *Fosdyke v. Nixon*, 107 Ind. 138, 8 N. E. 11; *Murray v. Snow*, 37 Iowa 410; *Farrington v. Hodgdon*, 119 Mass. 453; *Sage v. Valentine*, 23 Minn. 102; *Renard v. Tuller*, 4 Bosw. (N. Y.) 107; *Williams v. Carrington*, 1 Hilt. (N. Y.) 515; *Way v. Langley*, 15 Ohio St. 392; *Pierce v. Jones*, 8 S. Car. 273; *Lanes v. Squyres*, 45 Tex. 382; *Paddleford v. Thacher*, 48 Vt. 574.

⁹⁷*Edwards v. Coombe*, L. R. 7 C. P. 519. See also, *Pontius v. Derflinger*, 59 Ind. 27.

the creditor may sue for his original debt.⁹⁸ An agreement of a creditor with his debtor to accept a certain percentage of the debt in full satisfaction thereof, "provided that no other creditor shall receive more than the same percentage of his claim," is void for want of consideration.⁹⁹

§ 2081. Accord and satisfaction by a joint creditor.—Where one of two or more joint creditors makes an accord and satisfaction with the debtor, this puts an end to the debt.¹ Thus, where three creditors sue on a joint demand and the debtor pleaded an accord and satisfaction with one of the creditors, by a payment in cash and a set-off of a debt due from that one to the debtor, the plea was held good.² Where two or more are interested in a contract the presumption of law is that their interest is joint, and either may make a valid accord and satisfaction. Thus, where two persons bought a quantity of goods in their own names, and then sold the goods to a corporation and one of them made an accord and satisfaction for the price with the corporation, this was held to discharge the corporation from the other's demand.³ So, also, where one partner makes an accord and satisfaction with a debtor of the firm, and it does not appear whether it is intended to apply to separate or to partnership demands, the presumption is that it is a discharge from partnership claims.⁴ Tenants in common are likewise bound by an accord and satisfaction made by one of them.⁵ But in Ohio, it seems that joint creditors, between whom no partnership exists, can neither release nor make an accord and satisfaction with the common debtor so as to conclude their cocreditors who do not assent to such release or accord.⁶

⁹⁸ *Edwards v. Coombe*, L. R. 7 C. P. 519.

⁹⁹ *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103. See also, *Steinman v. Magnus*, 11 East 390; *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Eaton v. Lincoln*, 13 Mass. 424.

¹ *Wallace v. Kelsall*, 7 M. & W. 264.

² *Wallace v. Kelsall*, 7 M. & W. 264.

³ *Osborn v. Martha's Vineyard R. Co.*, 140 Mass. 549, 5 N. E. 486.

⁴ *Emerson v. Knowler*, 8 Pick. (Mass.) 63.

⁵ *Austin v. Hall*, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376.

⁶ *Upjohn v. Ewing*, 2 Ohio St. 13.

§ 2082. **Accord and satisfaction with a joint debtor.**—The creditor discharges all joint debtors by an accord and satisfaction with one,⁷ and, likewise, a partial accord and satisfaction by one joint debtor is a satisfaction pro tanto as to all.⁸ A covenant not to sue one of the joint obligors does not amount to an accord and satisfaction. It does not prevent the creditor from proceeding against all the joint debtors.⁹ While, as a general rule, a covenant not to sue is not pleadable in bar—it being a covenant only, and the covenantee being put to his cross-action to recover the damages which a breach may occasion him—there is an exception to this rule in case of a sole obligor. It then amounts to accord and satisfaction, and may be pleaded.¹⁰ There is some difference of judicial opinion as to whether a creditor can settle with one joint-debtor and reserve his rights against the others. It seems that in Ohio,¹¹ Connecticut,¹² California,¹³ and Maryland¹⁴ the courts will not enforce agreements between a creditor and a joint-debtor which do not equally inure to the benefit of all the debtors. But Penn-

⁷ *Nicholson v. Rovill*, 4 A. & E. 675; *Elliott v. Holbrook*, 33 Ala. 659; *Vandever v. Clark*, 16 Ark. 331; *Hockman v. Manning*, 4 Colo. 543; *Booth v. Campbell*, 15 Md. 569; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *McLaurine v. Monroe*, 30 Mo. 462; *Lamb v. Gregory*, 12 Nebr. 506, 11 N. W. 755; *Neligh v. Bradford*, 1 Nebr. 451; *Arnold v. Camp*, 12 Johns. (N. Y.) 409, 7 Am. Dec. 328; *Tellico Mfg. Co. v. Williams* (Tenn.) 59 S. W. 1075. Where a creditor of a corporation by an accord and satisfaction with a stockholder released such stockholder from all personal liability for his debt, he was held to thereby discharge the corporation and other stockholders to the same extent as the one with whom the accord was made. *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427.

⁸ *Merchants Bank v. Curtiss*, 37 Barb. (N. Y.) 317.

⁹ *Walker v. McCulloch*, 4 Greenl. (Maine) 421; *Smith v. Bartholomew*, 1 Metc. (Mass.) 276, 25 Am. Dec. 365; *Tuckerman v. Newhall*,

17 Mass. 581; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Frink v. Green*, 5 Barb. (N. Y.) 455; *Rowley v. Stoddart*, 7 Johns. (N. Y.) 207; *Winston v. Dalby*, 64 N. Car. 299; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711.

¹⁰ *Walker v. McCulloch*, 4 Greenl. (Maine) 421; *Crane v. Alling*, 15 N. J. L. 423; *Lizé v. Nelson*, 38 N. J. L. 358.

¹¹ *Ellis v. Bitzer*, 2 Ohio 89 (Where in an action to trespass against five, the plaintiff accepted a note from two for a sum of money to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction for the other defendants, it was held a good discharge for all.).

¹² *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154.

¹³ *Northern Ins. Co. v. Potter*, 63 Cal. 157.

¹⁴ *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504.

sylvania allows an accord and satisfaction between a creditor and joint-debtor so that on payment of his proportion of the debt he alone is discharged.¹⁵ The same rule likewise probably obtains in New York.¹⁶ It has been held that a receipt given to one joint-debtor on a note, for a part payment, coupled with the words "which is in full on his part on the within note, and the said A B is hereby discharged from all obligations on the same," was not such a release as would discharge the others.¹⁷ In Maine the courts not only will not allow an accord and satisfaction with one joint-debtor to discharge the others, but adopt the rule that where one of two joint-debtors has been discharged, such discharge is no defense to either in an action against both. The only remedy of the discharged debtor is to sue for a breach of the contract of discharge.¹⁸

§ 2083. Accord and satisfaction by a stranger.—An accord and satisfaction, moving from a stranger or person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitutes a good defense to an action to enforce the liability against the debtor.¹⁹ Some authorities, however, allow the accord and satisfaction of a stranger to be taken advantage of only when subsequently ratified by the debtor, but the fact of pleading it will be sufficient evidence of ratification.²⁰

¹⁵ *Burke v. Noble*, 48 Pa. St. 168. See, as to release of joint obligors, *Evans v. International Trust Co.* (Tenn.), 59 S. W. 373.

¹⁶ *Honegger v. Wettstein*, 47 N. Y. Super. Ct. 125, revd. 94 N. Y. 252, 13 Abb. N. Cas. (N. Y.) 393.

¹⁷ *Armstrong v. Hayward*, 6 Cal. 183.

¹⁸ *Drinkwater v. Jordan*, 46 Maine 432; *McAllester v. Sprague*, 34 Maine 296; *McCrillis v. Hawes*, 38 Maine 566.

¹⁹ *Ritenour v. Mathews*, 42 Ind. 7; *Harvey v. Tama County*, 53 Iowa 228, 5 N. W. 130; *Bullen v. McGillicuddy*, 2 Dana (Ky.) 90; *Briscoe v. Callahan*, 77 Mo. 134; *Rusk v. Soutter*, 67 Barb. (N. Y.) 371; *Van Etten v. Troudden*, 1 Hun (N.

Y.) 432, 67 Barb. (N. Y.) 342, 3 Thomp. & C. (N. Y.) 603; *Babcock v. Bonnell*, 80 N. Y. 244; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Beck v. Snyder*, 167 Pa. St. 234, 31 Atl. 555; *Bennett v. Hill*, 14 R. I. 322; *Merrick v. Giddings*, 115 U. S. 300, 29 L. ed. 403, 6 Sup. Ct. 65; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 45 Am. St. 872, 23 L. R. A. 120. But see, *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Armstrong v. School Dist. No. 3*, 28 Mo. App. 169; *Newbern v. Dawson*, 10 Ired. (N. Car.) 436.

²⁰ *Grymes v. Blofield*, Cro. Eliz. 541; *Jones v. Broadhurst*, 9 M. G. & S. 173, 67 E. C. L. 173; *Belshaw v. Bush*, 11 C. B. 191, 73 E. C. L.

§ 2084. Accord and satisfaction with representative of deceased creditor.—An agreement by the payee of a note, with the maker's widow, that certain sums paid by the maker, and by her after his death, for the payee's benefit, together with a sum paid by her to the payee, should be accepted in full settlement of the note, has been held to constitute a valid satisfaction thereof.²¹

§ 2085. Rescission of accord and satisfaction.—Parties to an accord and satisfaction may, by a subsequent agreement, rescind it, and restore the debt to its original status.²² But a mere breach of the accord and satisfaction or the declared intent of one of the parties not to abide by it will not amount to a rescission by the parties and restore the former status.²³ The accord and satisfaction may be set aside for fraud or misrepresentation either in the execution of the contract or in the inducement to the execution.²⁴ But a party seeking to rescind on this ground must, in general, first place the other party in statu quo.²⁵ Where an accord and satisfaction is fully executed, the party receiving money from the other can not rescind on the ground of fraud, or his own mental incompetency to make a binding contract, without refunding, or offering to refund, the money which was the fruit of the accord and satisfaction. If any exception to this general rule results from inability, by reason of poverty, to restore the money, it is only, as a rule, where the fraud is not discovered, or the mental disability continues, as the case may be, until after the money has been

191; *Goodwin v. Cremer*, 18 Ad. & El. (N. S.) 757, 83 E. C. L. 757; *Snyder v. Pharo*, 25 Fed. 398; *Woolfolk v. McDowell*, 39 Dana Ky.) 268.

²¹ *Beck v. Snyder*, 167 Pa. St. 234, 31 Atl. 555.

²² *Heavenrich v. Steele*, 57 Minn. 221; 58 N. W. 982; *Clark v. Bowen*, 22 How. (U. S.) 270, 16 L. ed. 337.

²³ *Byrd Printing Co. v. Whitaker Paper Co.*, 135 Ga. 865, 70 S. E. 798.

²⁴ *Reed v. Eugel*, 142 Ill. App. 413; *Brundige v. Nashville C. & St. L. R. Co.*, 112 Tenn. 526, 81 S.

W. 1248; *Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443.

²⁵ *Home Ben. Society of N. Y. v. Muehl*, 22 Ky. L. 1264, 60 S. W. 371; *Cunningham v. Belknap*, 22 Ky. L. 1580, 60 S. W. 837; *Galvin v. O'Brien*, 96 Mich. 483, 56 N. W. 85; *Pangborn v. Continental Insurance Co.*, 67 Mich. 683, 35 N. W. 814; *Crippen v. Hope*, 38 Mich. 344; *Headley v. Hackley*, 50 Mich. 43, 14 N. W. 693; *Walsh v. Sisson*, 49 Mich. 423, 13 N. W. 802; *Jewett v. Petit*, 4 Mich. 508.

expended, or otherwise put beyond the power and control of the plaintiff. To use and appropriate the money, with knowledge of the imposition, would be a ratification of the settlement.²⁶

§ 2086. Pleading.—Accord and satisfaction can not be proved unless it is pleaded;²⁷ it can not be proved under a general denial²⁸ or a plea of payment.²⁹ The plea should aver a delivery and acceptance of goods in satisfaction of the debt.³⁰ And the plea fails, when the performance necessary to constitute the satisfaction is not alleged, and it appears upon the face of the plea that performance, and not the agreement to perform, was to be received in satisfaction.³¹ A plea of accord and satisfaction is demurrable which alleges neither promise given, nor acceptance, nor anything parted with in the premises by either party.³² So, a replication of accord and satisfaction to a plea of set-off is defective which does not allege the giving and accepting of anything in satisfaction of the causes of action set up in the plea.³³ In an action for the value of property alleged

²⁶ *Strodder v. Stone &c. Granite Co.*, 94 Ga. 626, 19 S. E. 1022; *Hatchett v. Emerson*, 73 Mo. App. 282; *Doyle v. New York, O. & W. R. Co.*, 66 App. Div. (N. Y.) 398, 72 N. Y. S. 936; *Epes v. Williams* (Va.), 27 S. E. 427; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10.

²⁷ *Smith v. Elrod*, 122 Ala. 269, 24 So. 994; *Fogil v. Boody*, 76 Conn. 194, 56 Atl. 526; *Grand Lodge of A. O. U. W. v. Grand Lodge*, 83 Conn. 241, 76 Atl. 533; *Elair v. Philadelphia &c. R. Co.* (Del. Super.), 78 Atl. 1085; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420, 22 Wash. L. 377; *Ingram v. Hilton &c. Lumber Co.*, 108 Ga. 194, 33 S. E. 961; *George v. Chicago Ft. M. & D. M. R. Co.*, 85 Iowa 590, 52 N. W. 512; *Barker v. Wheeler*, 60 Nebr. 470, 83 N. W. 678, 83 Am. St. 541; *Habrich v. Donohue*, 51 App. Div. (N. Y.) 575, 64 N. Y. S. 604; *Niggli v. Foehry*, 83 Hun (N. Y.) 269, 64 N. Y. St. 658, 31 N. Y. S. 931; *Covell v. Carpenter*, 24 R. I. 1, 51 Atl. 425; *Gossett v.*

Southern R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. 846.

²⁸ *Harvey v. Denver &c. R. Co.*, 44 Colo. 258, 99 Pac. 31, 130 Am. St. 120.

²⁹ *Smith v. Elrod*, 122 Ala. 269, 24 So. 994; *Karter v. Fields*, 140 Ala. 352, 37 So. 204; *Barnum v. Green*, 13 Colo. App. 254, 57 Pac. 757; *Freiermuth v. McKee*, 86 Mo. App. 64; *Crilly v. Ruyle*, 87 Nebr. 367, 127 N. W. 251.

³⁰ *Angus v. Chicago Trust &c. Bank*, 68 Ill. App. 425, affd. 170 Ill. 298, 48 N. E. 946; *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576; *Van Housen v. Broehl*, 58 Nebr. 348, 78 N. W. 624, revd. 59 Nebr. 48, 80 N. W. 260; *Rawlins v. Jungquist* (Wyo.), 96 Pac. 144.

³¹ *Perdew v. Tillma*, 62 Nebr. 865, 88 N. W. 123.

³² *Montgomery v. Shirley*, 159 Ala. 239, 48 So. 679.

³³ *Heath v. Doyle*, 18 R. I. 252, 27 Atl. 333.

to have been converted by the defendant, where the answer was that the defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and the defendant at the time, and more especially the matter referred to in the petition, it was held to present the issue of settlement as a distinct and separate defense, and that the defendant was not confined to proof of the arbitration alleged.⁸⁴

§ 2087. Discharge by judgment.—The subject of merger by judgment has received extended consideration at another place in this work.⁸⁵ At this time it may be said generally that a final judgment on a cause of action for a breach of contract, rendered by a court of competent jurisdiction in favor of the plaintiff, discharges the cause of action by way of merger, and that a judgment against him on the merits discharges the cause of action by way of estoppel. It is essential to the operation of this principle that this judgment be a final judgment. An interlocutory order or a judgment on a matter merely in abatement will not suffice.⁸⁶ Furthermore, the judgment must be rendered by a court having jurisdiction of the subject-matter, otherwise the judgment will be null and inoperative to bar another action for the same cause.⁸⁷ The reasons for the merger, under these conditions, are that a judgment is of a higher nature than the cause of action for the breach of the contract,⁸⁸

⁸⁴ *Forbes v. Petty*, 37 Nebr. 899, 56 N. W. 730.

⁸⁵ See Ch. 45, on Discharge by Operation of Law—Merger and Bankruptcy.

⁸⁶ *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648; *Bissell v. Spring Valley*, 124 U. S. 225, 8 Sup. Ct. 495; *Harrison v. Hartford Ins. Co.*, 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709n; *Jordon v. Siefert*, 126 Mass. 25; *Webb v. Buckelew*, 82 N. Y. 555.

⁸⁷ *Blakeslee v. Murphy*, 44 Conn. 188; *Mount v. Scholes*, 120 Ill. 394,

11 N. E. 401; *Richardson v. Aiken*, 84 Ill. 221; *Phillips v. Quick*, 68 Ill. 324; *Roberts v. Hamilton*, 56 Iowa 683, 10 N. W. 236; *Tremblay v. Aetna Life Ins. Co.*, 97 Maine 547, 55 Atl. 509, 94 Am. St. 521; *Schindel v. Suman*, 13 Md. 310; *Sackett v. Montgomery*, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. 522; *Hughes v. United States*, 4 Wall. (U. S.) 232, 18 L. ed. 303.

⁸⁸ *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Wayman v. Cochrane*, 35 Ill. 152; *Runnamaker v. Cordray*, 54 Ill.

and also because it is against the policy of the law to allow the recovery of two judgments against the same person for one debt.³⁹ Where the judgment is against the plaintiff on the merits, the cause of action is discharged by way of estoppel.⁴⁰ A reversal of the judgment, however, restores the parties to their former positions so far as that can be done without prejudice to the rights of third persons.⁴¹

§ 2088. **Discharge by lapse of time.**—The effect of lapse of time to bar a cause of action on a contract is considered elsewhere.⁴² In this connection it may be said generally that delay amounting to laches in the assertion of a claim may raise a presumption of its settlement, but this presumption may be rebutted.⁴³ All states, however, have statutes which limit the time for commencement of actions on contracts. These statutes begin to run at the time of the accrual of the action, except in cases of disability, such as infancy, insanity, imprisonment, fraudulent concealment and the like. The effect of these statutes is to bar the rem-

303; *Ward v. Haggard*, 75 Ind. 381; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Harford v. Street*, 46 Iowa 594; *Cooksey v. Kansas City &c. R. Co.*, 74 Mo. 477; *Grant v. Burgwyn*, 88 N. Car. 95; *Schuler v. Israel*, 120 U. S. 506, 30 L. ed. 707, 7 Sup. Ct. 648.

³⁹ *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210; *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663, 82 Am. St. 720. The still broader doctrine of *res adjudicata* may also control.

⁴⁰ *Brennan v. Berlin &c. Bridge Co.*, 71 Conn. 479, 42 Atl. 625; *Nispele v. Laparle*, 74 Ill. 306; *Cole v. Favorite*, 69 Ill. 457; *Gutheil v. Goodrich*, 160 Ind. 92, 66 N. E. 446; *Norton v. Doherty*, 3 Gray (Mass.) 372, 63 Am. Dec. 758; *Patrick v. Shaffer*, 94 N. Y. 423; *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *Cromwell v. Sac*, 94 U. S. 351, 24 L. ed. 195; *Bissell v. Spring Valley*, 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. 495.

⁴¹ *Chickering v. Failes*, 29 Ill. 294; *Lambert v. Livingston*, 131 Ill. 161,

23 N. E. 352; *Crawford v. Thompson*, 161 Ill. 161, 43 N. E. 617; *Clodfelter v. Hulett*, 92 Ind. 426; *Dorsey v. Thompson*, 37 Md. 25; *Goodrich v. Bodurtha*, 6 Gray (Mass.) 323; *Gott v. Powell*, 41 Mo. 416; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Smith v. Frankfield*, 77 N. Y. 414; *Hubbell v. Broadwell's Admrs.*, 8 Ohio 120; *Fries v. Pennsylvania Co.*, 98 Pa. 142; *Clark v. Bowen*, 22 How. (U. S.) 270, 16 L. ed. 337; *United States Bank v. Washington Bank*, 6 Pet. (U. S.) 8, 8 L. ed. 299; *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793.

⁴² See post, ch. 55, on *Lapse of Time—Statute of Limitations*.

⁴³ *Knight v. McKinney*, 84 Maine 107, 24 Atl. 744; *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Stover v. Duren*, 3 Strob. (S. Car.) 448, 51 Am. Dec. 634; *Atkinson v. Dance*, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; *Walker v. Emerson*, 40 Tex. 706, 73 Am. Dec. 207.

edy, but this does not prevent the revival of the cause of action by an acknowledgment or new promise,⁴⁴ or by part payment.⁴⁵

⁴⁴ Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Wetz v. Greffe, 71 Ill. App. 313; Perry v. Chesley, 77 Maine 393; Yarbrough v. Gilland, 77 Miss. 139, 24 So. 170; Heany v. Schwartz, 155 Pa. 154, 25 Atl. 1078; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. 209.

⁴⁵ Waters v. Tompkins, 2 C. M. & R. 723; Sears v. Hicklin, 3 Colo. App. 331, 33 Pac. 137; Miner v. Lorman, 56 Mich. 212, 22 N. W. 265; Romaine v. Corlies, 47 N. J. L. 108; Blaskower v. Steel, 23 Ore. 106, 31 Pac. 253; Benton v. Holland, 58 Vt. 533, 3 Atl. 322.

CHAPTER XLIX.

REMEDIES FOR BREACH.

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| § 2095. Remedies available. | § 2106. Abandonment of contract as defense. |
| 2096. What law governs as to the remedy. | 2107. Waiver of performance as defense. |
| 2097. Election of remedies. | 2108. Breach where defendant makes his performance impossible. |
| 2098. Conditions precedent to action for breach. | 2109. Preventing performance as defense. |
| 2099. Accrual of action for breach at once—Choice of remedies for breach of labor contract. | 2110. Remedy of buyer on breach of seller. |
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| 2101. Quantum meruit. | 2112. Counterclaims and cross-actions. |
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§ 2095. Remedies available.—On breach of contract the injured party has his choice of three remedies in a proper case. He may sue on the contract for the damages he has sustained by reason of the breach, or he may consider the contract terminated by the breach and sue on the quantum meruit under an implied contract and recover for his services and the amount expended by him on the contract;¹ or he may have recourse to equity and compel a specific performance of the contract, notwithstanding the breach.²

§ 2096. What law governs as to the remedy.—The remedies for breach of a contract are governed by the laws

¹ McCullough v. Baker, 47 Mo. 401; Dempsey v. Lawson, 76 Mo. App. 522; Clark v. New York, 4 N. Y. 338, 53 Am. Dec. 379; Toher v. Schaefer, 45 Misc. (N. Y.) 618, 91 N. Y. S. 3. See also, McElwee v. Bridgeport Land & Imp. Co., 54 Fed. 627, 4 C. C. A. 525; Baca v. Barrier, 2 N. Mex. 131; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 19 Ct. Cl. (U. S.) 710, 4 Sup. Ct. 81.

² See ch. 51 on Specific Performance; also Snodgrass v. Snodgrass, 32 Ind. 406; Smyth v. Sturges, 108 N. Y. 495, 15 N. E. 544; Frisch v. Wells, 200 Mass. 429, 86 N. E. 773, 23 L. R. A. (N. S.) 144, and note; Madison River Live Stock Co. v. Osler, 39 Mont. 244, 102 Pac. 325, 133 Am. St. 558, and note.

of the state where the remedies are pursued and not the laws of the state where the contract was made. In other words, the law of the forum controls the remedy for breach of contract.³ This principle governs such incidents of the remedy as the time within which the action may be brought,⁴ the mode of service of process,⁵ the parties to the action,⁶ the defenses that may be interposed,⁷ the burden of proof,⁸ and questions generally of the admissibility of evidence on the trial.⁹

§ 2097. Election of remedies.—It is the doctrine of election of remedies that one having the choice of two or more inconsistent remedies for his relief is bound by his selection of the remedy he will pursue and he can not thereafter avail himself of the other remedies. It is essential to the full operation of this principle that the party should make his election with full knowledge of the existence of the inconsistent remedies. It is not allowed a litigant to sue upon one cause of action and recover upon another.¹⁰ Ac-

³ *Atlanta &c. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93; *Davis v. De Vaughn*, 7 Ga. App. 324, 66 S. E. 956; *McCoy v. Griswold*, 114 Ill. App. 556; *Reid v. Northern Lumber Co.*, 146 Ill. App. 371; *Mandru v. Ashby*, 108 Md. 693, 71 Atl. 312; *Edmonson v. Ferguson*, 11 Mo. 344; *Thompson v. Traders Ins. Co.*, 169 Mo. 12, 68 S. W. 889; *Jaqui v. Benjamin*, 80 N. J. L. 10, 77 Atl. 468; *Hooley v. Talcott*, 129 App. Div. (N. Y.) 233, 113 N. Y. S. 820; *Jamieson v. Potts*, 55 Ore. 292, 105 Pac. 93; *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018; *Missouri, K. & T. R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871; *Crofoot v. Thatcher*, 19 Utah 212, 57 Pac. 171, 75 Am. St. 725; *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. 779; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774n; *Studebaker Bros. Co. v. Man*, 14 Wyo. 68, 82 Pac. 2.

⁴ *McCoy v. Griswold*, 114 Ill. App.

556; *Missouri, K. & T. R. Co. v. Godair Commission Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871; *Crofoot v. Thatcher*, 19 Utah 212, 57 Pac. 171, 75 Am. St. 725.

⁵ *Hooley v. Talcott*, 129 App. Div. (N. Y.) 233, 113 N. Y. S. 820.

⁶ *Glenn v. Busey*, 5 Mackey (D. C.) 233; *Wilson v. Clark*, 11 Ind. 385; *Lynch v. Postlethwaite*, 7 Mart. (O. S.) (La.) 69, 12 Am. Dec. 495.

⁷ *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93.

⁸ *Atlanta &c. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355.

⁹ *National Express & Transp. Co. v. Morris*, 15 App. D. C. 262; *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. 715.

¹⁰ *Southern R. Co. v. Attalla*, 147 Ala. 653, 41 So. 664; *Wells v. Robinson*, 13 Cal. 133; *Elliott v. Collins*, 6 Idaho 266, 55 Pac. 301; *Larned v. Jordon*, 55 Kans. 124, 39 Pac. 1030; *Watson v. Perkins*, 88 Miss. 64, 40 So. 643; *State v. Bank of Commerce*, 61 Nebr. 22, 84 N. W.

cordingly, where a party injured by a breach of contract elects to stand on the contract, he can not generally recover on a quantum meruit, for the remedies are inconsistent.¹¹ So, where the party brings an action at law for damages for the breach, he can not thereafter maintain a suit in equity to enforce specific performance.¹² Neither can he sue for specific performance after he has elected to disaffirm the contract.¹³ And if he elects to sue upon the contract as executed, he can not afterward bring a suit to reform it.¹⁴ An action on the contract for damages in effect affirms the contract and precludes an action for rescission.¹⁵ And when a party injured by the stoppage of a contract elects to rescind it, he can not recover any damages for a breach of the contract, either for outlay or for loss of profits; he usually recovers the value of his services actually performed as upon a quantum meruit.¹⁶ It should be observed, however, that the mere fact that a party mistakes his remedy and pursues the wrong one at first may not prevent him from afterwards pursuing another remedy.^{16a}

406; *Turner v. Grimes*, 75 Nebr. 412, 106 N. W. 465; *Boots v. Ferguson*, 46 Hun (N. Y.) 129, 10 N. Y. St. 761; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

¹¹ *Reiffschneider v. Beck*, 148 Mo. App. 725, 129 S. W. 232; *Wade v. Nelson*, 119 Mo. App. 278, 95 S. W. 956; *Davis v. Drew*, 132 Mo. App. 503, 111 S. W. 869; *Missouri Pac. R. Co. v. Kansas City & I. Air Line Co.*, 189 Mo. 538, 88 S. W. 3; *Clements v. Yeates*, 69 Mo. 623; *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358. See also, *Davis v. Chase*, 159 Ind. 242, 64 N. E. 88, 95 Am. St. 294; *Boyce v. Timpe* (Iowa), 89 N. W. 83; *Hunt v. Tuttle*, 125 Iowa 676, 101 N. W. 509; *Ecker v. Isaacs*, 98 Minn. 146, 107 N. W. 1053; *Hayes v. Bunch*, 91 Mo. App. 467; *Wade v. Nelson*, 119 Mo. App. 278, 95 S. W. 956; *Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413; *Dorrington v. Powell*, 52 Nebr. 440, 72 N. W. 587; *Manning v. School*

Dist. No. 6, 124 Wis. 84, 102 N. W. 356.

¹² *Slaughter v. La Compagnie Francaise*, 119 Fed. 588, 57 C. C. A. 19; *Buckmaster v. Grundy*, 3 Gilm. (Ill.) 626; *Marston v. Humphrey*, 24 Maine 513.

¹³ *Herrington v. Hubbard*, 2 Ill. 569, 33 Am. Dec. 426; *Buckmaster v. Grundy*, 3 Gilm. (Ill.) 626; *White v. White*, 68 Vt. 161, 34 Atl. 425.

¹⁴ *Thomas v. Joslin*, 36 Minn. 1, 29 N. W. 344; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655.

¹⁵ *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827.

¹⁶ *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710. Compare, *Thompson v. Rhodehamel* (Wash.), 127 Pac. 572; *Houser & Co. Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925.

^{16a} *Harrill v. Davis*, 168 Fed. 187, 22 L. R. A. (N. S.) 1152, and note; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Zimmerman v. Robinson*,

§ 2098. Conditions precedent to action for breach.—There can be no recovery for breach of a contract in the absence of allegation and proof by the plaintiff that he has performed all the conditions precedent of the contract by him to be performed or that such performance has been waived and that the other party is in default.¹⁷ When the contract calls for performance on demand, then it is generally essential that demand should be made before suit is brought.¹⁸ Where no date is fixed for the performance of a contract, a reasonable time is intended and no default can, ordinarily, attach until after a demand and a failure or refusal to perform.¹⁹ Where, however, time is of the essence of the contract, it is not necessary for one party to notify the other that he will treat the contract as broken if not complied with on the date specified in order to avail himself of the time stipulation.²⁰ A demand for performance is unnecessary where there is a refusal of performance by the party sought to be charged with the default.²¹ Where demand is necessary in any case it must be made on the proper party.²² The failure to give notice under the terms of a contract is waived where the defendant denies liability on other grounds.²³ An offer to deliver is not required where the contract is repudiated by the party sought to be charged.²⁴

§ 2099. Accrual of action for breach at once—Choice of remedies for breach of labor contract.—The right to recover damages for the breach of a contract accrues as soon

128 Iowa 72, 102 N. W. 814; Clark v. Heath, 101 Maine 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144, and note.

¹⁷ Cincinnati, Indianapolis & Western R. Co. v. Baker, 130 Ill. App. 414; Home Ins. Co. v. Duke, 43 Ind. 418.

¹⁸ Ferguson v. State, 90 Ind. 38; Rodger v. Toilettes Co., 37 Misc. (N. Y.) 779, 76 N. Y. S. 940.

¹⁹ Gammon v. Bunnell, 22 Utah 421, 64 Pac. 958.

²⁰ Weatherford Machine &c. Co. v. Tate, 49 Tex. Civ. App. 392, 109 S. W. 406; Bounds v. Hickerson, 26 Tex. Civ. App. 608, 63 S. W. 887.

²¹ Abels v. Glover, 15 La. Ann 247; Barker v. Barker, 16 N. H. 333; Robinson v. Frank, 107 N. Y. 655, 1 Silvernail Ct. App. (N. Y.) 560, 14 N. E. 413; Holm v. Shay, 140 App. Div. (N. Y.) 176, 124 N. Y. S. 1020; Somers v. Tayloe, 2 Cranch C. C. (U. S.) 138, Fed. Cas. No. 13170. See also, Burns v. Fox, 113 Ind. 205, 14 N. E. 541.

²² Newburn v. Hyde, 132 Iowa 88, 107 N. W. 604.

²³ McQueen v. Smith, 118 N. Car. 569, 24 S. E. 412.

²⁴ Scott v. Miller, 114 App. Div. (N. Y.) 6, 99 N. Y. S. 609.

as the contract is broken.²⁵ And an action for breach of a contract will lie at once, on a positive refusal to perform, although the time specified for performance has not arrived.²⁶ But a declaration in an action on a contract, which fails to allege any breach thereof, is bad on demurrer.²⁷ In an action for breach of contract, defendants can not introduce evidence of an extension of the time within which the contract was to be performed, or of a change in the place of performance, where their answer admits their nonperformance under the alleged modifications.²⁸ And in an action for breach of contract, where the defense is the general issue, statute of limitations, and payment of all indebtedness, a charge authorizing the jury to consider whether plaintiff ratified certain acts of defendants, relied on as constituting a breach of the contract, is erroneous, the question of ratification not being in issue.²⁹ The general rule is well settled that a party to a contract where labor is to be performed has two remedies open to him when that contract is broken. He may sue for damages for the breach of the contract, or he may ignore the contract, and sue for services and labor expended and expenses incurred, from which he has derived no benefit.³⁰ In case he pursues the latter remedy, the measure of damages as to services is not necessarily the contract-price, even though the value of the

²⁵ Where one party to a contract has abandoned the same, it is not essential that the other, in order to recover for a breach, continue to perform useless acts with a view to keeping it alive. *Russell v. Excelsior Stove & Co.*, 120 Ill. App. 23; *Arnold v. Blabon*, 147 Pa. St. 372, 23 Atl. 575.

²⁶ *Donovan v. Sheridan*, 24 N. Y. S. 116. "The law is settled that an action for breach of contract will lie at once upon a positive refusal to perform, although the time specified for performance has not arrived. (*Butis v. Thompson*, 42 N. Y. 246; *Freer v. Denton*, 61 N. Y. 492; *Howard v. Daly*, 61 N. Y. 362; *Gray v. Green*, 9 Hun (N. Y.) 334; *Wetmore v. Jaffray*, 9 Hun (N. Y.) 140), and the damages recoverable

may continue down to the time of trial, if the contract extends beyond that. (*Bruell v. Colell*, 1 City Ct. (N. Y.) 308; *Cummings v. Hausen*, 63 How. Pr. (N. Y.) 351)."

²⁷ *Rich v. Calhoun* (Miss.), 12 So. 707.

²⁸ *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244.

²⁹ *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129.

³⁰ *Kearney v. Doyle*, 22 Mich. 294; *Mitchell v. Scott*, 41 Mich. 108, 1 N. W. 968; *Boyce v. Martin*, 46 Mich. 239, 9 N. W. 265; *Shulters v. Searls*, 48 Mich. 550, 12 N. W. 697; *Bush v. Brooks*, 70 Mich. 446, 38 N. W. 562; *Bromley v. Goff*, 75 Mich. 213, 42 N. W. 810; *Moore v. Capewell Horse-Nail Co.*, 76 Mich. 606, 43 N. W. 644.

services can be measured or apportioned by the contract rate, but he may, in some instances at least, recover what his services are reasonably worth, although in excess of the rate fixed by the contract.³¹

§ 2100. Parties to actions for breach of contract.—The question of parties is without difficulty where the controversy is between the parties to the contract and there is no undisclosed interest in a third person. Where, however, the contract is in the name of one for the benefit of another, the courts in most jurisdictions, especially under the modern statutes, allow the action to proceed in the name of the latter as the real party in interest,³² but the fact of such interest must be established.³³ In some jurisdictions, however, the action may be brought only in the name of the nominal party and not in that of the party in interest.³⁴ Where the parties injured by the breach are numerous, they should all sue for the breach of the contract unless the case exhibits some good reason why they should not

³¹ *Hemminger v. Western Assur. Co.*, 95 Mich. 355, 54 N. W. 949, citing *Hosmer v. Wilson*, 7 Mich. 293; *Kearney v. Doyle*, 22 Mich. 294; *Shulters v. Searls*, 48 Mich. 550, 12 N. W. 697. "The rule is otherwise, however, where the plaintiff is the author of the breach. The basis of a recovery by one who is in default is an implied agreement arising from the reception of something of benefit or value; but, where the party suing is not responsible for the breach, neither the right, nor the amount of the recovery, depends upon the measure of benefit received by the party guilty of the breach." Compare *Barker v. Wallace*, 62 Ind. 71. Where partially performed, measure of damages is compensation at contract price and indemnity of loss in respect to unexecuted part. See generally, post, ch. L.

³² *Ruppert v. Frauenknecht*, 146 Ill. App. 397; *Snider v. Greer-Wilkinson Lumber Co.* (Ind. App.), 96 N. E. 960; *Abbott v. Scotten*, 127 Ill. App. 58; *Morrison v. Payton*, 31 Ky. L. 992, 104 S. W. 685;

Klauck v. Federal Ins. Co., 60 Misc. (N. Y.) 170, 111 N. Y. S. 1037; *Ancrum v. Camden Light & Co.*, 82 S. Car. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029. See also, *Taylor v. Felder*, 7 Ga. App. 219; *Forsster v. Gregory*, 107 Ill. App. 437; *Wickham v. Hyde Park Bldg. Assn.*, 80 Ill. App. 523; *Vandalia R. Co. v. Keys*, 46 Ind. App. 353, 91 N. E. 173; *Burton v. Larkin*, 36 Kans. 246, 13 Pac. 398, 59 Am. St. 541; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849; *Holt v. United Security Life Ins. Co.*, 76 N. J. L. 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691n; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. 654; *Sackett v. Sackett*, 14 N. Y. St. 251; *Brice v. King*, 1 Head (Tenn.) 152; *Nutter v. Sydenstricker*, 11 W. Va. 535.

³³ *Rodhouse v. Chicago & Alton R. Co.*, 122 Ill. App. 642.

³⁴ *Mills v. Stillwell*, 28 Ky. L. 204, 89 S. W. 112; *Rowland v. Doolin's Admr.*, 10 Ky. L. (abstract) 684. See also, ante, Vol. 2, § 1421.

join.³⁵ The parties defendant should include all who are subject to legal liability.³⁶ Where the obligation is joint, all the parties committing the breach should be joined as defendants.³⁷ Where the obligation is joint as well as several all must be proceeded against jointly or each severally, subject to certain exceptions, as where one is an infant, or has been discharged in bankruptcy.³⁸ Where the contract recites a wrong name, the true name may be substituted in the pleadings.³⁹

§ 2101. Quantum meruit.—The general rule is that where one of the parties has endeavored in good faith to perform and has substantially performed his contract and thereby conferred on the other party a substantial benefit, although he has failed to perform in some particulars, he may recover, as the case may be, on the quantum meruit or the contract price, less the damage sustained by the other party by reason of the failure of strict performance. The right to this recovery does not always come from the original contract, but rests on another contract implied by the law.⁴⁰ It is another statement of the principle to say that where the default was not wilful, but due to such causes as sickness, death, prevention of performance by the other party or other causes not due to his fault, the

³⁵ Connolly v. Cottle, 1 Ill. 364; Moody v. Sewall, 14 Maine 295; Baker v. Jewell, 6 Mass. 460, 4 Am. Dec. 162; Rainey v. Smizer, 28 Mo. 310.

³⁶ Gawne v. Bicknell, 162 Fed. 587.
³⁷ Beard v. Lofton, 102 Ind. 408, 2 N. E. 129; People v. Sloper, 1 Idaho 158; McCall v. Price, 1 McCord (S. Car.) 82; Goldsmith v. Sachs, 8 Sawy. (U. S.) 110, 17 Fed. 726; Smith v. Kellogg, 46 Vt. 560.
³⁸ Goff v. Ladd (Colo.), 118 Pac. 792; Fay v. Jenks, 78 Mich. 312, 44 N. W. 380.

³⁹ Medway Cotton Manufactory v. Adams, 10 Mass. 360; Charitable Assn. v. Baldwin, 1 Metc. (Mass.) 359; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280.

⁴⁰ Katz v. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Jones v. Davenport, 74 Conn. 418, 50 Atl. 1028; Pinches v. Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Blood v. Wilson, 141 Mass. 25, 6 N. E. 362; Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Nolan v. Whitney, 88 N. Y. 648; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573; Todd v. Huntington, 13 Ore. 9, 4 Pac. 295; Gallagher v. Sharpless, 134 Pa. 134, 19 Atl. 491. See post, Vol. 4, §§ 3698, 3699.

law creates a promise to pay for the benefits received from part performance.⁴¹ The rule most strongly supported by authority and on principle requires the existence of the benefit as a fact and denies a recovery on a quantum meruit where the subject-matter of the contract is destroyed by the elements or otherwise and there is no benefit to the party sought to be charged.⁴² But this rule is not everywhere accepted, and in some jurisdictions quantum meruit will be allowed, though the subject-matter has been destroyed.⁴³ Recovery may be had on a quantum meruit where one is prevented from completing his contract by the act of the other party. In such a case he may treat the contract as terminated and sue for the value of services performed and materials furnished.⁴⁴ The principle is illustrated by cases where the contractor is wrongfully discharged by the other party and refused permission to finish the work.⁴⁵ The parties may, however, bind them-

⁴¹ *Robinson v. Davison*, L. R. 6 Eq. 269; *Boast v. Firth*, L. R. 4 C. P. 1; *Lakeman v. Pollard*, 43 Maine 463, 69 Am. Dec. 77; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Mooney v. York Iron Co.*, 82 Mich. 263, 46 N. W. 376; *Wolf v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Jones v. Judd*, 4 N. Y. 411; *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62; *Yerrington v. Green*, 7 R. I. 589, 84 Am. Dec. 578; *Green v. Gilbert*, 21 Wis. 395; *Prickett v. Badger*, 1 C. B. (N. S.) 96; *Phillips v. Jones*, 1 Ad. & El. 333; *Britt v. Hays*, 21 Ga. 157; *Adams v. Cosby*, 48 Ind. 153; *Urquhart v. Mortgage Co.*, 85 Minn. 69, 88 N. W. 264; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Brinkley v. Swicegood*, 65 N. Car. 626; *Derby v. Johnson*, 21 Vt. 17; *Hubbard v. Belden*, 27 Vt. 645.

⁴² *Appleby v. Meyers*, 16 L. T. 669; *Brumby v. Smith*, 3 Ala. 123; *Siegel v. Eaton*, 165 Ill. 550, 46 N. E. 449; *Krause v. Crothersville*, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. 203; *Taulbee v. McCarthy*, 144 Ky. 199, 137 S. W. 1045, 36 L. R. A. (N. S.) 43; *Milske v. Steiner Mantel Co.*, 103 Md. 235,

63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. 354; *Fildew v. Besley*, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; *Dame v. Woods*, 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133; *Newman Lumber Co. v. Purdum*, 41 Ohio St. 373; *Loneragan v. San Antonio Loan & C. Co.*, 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. 803.

⁴³ *Cleary v. Sohler*, 120 Mass. 210; *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293; *Hollis v. Chapman*, 36 Tex. 1; *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765.

⁴⁴ *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 111, 9 Am. St. 164; *San Francisco Bridge Co. v. Dumbarton Land & C. Co.*, 119 Cal. 272, 51 Pac. 335; *Batchelor v. Kirkbride*, 26 Fed. 899; *Person v. Stoll*, 72 App. Div. (N. Y.) 141, 76 N. Y. S. 324, *affd.* 174 N. Y. 548, 67 N. E. 1089; *White v. Livingston*, 69 App. Div. (N. Y.) 361, 79 N. Y. S. 466, *affd.* 174 N. Y. 538, 66 N. E. 1118.

⁴⁵ *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *McGoingle v. Klein*, 6 Colo. App. 306, 40 Pac. 465; *Connelly v. Devoe*, 37 Conn. 570; *Wag-*

selves to full performance by the terms of a contract so that there may be no recovery for partial performance.⁴⁶ There may be a recovery on quantum meruit for services performed or material furnished under a contract which is invalid because the minds of the parties did not meet as to its terms.⁴⁷ It is the holding of one of the cases that one who breaks his contract to support another for life can not recover on a quantum meruit for board furnished.⁴⁸ It is to be remembered in this connection that that which will make an owner liable on a quantum meruit on a partial performance by the contractor does not necessarily amount to a waiver of the right of the owner to recoup damages for the breach of the contractor.⁴⁹

§ 2102. Partial or entire breach.—Under the strict rule of the common law there can be no recovery for the partial performance of an entire, indivisible contract.⁵⁰ Complete performance is a condition precedent to recovery on such a contract unless partial performance is accepted for full

geman v. Janssen, 74 Ill. App. 38; *Forkner v. Purl*, 1 Ind. 489, *Smith* 275; *Black v. Woodrow*, 39 Md. 194; *McCullough v. Baker*, 47 Mo. 401; *Carroll v. Giddings*, 58 N. H. 333; *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379; *Davis v. Brown County Coal Co.*, 21 S. Dak. 173, 110 N. W. 113; *Derby v. Johnson*, 21 Vt. 17.

⁴⁶ *Cutter v. Powell*, 6 T. R. 320.

⁴⁷ *Turner v. Webster*, 24 Kans. 38, 36 Am. Rep. 251; *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810.

⁴⁸ *Ptacek v. Pisa*, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537n.

⁴⁹ *Walstrom v. Oliver-Watts Const. Co.*, 161 Ala. 608, 50 So. 46; *R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263; *Farmer v. Francis*, 34 N. Car. 282; *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

⁵⁰ *Miller v. Yockey*, 49 Colo. 303, 112 Pac. 772; *Holmes v. Stummel*,

24 Ill. 370; *Swift v. Williams*, 2 Ind. 365; *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N. S.) 1069n; *Timberlake v. Thayer*, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Brown v. Fitch*, 33 N. J. L. 418; *Cunningham v. Jones*, 3 E. D. Smith (N. Y.) 650, 4 Abb. Pr. 433, affd. 20 N. Y. 486; *Talmage v. White*, 35 N. Y. Super. Ct. 218; *Crane v. Knubel*, 61 N. Y. 645; *Hartman v. Meighan*, 171 Pa. St. 46, 33 Atl. 123; *Lewis v. Esther*, 2 Cranch. C. C. (U. S.) 423, Fed. Cas. No. 8322. In order to authorize the recovery the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial performance and the mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

performance,⁵¹ or full performance has been waived,⁵² or performance is prevented by sickness or death,⁵³ or by operation of law,⁵⁴ or by delinquency of the defendant,⁵⁵ or by his active interference.⁵⁶ And in cases generally where neither party is at fault,⁵⁷ there is an inclination on the part of the courts to relax the strict rule of the common law and allow a recovery where benefits have been received and retained, which sum is subject to reduction by the amount of damages resulting from the breach.⁵⁸ Where the part of the contract to be performed consists of several and distinct items, and the consideration to be paid by the other party is apportioned to each item to be performed,

⁵¹ *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403; *Wolcott v. Yeager*, 11 Ind. 84; *West v. Freeman*, 76 Mo. App. 96; *Stagg v. Munro*, 8 Wend. (N. Y.) 399.

⁵² *Chamberlain v. Hilton*, 42 Ala. 101; *Hayden v. Madison*, 7 Greenl. (Maine) 76; *Walker v. Millard*, 29 N. Y. 375; *Wilhelm v. Caul*, 2 Watts & S. (Pa.) 26; *Central Pennsylvania Tel. & C. Co. v. Thompson*, 112 Pa. St. 118, 3 Atl. 439.

⁵³ *Fahy v. North*, 19 Barb. (N. Y.) 341; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475; *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57.

⁵⁴ *Whitfield v. Zellnor*, 24 Miss. 663; *Jones v. Judd*, 4 N. Y. 411.

⁵⁵ *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146; *Mugan v. Regan*, 48 Mo. App. 461.

⁵⁶ *Joyce v. White*, 95 Cal. 236, 30 Pac. 524; *Cox v. Western Pac. R. Co.*, 47 Cal. 87; *Guerdon v. Corbett*, 87 Ill. 272; *Hoagland v. Moore*, 2 Blackf. (Ind.) 167; *McCausland v. Cresap*, 3 G. Greene (Iowa) 161; *Rankin v. Darnell*, 11 B. Mon. (Ky.) 30, 52 Am. Dec. 557; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; *Halpin v. Manny*, 57 Mo. App. 59; *Jones v. Judd*, 4 N. Y. 411; *Buffkin v. Baird*, 73 N. Car. 283; *Ralston v. Kohl's Admr.*, 30 Ohio St. 92; *Derby v. Johnson*, 21 Vt. 17; *Blood v. Enos*, 12 Vt. 625, 86 Am. Dec. 363; *United States v. Behan*, 110

U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710; *Chicago v. Tilley*, 103 U. S. 146, 26 L. ed. 371.

⁵⁷ *Hargrave v. Conroy*, 19 N. J. Eq. 281.

⁵⁸ *Duncan v. Baker*, 21 Kans. 99; *Gallagher v. Sharpless*, 134 Pa. 134, 19 Atl. 491; *Bush v. Jones*, 2 Tenn. Ch. 190. It is the settled law of Iowa that a person who performs work and furnishes material under a special agreement may recover compensation for a partial performance equal to and limited by the value of the benefit conferred, in estimating which the damages sustained by the failure to perform according to contract must be taken into consideration. *Wolf v. Gerr*, 43 Iowa 339. In Massachusetts, it is the rule that when a special contract has not been fully performed, but the plaintiff has in good faith done what the contract requires, and has thus rendered a benefit to the defendant, he can recover the value of his services, not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the stipulation of the contract. *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Reed v. Scituate*, 7 Allen (Mass.) 141; *Atkins v. Barnstable*, 97 Mass. 428; *Denham v. Bryant*, 139 Mass. 110, 28 N. E. 691; *Gorman v. Bellamy*, 82 N. Car. 496.

or is left to be implied under the law, the contract is generally held to be divisible and the failure of the promisor to perform one item does not entitle the other party to rescind the contract and refuse to accept further performance, nor discharge him from the obligation of paying for the other items if they have been performed.⁵⁹ Says the Supreme Court of Connecticut: "Where there is an entire, open, unrescinded, special contract, by which compensation for services to be performed is clearly made to depend upon full performance, the party whose part is unperformed can not recover, either on the contract itself or in general assumpsit, for such part performance as he may have rendered, because the parties may enter into such stipulations as they please. But the question in every case is whether such intention is expressed in the contract; and where such intention would seem to be contrary to the equity of the case, the courts ought to require that it should be clearly and precisely expressed before they enforce it."⁶⁰

§ 2103. Recovery for part or for substantial performance.—To entitle a party to recover for part performance, or for performance in a different way from that contracted for, his contract remaining open and unperformed, it has been held that the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party

⁵⁹ *Ritchie v. Atkinson*, 10 East 295; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; *Dibol v. Minot*, 9 Iowa 403; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; *Wooten v. Walters*, 110 N. Car. 251, 14 S. E. 734; *Fullmer v. Poust*, 155 Pa. 275, 26 Atl. 543, 35 Am. St. 881. A contract to repair a vessel is not entire and a recovery may be had though the whole of work is not performed. *Baeder*

v. Carnie, 44 N. J. L. 208. A total failure to perform a divisible contract discharges the other party the same as if it were indivisible. *Poussard v. Spiers*, 1 Q. B. Div. 410. Where a contract for the performance of work is divided into three separate and distinct parts, there is no reason why the plaintiff should not recover for work done on the first two parts according to the contract, though the third part was not finished. *Brewer v. Tysor*, 50 N. Car. 173.

⁶⁰ *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382.

is not enough from which to imply a promise to pay for it. Hence, in the case of a building on land, which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land and the owner enjoys the benefit of it, having no option to reject it, is not such an acceptance as will imply a promise to pay for it notwithstanding the nonperformance of the special contract.⁶¹ It has been held that a contractor who abandons work for the nonpayment of an instalment due under the contract may recover on a quantum meruit.⁶² In a comparatively recent New York case, the trial court charged that if plaintiff had not substantially performed he could not recover the balance of the contract price; but if he had, although a small and unimportant portion of the work remained to be done, he could recover the balance

⁶¹ *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. "Upon such a state of facts, the plaintiffs can not recover on the express contract, because they have not performed it on their part, and performance is a condition precedent to payment. They have not at all brought themselves within the liberal rule of 'substantial performance' laid down in *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, for the omissions and deviations were not slight and easily remedied, but substantial and remediless, except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional, and even fraudulent. And we may remark here, in passing, that the very nature of the deviations, as in using inferior and defective materials all through the building, is intrinsic evidence strongly supporting the finding that plaintiffs acted fraudulently. No case, we think, can be found where the doctrine of 'substantial performance' was applied to such a state of facts. To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent;

and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial, and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Woodward v. Fuller*, 80 N. Y. 312. It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: 'I never made any such agreement; I agreed to pay you if you would build my house in a certain manner, which you have not done.' The fault is with the one who voluntarily violates his contract."

⁶² *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635. "Nonpayment of an instalment of the contract price when due is such a breach of the contract as to justify a contractor in leaving the work and recovering upon a quantum meruit. *Porter v. Reservoir Co.*, 100 Cal. 500, 35 Pac. 146."

of the contract price, less the expense of performing that portion left undone. It was held no error.⁶³ Where a contract has been completely fulfilled, the contractor is entitled to his compensation, though he has failed to comply with a supplemental contract.⁶⁴ The party claiming the benefit of the doctrine of substantial performance has the burden of showing the value of the work or part omitted, or the expense of supplying the omissions.⁶⁵

§ 2104. **Defenses—Generally.**—The codes generally allow a defendant to an action for breach of contract to interpose any defense he may have without regard to whether it is legal or equitable.⁶⁶ The courts generally hold the party to the reason he gives for nonperformance of the contract and will not allow him to assert other reasons after litigation has commenced.⁶⁷ “Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he can not, after litigation has begun, change his ground and put his conduct upon an-

⁶³ *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418. “The defendants gave evidence tending to show that he had not performed his contract, and that they had been obliged to expend considerable sums of money to complete the work which he had contracted to do; and the trial judge charged the jury that, if he had not substantially performed his contract, he could not recover the balance of the contract price, but that if he had substantially performed the contract, although a small and unimportant portion thereof remained to be performed, he could recover the balance of the contract price, less the expense of performing the portion left unperformed by him. There was no exception to the rule of law thus laid down, and there could be no valid exception thereto. *Glacius v. Black*, 50 N. Y. 145; *Heckmann v. Pinkney*, 81 N. Y. 211; *Nolan v. Whitney*, 88 N. Y. 648; *Whelan v. Clock Co.*, 97 N. Y. 293.” See also, *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750.

⁶⁴ *Louisiana-Texas &c. Pipe Line*

Co. v. Atlanta Oil &c. Co., 124 La. 385, 50 So. 409.

⁶⁵ *St. George Contracting Co. v. New York*, 143 App. Div. (N. Y.) 554, 128 N. Y. S. 393.

⁶⁶ But see, *Courtright v. Burnes*, 13 Fed. 317, 3 McCrary (U. S.) 60, affd. 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. 865; *Carey v. Gunnison* (Iowa), 17 N. W. 881; *Buford v. Louisville N. R. Co.*, 82 Ky. 286, 2 Ky. L. 263; *Barton v. Radclyffe*, 149 Mass. 275, 21 N. E. 374; *Crosby v. Scott-Graff Lumber Co.*, 93 Minn. 475, 101 N. W. 610; *McCullun v. Boughton*, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; *Madison v. Benedict*, 73 App. Div. (N. Y.) 112, 76 N. Y. S. 402; *Atherholt v. Hughes*, 209 Pa. 156, 58 Atl. 269.

⁶⁷ *Kemp v. School District*, 84 Mo. App. 680; *Hixson Map Co. v. Nebraska Post Co.*, 5 Nebr. (Unof.) 388, 98 N. W. 872; *Ballou v. Sherwood*, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131. But see, *Wineburgh Advertising Co. v. Faust Co.*, 113 N. Y. S. 709.

other and a different consideration. He is not permitted thus to amend his hold."⁶⁸ But the rule that a party who has given a reason for his refusal to perform a contract is estopped to change his ground after litigation has begun does not apply where the contract was unlawful and in violation of a positive statute. In such case the defaulting party may plead its invalidity.⁶⁹ It is generally not regarded a defense that the plaintiff sustained no damages or would have made no profit if the contract had been performed.⁷⁰ An agreement to extend the time of payment of a debt or not to sue for a specified time can not be urged as a defense to an action brought before the time has expired. This amounts to the breach of another contract and must be the subject of a separate action.⁷¹ The illegality of the contract itself may be urged as a defense to an action for its breach,⁷² but this does not apply to a case where the illegality affects only part of the contract and the breach refers to the legal part of the contract and the illegal part may be disregarded and leave the contract complete.⁷³ But a party who seeks to take the benefit of the contract made by a third person in his behalf takes it subject to all legal defenses and the fraud of the third person in procuring the contract is his fraud.⁷⁴ It is a defense that the party sued for breach was prevented from performing by the plaintiff,⁷⁵ and likewise that the contract pleaded is not the whole

⁶⁸ *Ohio & Mississippi R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

⁶⁹ *Taenzer v. Chicago, R. I. & P. R. Co.*, 191 Fed. 543.

⁷⁰ *Langley v. Rodriguez*, 122 Cal. 580, 55 Pac. 406, 66 Am. St. 70; *Chapman v. Clements*, 22 Ky. L. 17, 56 S. W. 646; *Hax v. Hax*, 84 Mo. App. 306; *Pettit v. Carpenter*, 86 Mo. App. 452; *Letot v. Edens* (Tex. Civ. App.), 49 S. W. 109; *Lyle v. McCormick Harvesting Mach. Co.*, 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906.

⁷¹ *Howland v. Marvin*, 5 Cal. 501; *Walling v. Warren*, 2 Colo. 434; *Ralph v. Baxter*, 66 Ill. 416; *Guard v. Whiteside*, 13 Ill. 7; *Archibald v. Argall*, 53 Ill. 307; *Mendenhall*

v. Lenwell, 5 Blackf. (Ind.) 125, 33 Am. Dec. 458; *Newkirk v. Neild*, 19 Ind. 194, 81 Am. Dec. 383; *Berry v. Bates*, 2 Blackf. (Ind.) 118; *Clark v. Snelling*, 1 Ind. 382, Smith 201; *Murphy v. Robbins*, 17 Ind. 422; *Rodocanachi v. Buttrick*, 125 Mass. 134; *Winans v. Huston*, 6 Wend. (N. Y.) 471; *State Bank v. Corwith*, 6 Wis. 551.

⁷² *People v. Mercantile Co-operative Bank*, 104 App. Div. (N. Y.) 219, 93 N. Y. S. 521.

⁷³ *Borland v. Prindle*, 144 Fed. 713. See also, *Michigan Cent. R. Co. v. Chicago & C. R. Co.*, 132 Mich. 324, 93 N. W. 882.

⁷⁴ *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

⁷⁵ *Morehouse v. Bradley*, 80 Conn.

contract between the parties.⁷⁶ Changes in a contract may not be urged as a defense where they were made at the instance of the party sued and were for his benefit.⁷⁷ The defendant may waive a defense and this usually occurs where he fails to plead such defense.⁷⁸

§ 2105. Impossibility and act of God as defense.—One who relies as a defense upon the act of God rendering performance impossible must plead it.⁷⁹ No principle is better settled than that one who by his own contract creates a duty or charge upon himself is bound to make it good, no matter what the cost or difficulty, if performance be not absolutely impossible.⁸⁰ Thus, one who contracts to con-

611, 69 Atl. 937; *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837.

⁷⁶ *Carpenter v. Vulcanite Portland Cement Co.*, 211 Pa. 551, 61 Atl. 75.

⁷⁷ *Adams v. Haigler*, 2 Ga. App. 99, 58 S. E. 330.

⁷⁸ *Sutter v. Raeder*, 149 Mo. 297, 50 S. W. 813. See also, *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126. Some of such defenses, however, may be given under the general denial.

⁷⁹ *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354, 21 L. R. A. 726, per Moore, J.: "If one engages to make repairs before a particular day, and it becomes impossible by the act of God to make them by that day, he will not be liable for a breach of the covenant, if he repairs as soon as possible thereafter." *Taylor on Landlord and Tenant*, § 361. If the plaintiff had intended to rely upon the act of God as a dispensation, he should have alleged this fact, and made it an issue (*Bailey, Onus Probandi*, 296); but this he may be able to do in another trial by amendment if he so desire." *Robinson v. Mississippi River Logging Co.*, 61 Fed. 893, per Shiras, D. J.: "Counsel for the defendant cite in their brief many cases wherein exceptions are recognized to the doctrine formerly held, that, where the duty or obligation sought to be enforced was imposed by law, then impossibility

of performance was a good defense, but that, where the duty was one created by the contract of the parties, then impossibility of performance was not an excuse for non-performance, unless it was so provided in the contract. The general rule now prevailing is that stated by the Supreme Court in *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1-14, 37 L. ed. 625, 13 Sup. Ct. 779, wherein it is said: 'There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance; and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But, where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of, the particular contingency which afterwards happened.'"

⁸⁰ *Walton v. Waterhouse*, 3 Saund. 420; *Brecknock Navigation v. Pritchard*, 6 T. R. 750; *Atkinson v.*

struct a well for a certain sum, according to specifications which call for the use of a curb of a certain shape in the work, to be made of timber and planking of a prescribed size and quantity, can not recover, in addition to the contract price of the well which he constructs, compensation for work and material lost by the caving in of the well before completion, although it was due to the inadequacy of the curb prescribed by the specifications.⁸¹

§ 2106. Abandonment of contract as defense.—Abandonment of an executory contract by plaintiffs, and assent thereto by defendant, constitute a defense to an action on such contract.⁸² Where the plaintiff alleged that defendants agreed to sell stock of a corporation on his behalf, and that they neglected and refused to do so, or to return the

Ritchie, 10 East 533; Maryon v. Carter, 4 Car. & P. 295; Beale v. Thompson, 3 Bos. & P. 405; Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60; Bacon v. Cobb, 45 Ill. 47; Union v. Smith, 39 Iowa 9, 18 Am. Rep. 39; Phillips v. Stevens, 16 Mass. 238; Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Boyle v. Agawam Canal Co., 22 Pick. (Mass.) 381; Trenton v. Bennett, 27 N. J. L. 513, 72 Am. Dec. 373; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Janes v. Scott, 59 Pa. St. 178, 98 Am. Dec. 328; Dermott v. Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762.

⁸¹ Leavitt v. Dover, 67 N. H. 94, 32 Atl. 156, 68 Am. St. 640, per Blodgett, J.: "Whether the prescribed curb would prove adequate to its intended object was a matter of more or less uncertainty, as to which it was the plaintiff's duty to form his own conclusion. If he entertained doubts as to its sufficiency, he should have provided against the contingency in his contract, and for his neglect to do so the law affords no relief. Having voluntarily entered into an absolute contract, without any qualification or exception, to construct the wells for the defendant at a stipulated price, which he has received, he must abide by his contract, and perform his undertaking. The cav-

ing in of the earth did not render performance impossible, but simply made it more expensive."

⁸² Hobbs v. Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756, per Morton, J.: "The contract was an executory one, and the plaintiffs knew that the brick were to be made at the plaintiffs' place in Maine. They gave no notice, directly or indirectly, to the defendant, till May 12—more than four months after the notice of their assignment—that they would claim performance, and did not till then offer to pay or secure the defendant under the contract. The defendant sold the brick some time in April. We think it would have been competent for the jury to find, under these circumstances, that the plaintiffs had abandoned the contract, and that the defendant had assented to and acted upon such abandonment. The jury could properly have regarded the giving of the notice of the assignment as equivalent to the plaintiffs saying that they could not go on with the contract, especially when taken in connection with all the other circumstances. Morgan v. Bain, L. R. 10 C. P. 15; In re Phoenix Bessemer Steel Co., L. R. 4 Ch. D. 108; Ex parte Stapleton, L. R. 10 Ch. D. 586; Ex parte Chalmers, L. R. 8 Ch. 289."

stock, and it appeared that after the agreement had been made, as alleged, the plaintiff delivered to the defendants to sell pool receipts or pooled stock certificates, and he testified that he explained the difference when he delivered them, and the defendants produced the receipts at the trial, none of them having been sold, it was held that as the defendants may not have understood the plaintiff's explanation, and as purchasers may have refused to accept the receipts for stock certificates, a finding for the defendants would not be disturbed.⁸³

§ 2107. Waiver of performance as defense.—Before a party can be charged with a valid waiver of performance of a contract it must be evident that the party making it should know that the contract has not been performed and a pleading by plaintiff which sets up such waiver must aver such knowledge on the part of the defendant making it.⁸⁴ A waiver of performance of a contract, and a waiver of damages for its nonperformance set up in a pleading, have been held to amount to one and the same thing, and the establishment of either suffices as a defense.⁸⁵ Evidence of the waiver of performance of a contract, by modifications therein made at the defendant's request, can not be admitted under a general allegation of performance by the plaintiff, who should have set out such modifications or waiver in his petition.⁸⁶

§ 2108. Breach where defendant makes his performance impossible.—A default in a payment on a contract for work may amount to a breach justifying a rescission of the contract.⁸⁷ A complaint for breach of a contract to pay a sum of money in instalments, when realized from the products of certain land owned by the defendant, which alleges the contract, and a sale and conveyance by the defendant to

⁸³ *Simmons v. Brooks*, 159 Mass. 219, 34 N. E. 175.

⁸⁴ *Mohney v. Reed*, 40 Mo. App. 99.

⁸⁵ *Mohney v. Reed*, 40 Mo. App. 99.

⁸⁶ *Roy v. Boteler*, 40 Mo. App. 213.

⁸⁷ *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 Pac. 146.

others of the land and products, and that the defendant had not paid a part of the money which she had agreed to pay, sufficiently states a breach of the contract. If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and immediately becomes liable for the breach, without demand, even though the time specified for performance has not expired.⁸⁸ In an action against a contractor for breach of an agreement to furnish a subcontractor with the necessary tools to do the grading of a railroad track, in determining whether the subcontractor acted with reasonable diligence in purchasing tools after the contractor's breach of the agreement, the fact that the contractor from time to time promised to comply with his contract, and to furnish the tools, must be taken into consideration.⁸⁹

§ 2109. Preventing performance as defense.—Where a contract is executory, one party in most jurisdictions has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped at that stage in its execution; and the party thus forbidden to pro-

⁸⁸ *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962, per Belcher, C.: "It is true that a complaint for breach of contract must state the breach in unequivocal language. We think the complaint here fully complied with this rule. It set out the contract whereby the defendant agreed to pay a sum of money in instalments, when realized by her from the products of certain land which she owned, and then alleged that she had sold and conveyed to other persons the land and the products thereof, and had not paid a part of the money which she had agreed to pay. This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof. The case in this respect is like that of *Wolf v. Marsh*, 54 Cal. 228. There the defendant executed to the plaintiff a written agreement whereby he promised to

pay a sum of money when realized from the profits of certain coal mines in which he owned an interest. Before the mines had yielded any profits to the defendant he sold and conveyed his interest in them to a stranger. 'By so doing,' it was said by this court, 'he voluntarily put it out of his power ever to realize any profit from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that, "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived." *Bishop Contracts*, § 1426.' See, also, *Love v. Mabury*, 59 Cal. 484."

⁸⁹ *Graves v. Glass*, 86 Iowa 261, 53 N. W. 231.

ceed can not proceed to complete the contract, and recover the contract price as such, his only remedy being for damages for the breach.⁹⁰ Where, in an action to recover a balance for work, for rent of plaintiff's engine used by defendant, and for damages to plaintiff caused by defendant's delay in furnishing materials for the work, there was evidence that a possible delay was contemplated by the parties when they made the contract, and no complaint because of any delay was made by plaintiff until after settlement for the work, and defendant had refused to pay plaintiff's charge for the use of the engine, it was held that it was for the jury to determine whether there was a delay in furnishing materials for which defendant was liable.⁹¹ But where, in an action on a contract to erect an ice machine, plaintiff alleged as an excuse for failing to have the machine ready at the specified time that defendant continually threw obstacles in the way of plaintiff, in completing said work, and

⁹⁰ *Mitchell v. Boyce* (Tex. Civ. App.), 120 S. W. 1016. *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80, per Collins, J.: "The party thus forbidden can not afterwards go on, and thereby increase the damages, and then recover such damages of the other party. *Danforth v. Walker*, 37 Vt. 239; *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Butler v. Butler*, 77 N. Y. 472; *Collins v. Delaporte*, 115 Mass. 159. The question is very fully considered in the recent case of *Davis v. Bronson*, 2 N. Dak. 300, 50 N. W. 836, in which cases other than those above noted are referred to. The legal right, on general principles, of either party, to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows—subject to the jurisdiction of equity to decree specific performance in proper cases—is almost universally recognized and acted upon. Among the many authorities which might be cited on this, see *Bishop on Contracts*, paragraph 837; *Leake on Contracts*, 868, 1044; 1 *Sutherland on Damages*, 113; 2

Sutherland on Damages, 193, 526; *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875; *American Ins. Co. v. McAden*, 109 Pa. St. 399, 1 Atl. 526; *Frost v. Knight*, L. R. 7 Exch. 112; *Roper v. Johnson*, L. R. 8 C. P. 167; *Laird v. Pim*, 7 Mees. & W. 474; *Hochster v. De la Tour*, 2 El. & Bl. 678. From an examination of the adjudged cases just cited, it will be seen that ordinarily the party who is willing to abide by an executory contract may treat it as subsisting up to the time when performance should commence, for the purpose of insisting, that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms, or persist in his resolution not to perform upon his part. But the party who has not broken his compact is not allowed to treat it as in force, for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, and then enforce the payment of the contract price."

⁹¹ *Boston v. Henderson*, 92 Mich. 606, 52 N. W. 1020.

refused to furnish labor and material, it was held that the allegation was too indefinite, and subject to a special demurrer.⁹² In a suit by a contractor for the price to be paid him for building a house, it is error to charge the jury that, if the building does not come up to the requirements of the contract, and any deficiency was on account of the acts or interference of defendant, the plaintiff is not at fault, and is entitled to recover, where the declaration fails to allege that the failure to build the house according to the contract was caused by the acts or interference of the defendant, and the testimony wholly fails to show any act or interference on his part.⁹³

§ 2110. Remedy of buyer on breach of seller.—In some jurisdictions under an executory contract for the sale of goods, where there is no fraud nor warranty, the right of the vendee to claim damages, set up as a defense to an action for the purchase-price, or by way of counterclaim, does not survive a delivery of the goods by the seller and an acceptance by the purchaser. The retention of the property by the purchaser without objection is an admission on his part that the contract has been performed. Of course, he is not bound to receive or pay for an article he has not purchased, but he is bound to ascertain, when it is delivered to him, whether or not it is what he wants, or whether it conforms to the contract; and, if it does not, he must either re-

⁹² *Alamo Mills Co. v. Hercules Iron Works*, 1 Texas Civ. App. 683, 22 S. W. 1097. "Neither the court nor the defendant could know what facts would be relied upon to sustain the charge, or what was intended to be proved to show that defendant had obstructed the completion of the plant in time. Defendant alleged that time was of the essence of the contract. This was reasonable, considering the purpose. Plaintiff, anticipating this, attempted to excuse itself and make defendant responsible for the failure to comply with the contract in time. It should have stated the facts imposing this responsibility

upon defendant, and not the mere conclusion. This rule of pleading is elementary. *Thompson v. Munger*, 15 Tex. 523; *Ellis v. Singleary*, 45 Tex. 27; *Caldwell v. Haley*, 3 Tex. 317; *Morrison v. Ins. Co.*, 69 Tex. 353, 6 S. W. 605. The allegation that the delay was caused by misconduct of defendant in refusing to furnish labor and material for making ice was vague and unsatisfactory, and was only sufficient to admit under it the character of proof indicated, and it would be so limited."

⁹³ *Livingston v. Anderson*, 30 Fla. 117, 11 So. 270.

turn it to the vendor, or give him notice to take it back, or he will be presumed to have acquiesced in its quality. He can not accept the delivery of property under the contract, retain it after examination, or full opportunity for examination, as to its quality, and afterwards be heard to urge, as a defense to the purchase-price, or in support of a claim for damage, that the quality was inferior to that specified in the contract.⁹⁴ Where there is an express warranty that survives the acceptance, the purchaser may subsequently sue on it, if the price of the goods has been paid, or defend in suit for the price.⁹⁵ And in many jurisdictions acceptance does not necessarily discharge the vendor and deprive the vendee of all remedy he might have for defective performance, even though there is no express warranty.^{95a}

§ 2111. Action by third person on promise to another.—

Upon a promise made by one person to another for the benefit of a third person, such third person can, in most jurisdictions, maintain an action in his own name, although the consideration does not move from him.⁹⁶ It is a very general rule that a third party may maintain an action on a promise made to another for his benefit.⁹⁷ So, too, a party may main-

⁹⁴ *McMillan v. De Tamble*, 93 Ill. App. 65; *Libby v. Haley*, 91 Maine 331, 39 Atl. 1004; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

⁹⁵ *United States v. Walsh*, 108 Fed. 502, revd. 115 Fed. 697, 52 C. C. A. 419; *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. 753; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; *Taylor v. Thompson*, 62 App. Div. (N. Y.) 159, 70 N. Y. S. 997; *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. ed. 948, 21 S. Ct. 680. But see *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 27, 55 S. E. 50.

^{95a} See Vol. 5, Tit. "Sales," Chaps. CLVIII, CLXI.

⁹⁶ *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106; *Putney v. Farn-*

ham, 27 Wis. 187, 9 Am. Rep. 459; *Grant v. Diebold & Co. Lock Co.*, 77 Wis. 72, 45 N. W. 951.

⁹⁷ *Bristow v. Lane*, 21 Ill. 194; *Cloud v. Moorman*, 18 Ind. 40; *Day v. Patterson*, 18 Ind. 114; *Lamb v. Donovan*, 19 Ind. 40; *Beals v. Beals*, 20 Ind. 163; *Allen v. Thomas*, 3 Metc. (Ky.) 198, 77 Am. Dec. 169; *New Orleans St. Joseph's Assn. v. Magnier*, 16 La. Ann. 338; *Bohanan v. Pope*, 42 Maine 93; *Felton v. Dickinson*, 10 Mass. 287; *Watson v. Cambridge*, 15 Mass. 286; *Lent v. Padeford*, 10 Mass. 230, 6 Am. Dec. 119; *Delaware & Hudson Canal Co. v. Westchester County Bank*, 4 Den. (N. Y.) 97; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Scott v. Pilkington*, 15 Abb. Prac. (N. Y.) 280; *Thompson v. Gordon*, 3 Strob. (S. Car.) 196; *Crampton v. Ballard's Admr.*, 10 Vt. 251.

tain assumpsit on a promise not under seal made to another for his benefit.⁹⁸ Upon an agreement by one party to become responsible to another for a part of the proceeds of an expected sale, an action by a third person will not lie in Maryland, although the consideration moved from the third party.⁹⁹ And where a consignee receives goods or money with instructions to hand them or pay it over to a third party, such third party can not maintain either trover or an action for money had and received, without some act on the part of the consignee by which he binds himself to such third party.¹ Where a party has contracted with another to do a particular work, either at its cost or at a fixed price, a subcontractor can not resort to the principal for his compensation, but must look to his immediate employer.² Where a bond is given, conditioned that the obligor shall furnish the obligee with support, which condition is not performed, and such support is furnished by a third person at the request of the obligee, the law will imply no promise by the obligor to support an action against him by such third person to recover the value of such support.³

§ 2112. Counterclaims and cross-actions.—The defendant in an action for breach of contract may set up in defense a cause of action in his favor and against the plaintiff which arises out of the same transaction as that set forth in the foundation of the claim of the plaintiff.⁴ In this view the

⁹⁸ *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855. See *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55, Fed. Cas. No. 10546; *Jones v. Smoot*, 2 Cranch C. C. (U. S.) 207, Fed. Cas. No. 7498.

⁹⁹ *Tewksbury v. Hayes*, 41 Maine 123.

¹ *Eichelberger v. Murdock*, 10 Md. 373, 69 Am. Dec. 140.

² *Cleaves v. Stockwell*, 33 Maine 341.

³ *Moody v. Moody*, 14 Maine 307.

⁴ *Hays v. McLain*, 66 Ark. 400, 50 S. W. 1006; *Story & Isham Commercial Co. v. Story*, 100 Cal. 30, 24 Pac. 671; *Warren v. Hall*, 20 Colo. 508, 38 Pac. 767; *Ebensen v. Hover*, 3 Colo. App. 467; *Murphy*

v. Russell, 8 Idaho 151, 67 Pac. 427; *Grimes v. Duzan*, 32 Ind. 361; *Judah v. Vincennes University*, 16 Ind. 56; *Reichert v. Krass*, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454; *Steele v. Etheridge*, 15 Gil. (Minn.) 413; *Ritchie v. Hayward*, 71 Mo. 560; *Miller v. Crigler*, 83 Mo. App. 395; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Isham v. Davidson*, 52 N. Y. 237; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. 433; *Allen v. Shackelton*, 15 Ohio St. 145; *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745; *Vilas v. Mason*, 25 Wis. 310. See also, *Campbell v. Heney*, 128

term "transaction" is broader than the term "contract." It is enough that the counterclaim arises out of the transaction or is connected with the subject of the action.⁵ A counterclaim may be based on a breach of the contract sued on, though the breach amounted to a tort.⁶ A technical set-off must arise on an independent demand.⁷ "Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract."⁸ "Recoupment," says the Supreme Court of Mississippi, "is distinguished from set-off in these particulars: First, it arises out of matters connected with the transaction or contract on which the plaintiff's cause of action is founded; second, it matters not whether it be liquidated or unliquidated; third, it is not dependent on any statutory regulation, but is controlled by the principles of the common law."⁹ The party entitled to recoupment may interpose it either as a defense, or he may bring a cross- or new action, and generally it is optional with him which course he will adopt.¹⁰ The principle allows the defendant in an action on the contract to recoup the damages he has sustained through plaintiff's breach of the contract.¹¹ So an employer

Cal. 109, 60 Pac. 532; *Blaney v. Postal*, 10 Ind. App. 131, 34 N. E. 849; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Rogers v. Humphrey*, 39 Maine 382; *McLane v. Kelly*, 72 Minn. 395, 75 N. W. 601; *Price v. Kearney Canal & Water Supply Co.*, 29 Nebr. 33, 45 N. W. 252; *Bitting v. Thaxton*, 72 N. Car. 541; *McKinnon v. Morrison*, 104 N. Car. 354, 10 S. E. 513; *Allison v. Shinner*, 7 Okla. 272, 54 Pac. 471; *Cooperative Pub. Co. v. Walker*, 39 S. E. 525, 61 S. Car. 315; *Gwynn v. Citizens' Tel. Co.*, 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819.

⁵ *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454; *Ritchie v. Hayward*, 71 Mo. 560; *Barhyte v. Hughes*, 33 Barb. (N. Y.) 320; *Xenia Branch Bank v. Lee*, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. (N. Y.) 372; *Wyman v. Herard*, 9 Okla. 64, 59 Pac. 1009;

Loewenberg v. Rosenthal, 18 Ore. 178, 22 Pac. 601.

⁶ *LeClare v. Thibault*, 41 Ore. 601, 69 Pac. 552.

⁷ *Crookshank v. Mallory*, 2 G. Greene (Iowa) 257; *Harris v. Ogg*, 1 J. J. Marsh. (Ky.) 408; *Cardell v. Bridge*, 9 Allen (Mass.) 355.

⁸ *Black's Law Dic.* p. 1005.

⁹ *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. See also, *Myers v. Estell*, 47 Miss. 4; *Hayes v. Slidell Liquor Co.* (Miss.) 55 So. 356.

¹⁰ *Jefferson v. Western Nat. Bank*, 144 Ky. 62, 138 S. W. 308.

¹¹ *Woodrow v. Hawving*, 105 Ala. 240, 16 So. 720; *Hunter v. Waldron*, 7 Ala. 753; *Martin v. Hill*, 42 Ala. 275; *Ewing v. Jensen*, 57 Ark. 237, 21 S. W. 430; *Satchwell v. Williams*, 40 Conn. 371; *South Chicago City R. Co. v. Workman*, 64 Ill. App.

sued on an employment contract may recoup all damages he has sustained by the want of reasonable skill and care on the part of the servant in executing the work for which he was employed.¹² Damages for breach of contract may be recouped in cases where the plaintiff who has only partially performed his portion of the contract sues for compensation for such partial performance.¹³ Ordinarily, on failure of a contractor to perform a building contract, the other party has a right to take possession and complete the building and he may set off from the contract price all necessary and reasonable expenses incurred in its completion.¹⁴

§ 2113. What actions on contract survive the party's death.—As a general proposition, actions that sound in contract survive, but this is due rather to the substance of the action than its form. The nature of the damage sued for, and not the nature of the cause, determines whether or not it will survive.¹⁵ The rule is that where the injury complained of affects primarily and principally property and property rights, and the injury to the person is merely incidental, the cause of action survives. The action must involve injury to the estate, and not to the person.¹⁶ But where the action is brought primarily to recover for injury to the person, and the injury to the property is merely an incident, as loss of time while sick, and expenses incurred in endeavoring to be cured, the same does not survive.¹⁷

383; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631; *Heaston v. Colgrove*, 3 Ind. 265; *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388.

¹² *Jones v. Deyer*, 16 Ala. 221; *Parker v. Platt*, 74 Ill. 430; *Dunlap v. Hand*, 26 Miss. 460; *Still v. Hall*, 20 Wend. (N. Y.) 51; *Glennon v. Lebanon Mfg. Co.*, 140 Pa. St. 594, 21 Atl. 429, 12 L. R. A. 321.

¹³ *Crouch v. Miller*, 5 Humph. (Tenn.) 586; *Bishop v. Price*, 24 Wis. 480. If a party having performed work under a contract which is an entirety brings his action on a quantum meruit for what work he claims to have fully performed, he can not cut off the de-

fendant's right to recoup the damages on the whole. *Wellsville v. Geisse*, 3 Ohio St. 333.

¹⁴ *O'Brien v. Garibaldi*, 15 Cal. App. 518, 115 Pac. 249; *Wells v. West Bay City*, 78 Mich. 260, 44 N. W. 267. See also, Vol. 4, § 3694.

¹⁵ *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429.

¹⁶ *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519, and authorities cited; *Hess v. Lowery*, 122 Ind. 25, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355.

¹⁷ *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Hess v. Lowery*, 122 Ind. 25, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355.

The law is well settled that actions arising out of contract, express or implied, will not survive where the damages sustained by such breach are for injuries to the person, such as mental anguish, pain of body, or injury to character.¹⁸ Thus, under the Indiana statute providing that a cause of action arising out of an injury to the person dies with the person of either party, an action by a lessee for injury to the person, and incidentally for loss of time and expenses of a physician, occasioned by failure of the lessor to keep premises in repair, does not survive the death of the lessor, whether it be held to sound in contract or in tort.¹⁹

¹⁸ *Hess v. Lowery*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. 355; *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Chase v. Fitz*, 132 Mass. 359; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Jenkins v. French*, 58 N. H. 532; *Vittum v. Gilman*, 48 N. H. 416; *Wade v. Kalbfleisch*, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250; *Wolf v. Wall*, 40 Ohio St. 111.

¹⁹ *Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516. "In such case the loss of property—that is, the loss of time and the expenses incurred in endeavoring to be cured—was caused by the personal injury, and would not have occurred but for such injury. In this case the appellant's loss of time, and inability to attend to and manage her store, and the expense incurred for the services of a physician, were all caused by the personal injury alleged, and would not have been sustained but for such personal injury. This question has been fully considered by this court in the cases of *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, and *Hess v. Lowery*, 122 Ind. 225, 23 N. E. 156,

and decided against the appellant. The authorities cited by appellant were examined, distinguished, and explained in those cases; and, after a careful consideration, we see no reason to depart from the rule then stated. Under the foregoing propositions, it makes no difference in this case whether the action is on the contract, or in tort; the result is the same. It is not, therefore, necessary for us to decide, nor do we, whether it is an action sounding in contract or in tort. Neither do we wish to be understood as holding the complaint is otherwise sufficient. There are a number of authorities which declare that the covenant to repair does not include any liability for personal injury or death resulting from non-repair. *Gear, on Landl. and Ten.*, § 109; *McAdam on Landl. and Ten.*, § 110; *Kabus v. Frost*, 50 N. Y. Super. Ct. 72; *Spellman v. Bannigan*, 36 Hun (N. Y.) 174; *Flynn v. Hatton*, 43 How. Pr. (N. Y.) 333; *Sedg. Dam.* (4th ed.) 216; *Arnold v. Clark*, 45 N. Y. Super. Ct. 252; *Tuttle v. Gilbert Manufacturing Co.*, 145 Mass. 169, 13 N. E. 465; *Collins v. Karatopsky*, 36 Ark. 316; *Sanders v. Smith*, 5 Misc. (N. Y.) 1, 25 N. Y. Sup. 125."

CHAPTER L.

DAMAGES FOR BREACH OF CONTRACT.

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(a) *NATURE AND KINDS OF DAMAGES.*

§ 2120. **Definitions and characteristics.**—The term “damages” means the pecuniary compensation or indemnity which the law awards to an injured party for the breach of a contract or a duty.¹ They are based on the idea of a loss that must be made good; they are that which is given or adjudged to repair this loss.² The test, in general, for the measurement of these damages in actions for breach of contract is compensation,³ and this intends that the party injured shall

¹ Western Union Tel. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72; Deane v. Willamette Bridge Co., 22 Ore. 167, 29 Pac. 440, 15 L. R. A. 614; Nesbitt v. Moore, 39 S. Car. 351, 17 S. E. 798; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. 265; O'Connor v. Dils, 43 W. Va. 54, 26 S. E. 354. Damages have been defined as the sum of money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed

by the former. Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197.

² Maryland Casualty Co. v. Hudgins (Tex.), 72 S. W. 1047, revd. 97 Tex. 124, 126 S. W. 745, 104 Am. St. 857.

³ Warfield v. Hepburn, 62 Fla. 409, 57 So. 618; Allison v. Chandler, 11 Mich. 542; Hutchison v. Summerville, 66 S. Car. 442, 45 S. E. 8; Stallings v. Corbett, 2 Speer (S. Car.) 613, 42 Am. Dec. 388; Burr's Ferry, B. & C. R. Co. v. Allen (Tex. Civ. App.), 149 S. W. 358; Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390; Chase v.

be put in as good condition as he would have been if the injury had not been inflicted.⁴

§ 2121. Nominal damages.—Nominal damages mean damages in some trifling amount, such as one cent, five cents, one dollar.⁵ They are damages that exist only in name and not in amount.⁶ Damages in these insignificant amounts are awarded where a breach of contract is shown, but no serious loss is shown to have been sustained, or where from the nature of the case some injury has been done, the amount of which the proof fails entirely to show.⁷ In other words, these damages are awarded merely in recognition of a right of the plaintiff and its technical infringement by the defendant; that is, where a breach is shown, but no substantial damage is proved.⁸ These damages,

Hoosac Tunnel &c. Co. (Vt.), 81 Atl. 236; Spokane Truck &c. Co., v. Hoeffer, 2 Wash. St. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. 842.

⁴Grand Rapids &c. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212.

⁵Davidson v. Devine, 70 Cal. 519, 11 Pac. 664.

⁶Maher v. Wilson, 139 Cal. 514, 73 Pac. 418; Brennan v. Berlin Iron Bridge Co., 72 Conn. 386, 44 Atl. 727; Bellingham Bay &c. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144. "Nominal damages mean no damages at all. They exist only in name, and not in amount. In the quaint language of an old writer, they are a mere peg to hang costs on. They are such as are to be awarded in a case where there has been a breach of a contract, and no actual damages whatever have been or can be shown." Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110.

⁷Ellis v. Casey (Ala. App.), 58 So. 724, Adams v. Robinson, 65 Ala. 586; Knoch v. Haizlip (Cal.), 124 Pac. 998; McCarty v. Beach, 10 Cal. 461; Browner v. Davis, 15 Cal. 9; Maher v. Wilson, 139 Cal. 514, 73 Pac. 418; Western Union Tel. Co. v. Glenn, 8 Ga. App. 168, 68 S. E. 881; Browning v. Simons, 17 Ind. App. 45, 46 N. E. 86; Grau v. Grau, 37 Ind. App. 635, 77 N.

E. 816; Tate v. Booe, 9 Ind. 13; Ladoga Canning Co. v. Corydon Canning Co. (Ind. App.), 98 N. E. 849; Jones v. Noe, 71 Ind. 368; Harness v. Kentucky Fluor Spar Co., 149 Ky. 65, 147 S. W. 934; Howard v. Wilmington &c. R. Co., 1 Gill (Md.) 311; Pollard v. Porter, 3 Gray (Mass.) 312; Wilson v. Wagar, 26 Mich. 452; Cowley v. Davidson, 10 Minn. 392; Haynes v. Connelly, 12 Mo. App. 595; Uhlig v. Barnum, 43 Nebr. 584, 61 N. W. 749; Van Schoick v. Van Schoick, 76 N. J. L. 242, 69 Atl. 1080; Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. 611; Mortimer v. Otto (N. Y.) 99 N. E. 189; Rau v. Weyand, 89 App. Div. (N. Y.) 200, 85 N. Y. S. 916; Conger v. Weaver, 20 N. Y. 140; First National Bank v. Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; Moore v. Anderson, 30 Tex. 224; Pierce v. Aiken (Tex. Civ. App.) 146 S. W. 950; Rosenfield v. Express Co., 1 Woods (U. S.) 131, Fed. Cas. No. 12060; Hibbard v. Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.

⁸Blackburn v. Alabama Great Southern R. Co., 143 Ala. 346, 39 So. 345; Majenica Tel. Co. v. Rog-

however, are not to be confused with actual damages established for small amounts. In these cases the damages, though small, are actual and not nominal.⁹ Nominal damages are recoverable where the actual damages alleged are too remote for recovery,¹⁰ and in cases where special damages are insufficiently pleaded.¹¹

§ 2122. Nominal damages—Illustrations.—Nominal damages are properly allowed where the action is for wages and there is proof of rendition of the services but no proof of their value;¹² where there is a breach of an executory agreement to loan money, but no definite time is agreed on for the continuance of the loan, since the law implies an agreement to repay the loan on demand;¹³ where there is a breach of a contract not to engage in business in the same locality and there is no proof of any loss of business by reason of the breach of the contract;¹⁴ where the defendant has ordered certain machines and afterwards countermanded the order and the plaintiff, notwithstanding these facts, has made and tendered the machines which were not specially designed;¹⁵ where there was a breach of an agreement to collect a note and the evidence showed that the maker of the note was irresponsible;¹⁶ where there was a breach of an agreement to deliver stock in a supposed corporation and it was shown that the corporation had never been formed and that no stock was ever issued, and if issued would have been without value.¹⁷

§ 2123. General and special damages.—General damages

ers, 43 Ind. App. 306, 87 N. E. 165; Hill v. Boston, 193 Mass. 569, 79 N. E. 825; Haven v. Beidler Mfg. Co., 40 Mich. 286; Edwards v. Erwin, 148 N. Car. 429, 62 S. E. 545.

⁹ Moore v. Duke, 84 Vt. 401, 80 Atl. 194.

¹⁰ Coppola v. Kraushaar, 102 App. Div. (N. Y.) 306, 92 N. Y. S. 436.

¹¹ Cethran v. Witham, 123 Ga. 190, 51 S. E. 285; Coppola v. Kraushaar, 102 App. Div. (N. Y.) 306, 92 N. Y. S. 436.

¹² Owen v. O'Reilly, 20 Mo. 603.

¹³ Kelly v. Fahrney, 97 Fed. 176, 38 C. C. A. 103.

¹⁴ Diers v. Edwards, 23 Ky. L. 500, 63 S. W. 276.

¹⁵ Hemingway Mfg. Co. v. Council Bluffs Canning Co., 62 Fed. 897.

¹⁶ Mitchell v. Shuert, 16 Mich. 444.

¹⁷ Gibson v. Whip Pub. Co., 28 Mo. 450. See also, Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Fosdick v. Greene, 27 Ohio St. 484, 22 Am. Rep. 328.

are those which the law implies to have accrued from the breach of a contract for the reason that they are the immediate, direct and proximate result of such breach.¹⁸ This does not mean, however, that general damages are such only as must, a priori, inevitably and always result from a given wrong. Generally, it is enough that they result in the particular instance and that they do in fact result from the wrong directly and proximately and without reference to the special character, condition or circumstances of the person wronged. The law, then, as a matter of course, implies or presumes them as the effect which, in the particular instance, necessarily results from the wrong.¹⁹ Special damages, on the other hand, are those that are the natural, but not the necessary, result of the act complained of and consequently are not implied by the law, and must be particularly pleaded and proved.²⁰ Whenever these lat-

¹⁸ *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. 175; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 606; *Hereort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Thompson v. Webber*, 4 Dak. 240, 29 N. W. 671; *Bibb County v. Ham*, 110 Ga. 340, 35 S. E. 656; *Oldfather v. Zent*, 14 Ind. App. 89, 41 N. E. 555; *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kans. 593, 14 Pac. 229; *Hunter v. Stewart*, 47 Maine 419; *Tyler v. Salley*, 82 Maine 128, 19 Atl. 107; *Bateman v. Blake*, 81 Mich. 227, 45 N. W. 831; *Smith v. St. Paul M. & M. R. Co.*, 30 Minn. 169, 14 N. W. 797; *State v. Blackman*, 51 Mo. 319; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. 260; *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542; *Brown v. Hannibal & C. R. Co.*, 99 Mo. 310, 12 S. W. 655; *Root v. Butte, A. & P. R. Co.*, 20 Mont. 354, 51 Pac. 155; *Young v. Scheu*, 56 Hun (N. Y.) 307, 30 N. Y. St. 608, 9 N. Y. S. 349; *Loftus v. Bennett*, 68 App. Div. (N. Y.) 128, 74 N. Y. S. 290; *Woodruff v. Bradstreet Co.*, 35 Hun (N. Y.) 16, affd. 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; *Mood v. Western Union Tel. Co.*,

40 S. Car. 524, 19 S. E. 67; *Henderson v. Coleman* (Wya.), 115 Pac. 439.

¹⁹ *Hunter v. Stewart*, 47 Maine 419; *Smith v. St. Paul M. & M. R. Co.*, 30 Minn. 169, 14 N. W. 797.

²⁰ *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171; *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; *Herefort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *Tomlinson v. Derby*, 43 Conn. 562; *Fitchburg R. Co. v. Donnelly*, 87 Fed. 135, 30 C. C. A. 580; *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; *Lee v. Boise Development Co.*, 21 Idaho 461, 122 Pac. 851; *Kircher v. Larchwood*, 120 Iowa 578, 95 N. W. 184; *Louisville & N. R. Co. v. Reynolds*, 24 Ky. L. 1402, 71 S. W. 516; *Hunter v. Stewart*, 47 Maine 417; *Bateman v. Blake*, 81 Mich. 227, 45 N. W. 831; *Nicholson v. Rogers*, 129 Mo. 136, 31 S. W. 260; *Lynch v. Third Ave. R. Co.*, 36 N. Y. St. 431, 59 N. Y. Super. Ct. 71, 13 N. Y. S. 236, affd. 128 N. Y. 681, 29 N. E. 149; *Haszlacher v. Third Ave. R. Co.*, 26 Misc. (N. Y.) 865, 56 N. Y. S. 380; *Rembt v. Roehr Pub. Co.*, 71 App. Div. (N. Y.) 459, 75 N. Y. S. 861; *Woodruff*

ter damages are awarded, it is on the theory that the parties have contracted with a full knowledge of the facts, circumstances and objects of the agreement, and they may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach.²¹ It must be clearly shown that special damages from the breach of the contract were fairly within the contemplation of the parties at the time the contract was made. It is also necessary that their amount may be ascertained with reasonable certainty, and that their origin, with like certainty, can be traced to the breach of the contract.²² The distinction between general and special damages is important mainly on the question of pleading, for the general rule is that where special damages are not demanded the recovery is limited to general damages; in other words, special damages must be pleaded and proved.²³ The damages caused by the neglect to deliver a telegram which results in the loss of a fee to a professional man are special and not general damages.²⁴

§ 2124. **Exemplary damages.**—As a general rule, there can be no recovery of exemplary damages for the breach of a contract, for this class of damages depends on the motive of the party sought to be charged with liability

v. Bradstreet Co., 35 Hun (N. Y.) 16, *affd.* 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; Roberts v. Breckon, 31 App. Div. (N. Y.) 431, 52 N. Y. S. 638; Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. ed. 791; Lashus v. Chamberlain, 6 Utah 385, 24 Pac. 188; North Point Consolidated Irr. Co. v. Utah & S. L. Canal Co., 23 Utah 199, 63 Pac. 812.

²¹ Wallace v. Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; Lillard v. Kentucky & c. Warehouse Co., 134 Fed. 168, 67 C. C. A. 74.

²² Stevens v. Yale, 113 Mich. 680, 72 N. W. 5; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Howard v. Stillwell & c. Mfg. Co., 139 U.

S. 199, 35 L. ed. 147, 11 Sup. Ct. 500; Hammond v. Sandwich Mfg. Co., 146 Wis. 485, 131 N. W. 1097; Guetzkow Bros. Co. v. Andrews, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209n, 53 Am. St. 909. See also, Western Union Tel. Co. v. Albertville Canning Co. (Ala. App.), 59 So. 755; Givens v. North Augusta Electric & Imp. Co. (S. Car.), 74 S. E. 1067.

²³ Rosenberger v. Marsh, 108 Iowa 47, 78 N. W. 837; Alexander v. Humber, 8 Ky. L. (abstract) 619; Hayes v. Cooley, 13 N. Dak. 204, 100 N. W. 250; Peshine v. Shepperson, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

²⁴ Mood v. Western Union Tel. Co., 40 S. Car. 524, 19 S. E. 67.

and liability for breach of contract does not, ordinarily, concern itself with motives.²⁵ Exceptions to this rule, however, occur in some cases where there is a wilful breach of duty to deliver a telegram without delay,²⁶ in cases of breach of marriage contract,²⁷ and, in some jurisdictions, on attachment bonds.²⁸

§ 2125. Liquidated damages.—Liquidated damages are those the amount of which has been determined by an anticipatory agreement between the parties. Where the amount is reasonable and not disproportionate to the injury provided against, the injured party will not be allowed to recover more than the sum fixed and he will be regarded as having been injured to the extent of the amount stipulated, especially where the damages are incapable of exact computation.²⁹ If the amount fixed is

²⁵ *Snow v. Gace*, 25 Ark. 570; *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275; *Goins v. Western R. Co.*, 68 Ga. 190; *Haber &c. Hat Co. v. Southern Bell Tel. Co.*, 118 Ga. 874, 45 S. E. 696; *State Mutual Life & Annuity Assn. v. Baldwin*, 116 Ga. 855, 43 S. E. 262; *Ford v. Fargason*, 120 Ga. 708, 48 S. E. 180; *Dalby v. Campbell*, 26 Ill. App. 502; *Easton v. Commonwealth*, 26 Ky. L. 960, 82 S. W. 996; *Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co.*, 32 Ky. L. 1357, 108 S. W. 875; *Lexington &c. R. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209; *Ryder v. Thayer*, 3 La. Ann. 149; *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219; *Lane v. Wilcox*, 55 Barb. (N. Y.) 615; *Duche v. Wilson*, 37 Hun (N. Y.) 519; *Moon v. Interurban St. R. Co.*, 85 N. Y. S. 363; *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628; *McClendon v. Wells*, 20 S. Car. 514; *Welborn v. Dixon*, 70 S. Car. 108, 49 S. E. 232; *Givens v. North Augusta Electric & Imp. Co. (S. Car.)*, 74 S. E. 1067; *Burnett v. Edling*, 19 Tex. Civ. App. 711, 48 S. W. 775; *Houston &c. R. Co. v. Shirley*, 54 Tex. 125; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586; *Thomas v. Peterson (Tex. Civ. App.)*, 24 S. W.

1125; *Crump v. Ficklin*, 1 Pat. & H. (Va.) 201; *Gordon v. Brewster*, 7 Wis. 355. But see *Dunn v. Smith (Tex. Civ. App.)*, 74 S. W. 576.

²⁶ *Hellams v. Western Union Tel. Co.*, 70 S. Car. 83, 49 S. E. 12.

²⁷ See post § 2195 et seq.

²⁸ *Floyd v. Hamilton*, 33 Ala. 235; *Renkert v. Elliott*, 11 Lea (Tenn.) 235.

²⁹ *Jonesboro, Lake City & E. R. Co. v. Crigger (Ark.)*, 103 S. W. 1153; *Escondido Oil &c. Co. v. Glaser*, 144 Cal. 494, 77 Pac. 1040; *Blodget v. Columbia Live Stock Co.*, 164 Fed. 305, 90 C. C. A. 237; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274, affd. 142 Fed. 74, 73 C. C. A. 388; *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402; *Pinkney v. Weaver*, 216 Ill. 185, 74 N. E. 714; *Wright v. Craig*, 116 Ill. App. 493; *McCullough v. Moore*, 111 Ill. App. 545; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *Illinois Trust & Sav. Bank v. Burlington*, 79 Kans. 797, 101 Pac. 649; *Gartner v. Richardson*, 123 La. 194, 48 So. 886; *Morrison v. Richardson*, 194 Mass. 370, 80 N. E. 468; *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985; *Skinner v. Wilson*, 76 Nebr. 445, 107 N. W. 771; *Traub-*

greatly disproportionate or unconscionable it will be construed a penalty and not liquidated damages, and hence, not recoverable, for compensation is the basic rule of the law of damages.³⁰ "A stipulation on the subject of damages differs from a penalty in this," says one authority, "that the parties are holden by it; whereas, a penalty is regarded as a forfeiture, from which the defaulting party can be relieved."³¹

§ 2126. Liquidated damages—How distinguished from penalty.—No positive rules can be deduced from the cases as an absolute guide in all instances to determine whether a contract providing for a stipulated sum for its breach is to be regarded as a penalty or liquidated damages. The matter is to be determined in each case from the intention of the parties as gathered from the facts and the tenor of the contract aided by general principles for inferring such intention.³² But the rule that the intentions of the parties shall govern does not apply where the provision for the damages is illegal in its object.³³ Neither is the language used by the parties conclusive. The designation of what

Dittmar Const. Co. v. Hartman, 61 Misc. (N. Y.) 173, 112 N. Y. S. 919; Smith v. Detroit & Mining Co., 17 S. Dak. 413, 97 N. W. 17; Kellam v. Hampton (Tex. Civ. App.), 124 S. W. 970; Santa Fe Street R. Co. v. Schutz, 37 Tex. Civ. App. 14, 83 S. W. 39; Donovan v. Hanauer, 32 Utah 317, 90 Pac. 569; Jackson v. Hunt, 76 Vt. 284, 56 Atl. 1010; Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165; Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., 58 W. Va. 62, 51 S. E. 129.

³⁰ Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138; Florence Wagon Works v. Salmon, 8 Ga. App. 197, 68 S. E. 866; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; Thomas v. Gavin, 15 N. Mex. 660, 110 Pac. 841; Bell v. Scranton Coal Mines Co., 59 Wash. 659, 110 Pac. 628.

³¹ Bouvier Law Dic. (Rawle's Rev.), tit. Liquidated Damages.

³² Bilz v. Powell, 50 Colo. 482, 117 Pac. 344; Sutton v. Howard, 33 Ga. 536; Allison v. Dunwoody, 100 Ga. 51, 28 S. E. 651; Reeves v. Stipp, 91 Ill. 609; Low v. Nolte, 16 Ill. 475; Butler v. Wallbaum Stone & Min. Co., 47 Ill. App. 153; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; Sanford v. First National Bank, 94 Iowa 680, 63 N. W. 459; Gowen v. Gerrish, 15 Maine 273; Jaquith v. Hudson, 5 Mich. 123; May v. Crawford, 142 Mo. 390, 44 S. W. 260; Brewster v. Edgerly, 13 N. H. 275; Houghton v. Pattee, 58 N. H. 326; Shute v. Hamilton, 3 Daly (N. Y.) 462; March v. Allabough, 103 Pa. St. 335; Santa Fe Street R. Co. v. Schutz, 37 Tex. Civ. App. 14, 83 S. W. 39; Durst v. Swift, 11 Tex. 273; Potomac Power Co. v. Burchell, 109 Va. 676, 64 S. E. 982.

³³ Pierce v. Jung, 10 Wis. 30.

is clearly a penalty as liquidated damages will not have that effect.³⁴ Again, the contract may designate the amount as a penalty and yet the contract read in the light of surrounding facts may show that the parties intended the amount as liquidated damages and where this is the case the intent will control.³⁵ Where by reason of the surrounding circumstances it is doubtful whether the sum stated should be deemed a penalty or liquidated damages the courts incline to construe the sum set out as a penalty, for the courts prefer to allow the actual rather than the agreed compensation to a party injured by a breach of contract.³⁶ The provision will be construed

³⁴ *Henderson v. Nichols*, 5 U. C. Q. B. 398; *Boys v. Ansell*, 7 Scott. 364; *Dimech v. Corlett*, 12 Mood. P. C. 199; *Sainter v. Ferguson*, 7 C. B. 716; *Green v. Price*, 13 M. & W. 695; *Watt's Exrs. v. Sheppard*, 2 Ala. 425; *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149; *Sherburn v. Hirst*, 121 Fed. 998; *McCullough v. Moore*, 111 Ill. App. 545; *Westfall v. Albert*, 212 Ill. 68, 72 N. E. 4; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Fisk v. Gray*, 11 Allen (Mass.) 132; *Davis v. Freeman*, 10 Mich. 188; *Bayse v. Ambrose*, 28 Mo. 39; *Moore v. Platte County*, 8 Mo. 467; *Davis v. Gillett*, 52 N. H. 126; *Colwell v. Lawrence*, 38 N. Y. 71, 36 How. Pr. 306; *Shreve v. Brereton*, 51 Pa. St. 175; *Fitzpatrick v. Cottingham*, 14 Wis. 219.

³⁵ *Bonsall v. Byrne, Jr.*, 1 C. L. 573; *Jones v. Green*, 3 Y. & J. 298; *Chatterton v. Crothers*, 9 Ont. 683; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Kelly v. Fejervary*, 111 Iowa 693, 83 N. W. 791; *Dwinel v. Brown*, 54 Maine 468; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Chamberlain v. Bagley*, 11 N. H. 234; *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 26 N. E. 256; *Streeper v. Williams*, 48 Pa. St. 450; *Moore v. Colt*, 127 Pa. St. 289, 18 Atl. 8, 14 Am. St. 845.

³⁶ *Crisdee v. Bolton*, 3 C. & P. 240, 14 E. C. L. 547; *Dimech v.*

Corlett, 12 Moo. P. C. 199; *Astley v. Weldon*, 2 B. & P. 346; *Coles v. Sims*, 5 De G. M. & G. 1; *Chilliner v. Chilliner*, 2 Ves. 528; *Ainslie v. Chapman*, 5 U. C. Q. B. 313; *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149; *Williams v. Green*, 14 Ark. 315; *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. 267; *Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Heatwole v. Gorell*, 35 Kans. 692, 12 Pac. 135; *Loudon v. Taxing Dist.*, 104 U. S. 771, 26 L. ed. 923; *Taylor v. Sandford*, 7 Wheat. (U. S.) 13, 5 L. ed. 384. See also, *Amanda Consol. Gold-Min. Co. v. People's Min. & Mill. Co.*, 28 Colo. 251, 64 Pac. 218; *Harris v. Miller*, 11 Fed. 118, 6 Sawy. (U. S.) 319; *Meirca v. Burget*, 36 Ind. App. 453, 75 N. E. 1083; *Smith v. Wedgwood*, 74 Maine 457; *Gammon v. Howe*, 14 Maine 250; *Dwinel v. Brown*, 54 Maine 468; *Geiger v. Western Maryland R. Co.*, 41 Md. 4; *Willson v. Baltimore*, 83 Md. 203, 34 Atl. 774, 55 Am. St. 339; *Cushing v. Drew*, 97 Mass. 445; *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Moore v. Platte County*, 8 Mo. 467; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Davis v. Gillett*, 52 N. H. 126; *Lansing v. Dodd*, 45 N. J. L. 525; *Cheddick's Exr. v. Marsh*, 21 N. Cheddick's Exr. v. Marsh, 21 N. J. L. 463; *Colwell v. Lawrence*, 38 N. Y. 71, 36 How. Pr. (N. Y.) 306; *Bagley v. Peddie*, 7 N. Y.

one way or the other, for such a provision can not be held for some purposes to be a penalty and for some others to be liquidated damages.³⁷ The provision will generally be regarded as a penalty rather than liquidated damages where the damages are readily ascertainable.³⁸ But when, from the nature of the conditions, the damages can not be calculated with any degree of certainty, then the provision will usually be held to be liquidated or stipulated damages and enforceable as such.³⁹ It is always essen-

Super. Ct. 192, revd. 16 N. Y. 469, 69 Am. Dec. 713; Leggett v. Mutual Life Ins. Co., 53 N. Y. 394; Disosway v. Edwards, 134 N. Car. 254, 46 S. E. 501; Burrage v. Crump, 48 N. Car. 330; Knox Rock Blasting Co. v. Grafton Stone Co., 16 Ohio C. C. 21, 8 Ohio C. Dec. 478; Shreve v. Brereton, 51 Pa. St. 175; Streep v. Williams, 48 Pa. St. 450; Bearden v. Smith, 11 Rich. L. (S. Car.) 554; Baird v. Tolliver, 6 Humph. (Tenn.) 186, 44 Am. Dec. 298; Farrar v. Beman, 63 Tex. 175; Ewing v. Litchfield, 91 Va. 575, 22 S. E. 362; Laubenheimer v. Mann, 19 Wis. 519; Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

³⁷ Steer v. Brown, 106 Ill. App. 361.

³⁸ Watt's Exrs. v. Sheppard, 2 Ala. 425; Eva v. McMahon, 77 Cal. 467, 19 Pac. 872; Greenleaf v. Stockton Harvester Co., 78 Cal. 606, 21 Pac. 369; Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. 257; North & South Rolling Stock Co. v. O'Hara, 73 Ill. App. 691; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; St. Louis & S. F. R. Co. v. Shoemaker, 27 Kans. 677; Hahn v. Horstman, 12 Bush. (Ky.) 249; Dwinel v. Brown, 54 Maine 468; Burrill v. Daggett, 77 Maine 545, 1 Atl. 677; Geiger v. Western Md. R. Co., 41 Md. 4; Willson v. Baltimore, 83 Md. 203, 34 Atl. 774, 55 Am. St. 339; Hall v. Crowley, 5 Allen (Mass.) 304, 81 Am. Dec. 745; Brown v. Belows, 4 Pick. (Mass.) 179; Mason v. Callender, 2 Gil. (Minn.) 302,

72 Am. Dec. 102; May v. Crawford, 150 Mo. 504, 51 S. W. 693; Hill v. Werthimer-Swartz Shoe Co., 150 Mo. 483, 51 S. W. 702; Squires v. Elwood, 35 Nebr. 126, 49 N. W. 939; Lansing v. Dodd, 45 N. J. L. 525; Ward v. Hudson River Building Co., 125 N. Y. 230, 26 N. E. 256; Shreve v. Brereton, 51 Pa. St. 175; Burr v. Todd, 41 Pa. St. 206; McIntosh v. Johnson, 8 Utah 359, 31 Pac. 450; Fitzpatrick v. Cottingham, 14 Wis. 219.

³⁹ Stratton v. Fike, 166 Ala. 203, 51 So. 874; Cox v. Smith, 93 Ark. 371, 125 S. W. 437, 137 Am. St. 89; New Britain v. New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881, 1015; Chapman Decorative Co. v. Security Life Ins. Co., 149 Fed. 189, 79 C. C. A. 137, affg. 145 Fed. 434; Union Pac. R. Co. v. Mitchell-Crittenden Tie Co., 190 Fed. 544, 111 C. C. A. 396; Schroeder v. California Trading Co., 95 Fed. 296; Florence Wagon Works v. Salmon, 8 Ga. App. 197, 68 S. E. 866; McCullough v. Moore, 111 Ill. App. 545; Leavitt v. Bolton, 102 Ill. App. 582; Chicago & S. E. R. Co. v. McEwen, 35 Ind. App. 251, 71 N. E. 926; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Calbeck v. Ford, 140 Mich. 48, 103 N. W. 516; Hull v. Angus, 60 Ore. 95, 118 Pac. 284; Kellam v. Hampton (Tex. Civ. App.), 124 S. W. 970; Sun Printing & Publishing Assn. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. 240; Crawford v. Heatwole, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587n.

tial, however, that the sum stipulated should not be grossly disproportionate to the actual damages sustained.⁴⁰

§ 2127. Liquidated damages—Illustrations.—On the theory that the damages are uncertain and difficult of exact ascertainment, stipulations of this character are generally upheld in cases of contracts to sell,⁴¹ a contract not to engage in a particular profession or business within prescribed limits as to time or place,⁴² and contracts for the completion of buildings or other improvements within a certain time, where the amount fixed was not disproportionate.⁴³

§ 2128. Liquidated damages—Actual damages need not be proved.—A valid provision for liquidated damages is enforceable without proof of actual damages, provided it is definite and certain. In other words, where damages for the breach of an agreement are clearly liquidated, it is not

⁴⁰ *Cox v. Smith*, 93 Ark. 371, 125 S. W. 437, 137 Am. St. 89; *Radloff v. Haase*, 96 Ill. App. 74, revd. 196 Ill. 365, 63 N. E. 729; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Louisville Water Co. v. Youngstown Bridge Co.*, 16 Ky. L. (abstract) 350; *Baxter v. Wales*, 12 Mass. 365; *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Traub-Dittmar Const. Co. v. Hartman*, 61 Misc. (N. Y.) 173, 112 N. Y. S. 919; *Ellicott Machine Co. v. United States*, 43 Ct. Cl. (U. S.) 232; *Sheard v. United States Fidelity & Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276.

⁴¹ *Aikman v. Murphy*, 122 Cal. 18, 55 Pac. 1099; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274, affd. 142 Fed. 74, 73 C. C. A. 388; *Merica v. Burget*, 36 Ind. App. 453, 75 N. E. 1083; *Tobler v. Austin*, 22 Tex. Civ. App. 99, 53 S. W. 706; *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. 243.

⁴² *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806, 54 Am. St. 177; *Shafer v. Sloan*, 3 Cal. App. 335, 85 Pac. 162; *Merica v. Burget*, 36

Ind. App. 453, 75 N. E. 1083; *Applegate v. Jacoby*, 9 Dana (Ky.) 206; *Augusta Steam Laundry Co. v. Debow*, 98 Maine 496, 57 Atl. 845; *Holbrook v. Tobey*, 66 Maine 410, 22 Am. Rep. 581; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Robinson v. Centenary & Aid Soc.*, 68 N. J. L. 723, 54 Atl. 416; *Hoagland v. Segur*, 38 N. J. L. 230; *Rucker v. Campbell*, 35 Tex. Civ. App. 178, 79 S. W. 627; *Canady v. Knox*, 43 Wash. 567, 86 Pac. 930.

⁴³ *Emack v. Campbell*, 14 App. D. C. 186; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129; *Western Gas Const. Co. v. Dowagiac Gas & Fuel Co.*, 146 Mich. 119, 109 N. W. 29; *Couch v. Newtown Council Building Assn.*, 109 App. Div. (N. Y.) 856, 96 N. Y. S. 441; *Illinois Cent. R. Co. v. Southern Seating & Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729; *Neblett v. McGraw*, 41 Tex. Civ. App. 239, 91 S. W. 309; *American Copper & Works v. Galland-Burke Brewing & Co.*, 30 Wash. 178, 70 Pac. 236.

necessary for the plaintiff to show in what manner or to what extent he has been damaged.⁴⁴

(b) *ELEMENTS AND MEASURE OF DAMAGES GENERALLY.*

§ 2129. Damages for breach of contract are compensatory—Damages within contemplation of parties.—The purpose of damages is to place the party damaged in the situation that he would occupy if no breach had occurred. The damages are actual or compensatory,⁴⁵ and are such damages as may reasonably be considered to have arisen naturally from such breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of its breach.⁴⁶ The measure of damages “should be such as

⁴⁴ Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213; Spicer v. Hoop, 51 Ind. 365; Selby v. Matson, 137 Iowa 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210n; Sanford v. First National Bank, 94 Iowa 680, 63 N. W. 459; Ahlers v. Harrison, 131 Iowa 289, 108 N. W. 331; Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064; Robertson v. Grand Rapids, 96 Minn. 69, 104 N. W. 715; Gann v. Ball, 26 Okla. 26, 110 Pac. 1067; Pierce v. Jung, 10 Wis. 30.

⁴⁵ Hayes v. Moynihan, 52 Ill. 423; King v. Gilson's Admx., 32 Ill. 348, 83 Am. Dec. 269; Jones v. VanPatten, 3 Ind. 107; Osborne v. Stassen, 25 Kans. 736; Gauthier v. Green, 14 La. Ann. 788; Kaiser v. New Orleans, 17 La. Ann. 178; Paine v. Sherwood, 21 Minn. 225; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Jamison v. Moon, 43 Miss. 598; Bates v. Diamond Crystal Salt Co., 36 Nebr. 900, 55 N. W. 258; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; Clarke v. Crandall, 27 Barb. (N. Y.) 73; Hayes v. Cooley, 13 N. Dak. 204, 100 N. W. 250; Doolittle v. McCullough, 12 Ohio St. 360; Hull v. Angus, 60 Ore. 95, 118 Pac. 284; Morris v. Parham, 4 Phila. (Pa.) 62; Waco Water Co. v. Sanford, 1 White &

W. Civ. Cas. Ct. App. (Tex.) § 193; Austin City Water Co. v. Capital Ice Co. (Tex.), 1 White & W. Civ. Cas. Ct. App. § 1132; Smith v. Sherwood, 2 Tex. 460; Robinson v. Varnell, 16 Tex. 382.

⁴⁶ Southern R. Co. v. Coleman, 153 Ala. 266, 44 So. 837; Dickerson v. Finley, 158 Ala. 149, 48 So. 548; Western Union Tel. Co. v. McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. 46; McDonald v. Kansas City Bolt & Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110n; Albany Phosphate Co. v. Hugger, 4 Ga. App. 771, 62 S. E. 533; Alkahest Lyceum System v. Curry, 6 Ga. App. 625, 65 S. E. 580; Holliday v. Highland Iron & Co., 43 Ind. App. 342, 87 N. E. 249; Mihills Mfg. Co. v. Day, 50 Iowa 250; Kimball Bros. Co. v. Citizens' Gas & Co., 141 Iowa 632, 118 N. W. 891; George v. Lane, 80 Kans. 94, 102 Pac. 55; Taylor v. Spencer, 75 Kans. 152, 88 Pac. 544; Goodloe v. Rodgers, 9 La. Ann. 273, 10 La. Ann. 631, 61 Am. Dec. 205; Adeline Sugar Factory Co. v. Evangeline Oil Co., 121 La. 961, 46 So. 935; Freeman v. Morey, 41 Maine 588; Winslow Elevator & Mach. Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130n; Leavitt v. Fibroid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855n; Boy-

will, as near as may be, restore to the injured party all he has lost, and all that he, in reasonable probability, would have gained, and no more."⁴⁷ Special damages can be recovered only when the party in default had notice of the special circumstances out of which such damages naturally arose.⁴⁸ The recovery can not in any event exceed the amount that the injured party would have gained by the full performance of the contract.⁴⁹

§ 2130. Difficulty of establishment of damages not a bar to recovery.—The law requires reasonable and not absolute certainty of proof of the damages sustained by reason of the breach of a contract.⁵⁰ The rule which denies a recovery of damages where they are uncertain relates to uncertainty as to the cause rather than as to the measure or extent of the damages.⁵¹ Where the damages can not be

den v. Hill, 198 Mass. 477, 85 N. E. 413; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; Delafield v. Armsby Co., 131 App. Div. (N. Y.) 572, 116 N. Y. S. 71; Southwestern Tel. &c. Co. v. Solomon, 54 Tex. Civ. App. 306, 117 S. W. 214; Hurxthal v. St. Lawrence Boom &c. Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. 954.

⁴⁷ Norman v. Vandenberg, 157 Mo. App. 488, 138 S. W. 47.

⁴⁸ McDonald v. Kansas City Bolt &c. Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110n; Mitchell v. Henry Vogt Mach. Co., 3 Ga. App. 542, 60 S. E. 295; Winslow Elevator & Mach. Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130n; Klauck v. Federal Ins. Co., 131 App. Div. (N. Y.) 519, 115 N. Y. S. 1049; Towles v. Atlantic Coast Line R. Co., 83 S. Car. 501, 65 S. E. 638; Western Union Tel. Co. v. Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

⁴⁹ Hickok v. W. E. Adams Co., 18 S. Dak. 14, 99 N. W. 77; Bates v. Diamond Crystal Salt Co., 36 Nebr. 900, 55 N. W. 258.

⁵⁰ Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43; Hollweg v. Schaefer Brokerage Co., 197 Fed. 689; Lake Drummond Canal &c.

Co. v. West End Trust &c. Co., 142 Fed. 41, 73 C. C. A. 227; Rugg v. Rohrbach, 110 Ill. App. 532; Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; Cowan v. Western Union Tel. Co., 122 Iowa 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. 268; Atchison, T. & S. F. R. Co. v. Watson, 71 Kans. 696, 81 Pac. 499; Newton v. Devlin, 134 Mass. 490; Jackson Sleigh Co. v. Holmes, 129 Mich. 370, 88 N. W. 895; Gilbert v. Kennedy, 22 Mich. 117; Beach v. Johnson (Miss.), 59 So. 800; McDaniel v. United R. Co., 165 Mo. App. 678, 148 S. W. 464; Bartow v. Erie R. Co., 73 N. J. L. 12, 62 Atl. 489; Bates v. Holbrook, 89 App. Div. (N. Y.) 548, 85 N. Y. S. 673; Stevens v. Amsinck, 149 App. Div. (N. Y.) 220, 133 N. Y. S. 815; Central Trust Co. v. West. India Imp. Co., 144 App. Div. (N. Y.) 560, 129 N. Y. S. 730; Bowen v. King, 146 N. Car. 385, 59 S. E. 1044; Newsome v. Western Union Tel. Co., 153 N. Car. 153, 69 S. E. 10; Dorris v. King (Tenn.), 54 S. W. 683.

⁵¹ Beach v. Johnson (Miss.), 59 So. 800; Thayer-Moore Brokerage Co. v. Campbell, 164 Mo. App. 8, 147 S. W. 545.

measured by a fixed rule, all the facts and circumstances which tend to show what they are should be submitted to the jury. If the damages are not capable of exact ascertainment then reasonable inferences and probable estimates thereof may be made from the evidence. It is generally enough that the evidence satisfies the minds of prudent and impartial persons that the damages are traceable as a reasonable probability to the breach of the contract.⁵² It follows that difficulty of ascertainment of damages will furnish no ground for denying a recovery where there is reasonable certainty that such damages have been sustained and there is evidence to show something of the amount of such damages.⁵³ Thus, while it is the duty of one who completes a contract after its breach to keep an accurate account of the money expended by him for this purpose, yet if by accident the book containing the account is lost, so that the amount can not be ascertained with exact precision, the law will allow a recovery of such amount as can be ascertained with reasonable certainty.⁵⁴ In cases of like character it is enough that the evidence furnishes data for an approximate estimate of the damages.⁵⁵ Where, however, the evidence to establish damages is general and unsatisfactory, and leaves the matter wholly to conjecture, there can be no recovery of substantial damages.⁵⁶

⁵² *McDaniel v. United R. Co.*, 165 Mo. App. 678, 148 S. W. 464; *Stevens v. Amsinck*, 149 App. Div. (N. Y.) 220, 133 N. Y. S. 815.

⁵³ *W. T. Adams Mach. Co. v. South State Lumber Co.*, 2 Ala. App. 471, 56 So. 826; *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243; *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Occidental Consol. Mining Co. v. Comstock Tunnel Co.*, 125 Fed. 244; *Silver Springs O. & G. R. Co. v. Van Ness*, 45 Fla. 559, 34 So. 884; *Rugg v. Rohrbach*, 110 Ill. App. 532; *Swift v. Redhead*, 147 Iowa 94, 122 N. W. 140; *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa 674, 112 N. W. 820; *First National Bank v. Park*, 117 Iowa 552, 91 N.

W. 826; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. 268; *Newton v. Devlin*, 134 Mass. 490; *First National Bank v. St. Cloud*, 73 Minn. 219, 75 N. W. 1054; *Smalling v. Jackson*, 133 App. Div. (N. Y.) 382, 117 N. Y. S. 268; *Banta v. Banta*, 84 App. Div. (N. Y.) 138, 82 N. Y. S. 113; *Bowen v. King*, 146 N. Car. 385, 59 S. E. 1044.

⁵⁴ *Newton v. Devlin*, 134 Mass. 490.

⁵⁵ *W. T. Adams Mach. Co. v. South State Lumber Co.*, 2 Ala. App. 471, 56 So. 826.

⁵⁶ *Hyde's Case*, 38 Ct. Cl. (U. S.) 649; *Hays v. Hill*, 23 Wash. 730, 63 Pac. 576.

§ 2131. **Damages must be proximate and not remote or speculative.**—There are few principles of the law more firmly established by the decisions than the rule which limits the recovery for the breach of a contract to those damages which are the proximate and natural result of the breach and which denies a recovery for those consequences which are remote and speculative.⁵⁷ “The dam-

⁵⁷ *Ashley v. Harrison*, 1 Esp. N. P. 48; *Leame v. Bray*, 3 East 593; *Lynch v. Nurdin*, 1 Q. B. 29; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Cox v. Burbridge*, 32 L. J. C. P. 89; *Thol v. Henderson*, 8 Q. B. Div. 457; *Skinner v. London Marine Ins. Corporation*, 14 Q. B. Div. 882; *Welch v. Anderson*, 61 L. J. Q. B. 167; *Mowbray v. Merryweather*, 65 L. J. Q. B. 50; *Bain v. Fothergill*, L. R. 6 Exch. 59; *Bird v. Holbrook*, 4 Bing. 628; *Clark v. Chambers*, 3 Q. B. Div. 327; *Western Union Tel. Co. v. Albertville Canning Co.* (Ala. App.), 59 So. 755; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508, 18 So. 659, 54 Am. St. 188; *Burton v. Henry*, 90 Ala. 281, 7 So. 925; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 363; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *St. Louis A. & T. H. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963; *St. Louis I. M. & S. R. Co. v. Heath*, 41 Ark. 476; *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *Mitchell v. Clark*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; *Benson v. Central Pac. R. Co.*, 98 Cal. 45, 32 Pac. 809, 33 Pac. 206; *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201; *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Connecticut Mut. Life Ins. Co. v. New York & c. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Hubbard v. Rowell*, 51 Conn. 423; *Baldwin v. Greenwoods Tpk. Co.*, 40 Conn. 238, 16 Am. Rep. 33; *Bowen v. Isenberg Bros. Co.*, 6 Pennew. (Del.) 230, 65 Atl. 152; *Unruh v. Taylor*, 2 Pennew. (Del.) 42, 43 Atl. 515; *Occidental Consolidated Mining Co. v. Comstock Tunnel Co.*, 125 Fed. 244; *Lanston Monotype Machine Co. v. Mergenthaler Linotype Co.*, 147 Fed. 871; *Brown v. Pillow*, 174 Fed. 967, 98 C. C. A. 579; *Crane Elevator Co. v. Lippert*, 63 Fed. 942, 11 C. C. A. 521; *Warfield v. Hepburn*, 62 Fla. 409, 57 So. 618; *Robinson v. Hyer*, 35 Fla. 544, 17 So. 745; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Albany Phosphate Co. v. Hugger*, 4 Ga. App. 771, 62 S. E. 533; *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *Stewart v. Lanier House Co.*, 75 Ga. 582; *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396; *Chicago v. Lamb*, 105 Ill. App. 204; *Newton v. Peoria*, 132 Ill. App. 651; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359; *Schroeder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Haven v. Wakefield*, 39 Ill. 509; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Hewitt v. Walker*, 2 Ill. App. 490; *Green v. Mann*, 11 Ill. 613; *Kagy v. Western Union Tel. Co.*, 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. 278; *Western Union Tel. Co. v. Biggerstaff* (Ind.), 97 N. E. 531; *Mauzy v. Flint*, 42 Ind. App. 386, 83 N. E. 757; *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Teagarden v. Hetfield*, 11 Ind. 522; *Wabash & c. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Cole*

ages which a party may recover for a breach of contract," says the Supreme Court of Virginia, "are such as ordinarily and naturally flow from its nonperformance, which are proximate and certain, or capable of being made certain, and not remote, contingent or speculative. Parties are

- v. Laird, 121 Iowa 146, 96 N. W. 744; Brown v. Allen, 35 Iowa 306; McCormick v. Vanatta, 43 Iowa 389; Hampton v. Jones, 58 Iowa 317, 12 N. W. 276; Stevens v. Bradley, 89 Iowa 174, 56 N. W. 429; West v. Ward, 77 Iowa 323, 42 N. W. 309, 14 Am. St. 284; Poland v. Earhart, 70 Iowa 285, 30 N. W. 637; Osage City v. Larkin, 40 Kans. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. 186; Stewart v. Power, 12 Kans. 596; Patch v. Covington, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186; Smith v. Western Union Tel. Co., 83 Ky. 104, 7 Ky. L. 22, 4 Am. St. 126; Weber v. Coussy, 12 La. Ann. 534; Kaiser v. New Orleans, 17 La. Ann. 178; Chase v. Cochran, 102 Maine 431, 67 Atl. 320; Wyman v. Leavitt, 71 Maine 227, 36 Am. Rep. 303; Bartlett v. Western Union Tel. Co., 62 Maine 209, 16 Am. Rep. 437; True v. International Tel. Co., 60 Maine 9, 11 Am. Rep. 156; Aldrich v. Gorham, 77 Maine 287; Western Union Tel. Co. v. Lehman, 106 Md. 318, 67 Atl. 241; Brown v. Werner, 40 Md. 15; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Holly v. Boston Gas Light Co., 8 Gray. (Mass.) 123, 69 Am. Dec. 233; Squire v. Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Hoadley v. Northern Transportation Co., 115 Mass. 304, 15 Am. Rep. 106; Lane v. Atlantic Works, 111 Mass. 136; Sweet v. Western Union Tel. Co., 139 Mich. 322, 102 N. W. 850; Carnegie v. Holt, 99 Mich. 606, 58 N. W. 623; Richards v. Johnston, 46 Mich. 297, 9 N. W. 423; Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052, 18 Am. St. 431; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Osborne v. Poket, 33 Minn. 10, 21 N. W. 752; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Meyer v. King, 72 Miss. 1, 16 So. 245, 35 L. R. A. 474; Carpenter v. McDavitt, 53 Mo. App. 393; Hull v. Kansas, 54 Mo. 598, 14 Am. Rep. 487; Uhlig v. Barnum, 43 Nebr. 584, 61 N. W. 749; Bank of Commerce v. Goos, 39 Nebr. 437, 58 N. W. 84, 23 L. R. A. 190; MacNabb v. Wixom, 7 Nev. 163; Hurd v. Dunsmore, 63 N. H. 171; Warwick v. Hutchinson, 45 N. J. L. 61, affd. 46 N. J. L. 200; Crater v. Binninger, 33 N. J. L. 513, 97 Am. Dec. 737; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Terwilliger v. Wands, 25 Barb. (N. Y.) 313, affd. 17 N. Y. 54, 72 Am. Dec. 420; Pollett v. Long, 56 N. Y. 200; Eten v. Luyster, 60 N. Y. 252; Schile v. Brokhahus, 80 N. Y. 614; Vuccino v. Brown, 46 Misc. (N. Y.) 407, 92 N. Y. S. 319; Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Hubbell v. Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; Sledge v. Reid, 73 N. Car. 440; Hayes v. Cooley, 13 N. Car. 204, 100 N. W. 250; Lewis v. Rountree, 79 N. Car. 122, 28 Am. Rep. 309n; Mace v. Ramsey, 74 N. Car. 11; Chacey v. Fargo, 5 N. Dak. 173, 64 N. W. 932; First National Bank v. Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Adams v. Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Adams Exp. Co. v. Egbert, 36 Pa. St. 360, 78 Am. Dec. 382; Fairbanks v. Kerr, 70 Pa. St. 86, 10 Am. Rep. 664; Jones v. Gilmore, 91 Pa. St. 310; Pennypacker v. Jones, 106 Pa. St. 237; United States Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751; Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66; Sitton v. Macdonald, 25 S. Car. 68, 60 Am. Rep. 484; Postal Tel.-Cable Co. v. Zopfi, 93 Tenn. 369, 24 S. W. 633; Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. 812; Miller v. Mosely (Tex. Civ. App.), 91 S. W. 648; King v. Grif-

presumed to contemplate the usual and natural consequences of its breach when the contract is entered into. If made with reference to special circumstances, which fix or affect the amount of damages, such circumstances are regarded as within the contemplation of the parties, and damages may be assessed accordingly."⁵⁸

§ 2132. Proximate and remote or speculative damages—Difficulty in application of rule.—The rule limiting the recovery of damages to the proximate consequences of a breach of contract is capable of very easy statement, but its application in all cases is not so easily made. "The line between proximate and remote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect."⁵⁹ Remote damages are not rejected on the ground that they do not exist, but on the ground of their uncertainty for judicial consideration.⁶⁰ The natural consequences of a breach of contract, within the meaning of the rule, are those consequences which follow in the usual and ordinary course of things.⁶¹ The proximate consequences

fin, 39 Tex. Civ. App. 497, 87 S. W. 844; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Wells v. Battle, 5 Tex. Civ. App. 532, 24 S. W. 353; Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 44, 19 L. ed. 65; Scheffer v. Washington City & C. R. Co., 105 U. S. 249, 26 L. ed. 1070; Stokes v. Saltonstall, 13 Pet. (U. S.) 181, 10 L. ed. 115; Philadelphia, W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 14 L. ed. 157; Piper v. Kingsbury, 48 Vt. 480; Maynard v. Maynard, 49 Vt. 297; Packard v. Slack, 32 Vt. 9; Hodge v. Bennington, 43 Vt. 450; Raven Red Ash Coal Co. v. Herron (Va.), 75 S. E. 752; Perry Tie & Lumber Co. v. Reynolds, 100 Va. 264, 40 S. E. 919; Burruss v. Hines, 94

Va. 413, 26 S. E. 875; Slaughter v. Denmead, 88 Va. 1019, 14 S. E. 833; Berg v. Humptulips & C. Imp. Co., 38 Wash. 342, 80 Pac. 528; James v. Adams, 8 W. Va. 568; Kellogg v. Malick, 125 Wis. 239, 103 N. W. 1116; Candee v. Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Olson v. Chipewa Falls, 71 Wis. 558, 37 N. W. 575; Harris v. Cameron, 81 Wis. 231, 51 N. W. 437, 29 Am. St. 891.
⁵⁸Perry Tie & Lumber Co. v. Reynolds, 100 Va. 264, 40 S. E. 919.
⁵⁹Smith v. Western Union Tel. Co., 83 Ky. 104, 7 Ky. L. 22, 4 Am. St. 126. See also, Sledge v. Reid, 73 N. Car. 440.

⁶⁰Pollett v. Long, 56 N. Y. 200.
⁶¹Purcell v. St. Paul City R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Wiley v. West Jersey R.

are the immediate or direct consequences.⁶² In determining whether a particular case falls within the rule, the courts look to the nature and terms of the undertaking, and the things to be done, and how it was expected and intended the parties should enjoy what they had bargained for, and how they were to be, and would be, benefited by the performance, and damaged by a breach of the particular engagement, under the particular circumstances.⁶³

§ 2133. Proximate and remote or speculative damages—Examples of remote damages.—In these cases the damages were held too remote and speculative for allowance: the loss of trade and custom due to the failure to deliver labels to be attached to goods within the time fixed by the contract with the manufacturer of the labels;⁶⁴ the loss of the right to vote by reason of delay in the movement of a train on which a citizen was traveling to exercise that right;⁶⁵ the loss of rents from prospective tenants in an office building by reason of delay in installing an elevator in such building for the use of its tenants;⁶⁶ the diminished output of work by reason of a failure to furnish adequate steam power as agreed;⁶⁷ an impairment of the value of a patent for a machine by reason of the use of inferior material in the articles turned out by the machine.⁶⁸

§ 2134. Loss of profits as element of damages for breach of contract.—The general rule is, undoubtedly, that mere prospective profits from an enterprise are, ordinarily, too remote and speculative to be considered in estimating the damages for the breach of a contract.⁶⁹ The grounds upon which

Co., 44 N. J. L. 247; Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

⁶² Wiley v. West Jersey R. Co., 44 N. J. L. 247; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.

⁶³ Chicago & R. I. R. Co. v. Ward, 16 Ill. 522.

⁶⁴ Vuccino v. Brown, 46 Misc. (N. Y.) 407, 92 N. Y. S. 319.

⁶⁵ Morris v. Colorado Midland R.

Co., 48 Colo. 147, 109 Pac. 430, 139 Am. St. 268.

⁶⁶ Winslow Elevator & Mach. Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130n.

⁶⁷ Manhattan Stamping Works v. Koehler, 45 Hun (N. Y.) 150, 10 N. Y. St. 60.

⁶⁸ Balph v. Rathburn Co., 75 Fed. 971, 21 C. C. A. 584.

⁶⁹ Reed Lumber Co. v. Lewis, 94 Ala. 626, 10 So. 333; Gunter v.

the general rule of excluding profits in estimating damages rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) that such loss

- Beard, 93 Ala. 227, 9 So. 389; Goodell v. Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104; Daniels v. Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. 151; Wallace v. Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534; Selden v. Cashman, 20 Cal. 56, 81 Am. Dec. 93; Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313; Yonge v. Pacific Mail Steamship Co., 1 Cal. 353; Giacomini v. Bulk-eley, 51 Cal. 260; Friend &c. Lum-ber Co. v. Miller, 67 Cal. 464, 8 Pac. 40; Jones v. Nathrop, 7 Colo. 1, 1 Pac. 435; Lewis v. Hartford Dredging Co., 68 Conn. 221, 35 Atl. 1127; Cooper v. Young, 22 Ga. 269, 68 Am. Dec. 502; Red v. Au-gusta, 25 Ga. 386; Sturgis v. Frost, 56 Ga. 188; Lightfoot v. West, 98 Ga. 546, 25 S. E. 587; Koch v. Merk, 48 Ill. App. 26; Haven v. Wakefield, 39 Ill. 509; Moline Water-Power Co. v. Waters, 10 Ill. App. 159; Strawn v. Cogswell, 28 Ill. 457; Frazer v. Smith, 60 Ill. 145; Olmstead v. Burke, 25 Ill. 86; Chicago & R. I. R. Co. v. Ward, 16 Ill. 522; Miller v. White, 80 Ill. 580; Western Gravel Road Co. v. Cox, 39 Ind. 260; Singer v. Farnsworth, 2 Ind. 597; Glass v. Garber, 55 Ind. 336; Winne v. Kel-ley, 34 Iowa 339; Howe Mach. Co. v. Bryson, 44 Iowa 159, 24 Am. Rep. 735; McCormick v. Vanatta, 43 Iowa 389; Sherman Center Town Co. v. Leonard, 46 Kans. 354, 26 Pac. 717, 26 Am. St. 101; Missouri, K. & T. R. Co. v. Ft. Scott, 15 Kans. 435; Koch v. God-shaw, 12 Bush. (Ky.) 318; Smith v. Phillips, 16 Ky. L. 615, 29 S. W. 358; Grant v. McDonogh, 7 La. Ann. 447; Minor v. Picayune No. 2, 13 La. Ann. 564; Bergen v. New Orleans, 35 La. Ann. 523; Blymer Ice Mach. Co. v. McDonald, 48 La. Ann. 439, 19 So. 459; Dennery v. Bisa, 6 La. Ann. 365; Winslow v. Lane, 63 Maine 161; Shafer v. Wilson, 44 Md. 268; Lanahan v. Heaver, 79 Md. 413, 29 Atl. 1036; Waite v. Gilbert, 10 Cush. (Mass.) 177; Barnard v. Poor, 21 Pick. (Mass.) 378; Ballou v. Farnum, 11 Allen (Mass.) 73; Brown v. Smith, 12 Cush. (Mass.) 366; Boyd v. Brown, 17 Pick. (Mass.) 453; Frie-land v. McNeil, 33 Mich. 40; Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Williams v. Wood, 55 Minn. 323, 56 N. W. 1066; Doud v. Duluth Milling Co., 55 Minn. 53, 56 N. W. 463; Wright v. Petrie, Sm. & M. Ch. (Miss.) 282; Taylor v. Maguire, 12 Mo. 313; Callaway Min. &c. Co. v. Clark, 32 Mo. 305; Denver, T. & G. R. Co. v. Hutch-kins, 31 Nebr. 572, 48 N. W. 398; Blanchard v. Ely, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Masterton v. Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Manhattan Stamping Works v. Koehler, 45 Hun (N. Y.) 150, 10 N. Y. St. 60; Havemeyer v. Have-meyer, 45 N. Y. Super. Ct. 464, affd. 86 N. Y. 618; Bennett v. Drew, 16 N. Y. Super. Ct. 355; Lincoln v. Saratoga & S. R. Co., 23 Wend. (N. Y.) 425; Beals v. Terry, 4 N. Y. Super. Ct. 127; Scott v. Rogers, 4 Abb. App. Dec. (N. Y.) 157; Dewint v. Wiltzie, 9 Wend. (N. Y.) 325; Driggs v. Dwight, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; Giles v. O'Toole, 4 Barb. (N. Y.) 261; Mitchell v. Cornell, 44 N. Y. Super. Ct. 401; Wehle v. Haviland, 69 N. Y. 448; Phyfe v. Manhattan R. Co., 30 Hun (N. Y.) 377; Kelly v. Miles, 58 N. Y. Super. Ct. 495; Hunt v. Hobo-ken Land Imp. Co., 3 E. D. Smith. (N. Y.) 144; Van Ness v. Fisher, 5 Lans. (N. Y.) 236; Freeman v. Clute, 3 Barb. (N. Y.) 424; Boyle v. Reeder, 23 N. Car. 607; Fagan v. Newson, 12 N. Car. 20; Davis v. Cincinnati, H. & D. R. Co., 1 Disn.

of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfilment of the contract; and (3) that most frequently the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor can it be implied from its nature and terms.⁷⁰ But such damages are not excluded solely on the ground that they are profits. Their rejection, where they are refused, is on the ground that they are too speculative to admit of certainty of proof. They may be recovered where they may

(Ohio) 23, 12 Ohio Dec. 463; Rhodes v. Baird, 16 Ohio St. 573; Cincinnati v. Evans, 5 Ohio St. 594; Drake v. Sears, 8 Ore. 209; McKnight v. Ratcliffe, 44 Pa. St. 156; Fleming v. Beck, 48 Pa. St. 309; Pittsburg Coal Co. v. Foster, 59 Pa. St. 365; Rogers v. Bemus, 69 Pa. St. 432; Lentz v. Choteau, 42 Pa. St. 435; Sitton v. Macdonald, 25 S. Car. 68, 60 Am. Rep. 484; McWhirter v. Douglas, 1 Cold. (Tenn.) 591; Porter v. Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153; Varner v. Dexter Gin &c. Assn. (Tex. Civ. App.), 39 S. W. 206; Houston &c. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642; DeLaZerda v. Korn, 25 Tex. Supp. 188; Hamilton v. Schumacher, 4 Tex. App. Civ. Cas., § 212; Fraser v. Echo Min. &c. Co., 9 Tex. Civ. App. 210, 28 S. W. 714; Holliday v. Brosig (Tex. Civ. App.), 30 S. W. 841; Dennis v. Stoughton, 55 Vt. 371; James v. Adams, 8 W. Va. 568; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. 393; Ramsey v. Holmes Electric Protective Co., 85 Wis. 174, 55 N. W. 391. See also, Nichols v. Rasch, 138 Ala. 372, 35 So. 409; Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018; Deford v. Maryland Steel Co., 113 Fed. 72, 51 C. C. A. 59; Levinski v. Middlesex Banking Co., 92 Fed. 449, 34 C. C. A. 452; Malone v. Hastings, 193 Fed. 1; Taber Lumber Co. v. O'Neal, 160 Fed. 596, 87 C. C. A. 498; Piedmont Wagon Co. v. Hudgens, 4 Ga. App. 393, 61 S. E. 835; Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind.

123, 76 N. E. 294, 31 L. R. A. (N. S.) 709; Towles v. Cincinnati Tobacco Warehouse Co., 146 Ky. 301, 142 S. W. 401; Hetherington v. William Firth Co., 210 Mass. 8, 95 N. E. 961; Truman v. Case Threshing Machine Co., 169 Mich. 153, 135 N. W. 89; Walsh v. New York Cent. & H. R. Co. (N. Y.), 97 N. E. 408; Bowen v. King, 146 N. Car. 385, 59 S. E. 1044; Choc-taw & M. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502; Standard Supply Co. v. Carter, 81 S. Car. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155n; Hedrick v. Smith (Tex. Civ. App.), 146 S. W. 305; American Const. Co. v. Davis (Tex. Civ. App.), 141 S. W. 1019; North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 68 Wash. 457, 123 Pac. 605; Kellogg v. Malick, 125 Wis. 329, 103 N. W. 1116.

⁷⁰ Sedgwick Damages (9th ed.), § 636b; Horst v. Roehm, 84 Fed. 565, affd. 91 Fed. 345, 33 C. C. A. 550; Varner v. Dexter Gin Assn. (Tex. Civ. App.), 39 S. W. 206; Howard v. Stillwell Mfg. Co., 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. 500; The Lively, 1 Gall. (U. S.) 315, Fed. Cas. No. 8, 403; The Anna Maria, 2 Wheat. (U. S.) 327, 4 L. ed. 252; The Amiable Nany, 3 Wheat. (U. S.) 546, 4 L. ed. 456; LaAmistad De Rues, 5 Wheat. (U. S.) 385, 5 L. ed. 115; Smith v. Condry, 1 How. (U. S.) 28, 11 L. ed. 35; Parish v. United States, 100 U. S. 500, 25 L. ed. 763, 15 Ct. Cl. (U. S.) 631; Bulkley v. United State, 19 Wall. (U. S.) 37, 22 L. ed. 62, 9 Ct. Cl. (U. S.) 81.

be proved with some degree of certainty and where they arise directly and as a natural consequence of the injury alleged, or where, from the express or implied terms of the contract itself or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.⁷¹

§ 2135. Loss of profits—Necessity of certainty of proof.

—It is essential to the recovery of anticipated profits for

⁷¹ *Mason v. Alabama Iron Co.*, 73 Ala. 270; *Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.* (Ark.), 151 S. W. 275; *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Beekman Lumber Co. v. Kittrell*, 80 Ark. 228, 96 S. W. 988; *Alden v. Mayfield* (Cal.), 127 Pac. 45; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; *Cox v. McLaughlin*, 54 Cal. 605; *Cunningham v. Dorsey*, 6 Cal. 19; *Kenney v. Knight*, 127 Fed. 403; *Pennsylvania Steel Co. v. New York City R. Co.*, 198 Fed. 721; *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80; *Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co.*, 161 Fed. 215; *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584, 41 S. E. 797; *Rice v. Caudle*, 71 Ga. 605; *Tygart v. Albritton*, 5 Ga. App. 412, 63 S. E. 521; *Harris v. Paris-Kesl Const. Co.*, 13 Idaho 211, 89 Pac. 760; *Blood v. Herring*, 22 Ky. L. 1725, 61 S. W. 273; *Williams v. Yates* (Ky.), 113 S. W. 503; *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. 711; *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. 976; *Hitchcock v. Supreme Tent*, 100 Mich. 40, 58 N. W. 640, 43 Am. St. 423; *Herron v. Raupp*, 156 Mich. 162, 120 N. W. 584; *Silberstein v. Duluth News-Tribune Co.*, 68 Minn. 430, 71 N. W. 622; *Singer v. Potts*, 59 Minn. 240, 61 N. W. 23; *Breen v. Fairbank*, 35 Mo. App. 212; *Park v. Kitchen*, 1 Mo. App. 357; *Wittenberg v. Mollyneaux*, 60 Nebr. 583, 83 N. W. 842; *Roberts v. Drehmer*, 41 Nebr. 306, 59 N. W. 911; *Kreamer v. Irwin*, 46 Nebr. 827, 65 N. W. 885; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *De Palma v. Weinman*, 15 N. Mex. 68, 103 Pac. 782; *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752, affg. 12 App. Div. (N. Y.) 481, 42 N. Y. S. 38; *Mas-terton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584, 41 S. E. 797; *C. B. Coles & Sons Co. v. Standard Lumber Co.*, 150 N. Car. 183, 63 S. E. 736; *Wilkinson v. Dunbar*, 149 N. Car. 20, 62 S. E. 748; *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310; *Wilson v. Wernwag*, 217 Pa. 82, 66 Atl. 242; *McManus v. Philadelphia*, 195 Pa. St. 304, 45 Atl. 1053; *Kenderdine Hydro-Carbon Co. v. Plumb*, 182 Pa. St. 463, 38 Atl. 480; *Smith v. O'Donnell*, 76 Tenn. 468; *Reagan Round Bale Co. v. Dickson Car Wheel Co.*, 55 Tex. Civ. App. 509, 121 S. W. 526; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. ed. 479; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710; *Vilas v. Barre & Co. Power Co.*, 79 Vt. 311, 65 Atl. 104; *Parker v. McKannon*, 76 Vt. 96, 56 Atl. 536; *Morey v. King*, 49 Vt. 304; *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4; *Federal Iron Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Douglass v. Ohio River Co.*, 51 W. Va. 523, 41 S. E. 911; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1; *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752.

breach of contract, however, that they shall be established with reasonable certainty and that they shall be the proximate consequence of the breach.⁷² It is likewise essential that these profits should have been within the contemplation of the parties at the time the contract was made, or such as should be deemed to have been within their contemplation.⁷³ Generally where profits are recoverable, the profits for a reasonable period preceding the injury may be taken as a basis of estimate.⁷⁴

§ 2136. Loss of profits—Partial or entire breach.—

Where a contract for railroad construction provides for payment in instalments as the work progresses, it has been held that a failure to pay an instalment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to sue to recover the profits which he would have earned had the contract been fully performed. In such case the contractor may at once rescind and recover for what he has done, or proceed with performance and sue to recover the past due instalment.⁷⁵ And if an action is brought by the contractor before

⁷² *Iron City Tool-works v. Welisch*, 128 Fed. 693, 63 C. C. A. 245; *Central Trust Co. v. Clark*, 92 Fed. 293, 34 C. C. A. 354; *Red v. Augusta*, 25 Ga. 386; *Atchison, T. & S. F. R. Co. v. Thomas*, 70 Kans. 409, 78 Pac. 861; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Noble v. American Three-Color Co.*, 37 Misc. (N. Y.) 96, 74 N. Y. S. 764. The plaintiff in an action for loss of profits is not compelled to prove with absolute certainty what these profits would have been; he is only required to prove them with such reasonable certainty as will satisfy the jury of the reasonableness of his demand and estimate. *Barett v. Raleigh Coal & Coke Co.*, 55 W. Va. 395, 47 S. E. 154.

⁷³ *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Blood v. Herring*, 22 Ky. L. 1725, 61 S. W. 273; *Williams v. Barton*, 13 La. Ann. 404; *Blymer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439, 19 So. 459;

Fell v. Newberry, 106 Mich. 542, 64 N. W. 474; *Dykema v. Minneapolis & C. R. Co.*, 101 Mich. 47, 59 N. W. 447; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, affd. 38 N. J. L. 496, 20 Am. Rep. 425; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Messmore v. New York Shot & C. Co.*, 40 N. Y. 422; *Sitton v. McDonald*, 25 S. Car. 68, 60 Am. Rep. 484; *James v. Adams*, 8 W. Va. 568.

⁷⁴ *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19; *Landis v. Wolf*, 206 Ill. 392, 62 N. E. 103; *Illinois Central R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720; *Bates v. Holbrook*, 89 App. Div. (N. Y.) 548, 85 N. Y. S. 673; *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N. W. 362; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

⁷⁵ *Moffitt-West Drug Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351; *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589.

completion of the contract by him, to authorize a recovery of prospective profits, a willingness on his part to complete the work and defendant's refusal to be further bound by the contract must appear.⁷⁶ Where, by the terms of a contract of sale, the property is to be delivered in specified portions, from time to time, the purchaser to give his notes for each portion delivered, and, before completion of the contract, he refuses to give notes demandable for deliveries made, and also refuses to give notes for future deliveries, or to be further bound by the terms of the contract, this gives a present right of action to recover damages for the breach. The vendor is not required to wait until the expiration of the terms of credit to recover therefor, nor is he required to make further deliveries.⁷⁷ When an entire contract to lumber several tracts of land is broken by the owner's sale of the one tract out of which the contractors expected to make their profit, it has been held that they are not obliged to finish the other tracts in order to maintain a suit on the contract, or to recover merely for money expended and the value of the work done, but they may abandon, and recover, as damages for the breach, the profits they would have made on the whole job, since the profits that would have been made on an abandoned lumbering contract are ascertainable, and not speculative.⁷⁸

§ 2137. Loss of profits—Inadvertent breach of contract.

⁷⁶ *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589.

⁷⁷ *Scully Steel & Iron Co. v. Old Meadow Rolling-Mill Co.*, 108 Fed. 732, 47 C. C. A. 646; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561; *Windmuller v. Pope*, 36 Hun (N. Y.) 644, affd. 107 N. Y. 674, 14 N. E. 436, 1 *Silvernail Ct. App.* (N. Y.) 550; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Freer v. Denten*, 61 N. Y. 492; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516. For a full consideration of this subject and conflicting authorities as to

anticipatory breach, see ante, ch. XLVII, and Vol. 5, Tit. Sales.

⁷⁸ In *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477, it is said, "In *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378, it was held, in a suit for breach of a logging contract by being prevented from cutting and removing the timber, that the difference between the cost of said cutting and removal and the contract price was the proper measure of damages. These damages are not speculative, but are capable of ascertainment." *Leonard v. Beaudry*, 68 Mich. 312, 36 N. E. 88; *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. 711.

—An inadvertent sale of a patented article in territory for which the seller has granted an exclusive right to another renders him liable only for actual damages represented by the profits actually realized, and not for profits which the grantee would have realized if he himself had made the sale at the higher prices established by him, especially when there is evidence that he could not have effected such sale.⁷⁹

§ 2138. Loss of profits—Profits mean net profits.—The profits intended by the rule which allows their recovery under certain conditions are the net profits that would be made by the party prevented from performing his contract, and in estimating his damages the expenses in carrying out the contract must be deducted from the gross profits.⁸⁰ Thus, where the defendant has breached the contract, but is still endeavoring to carry it out in good faith, the rule for arriving at these profits is to ascertain the difference between the cost of doing the work and what the claimant was to receive for it, making a reasonable deduction therefrom for the less time engaged and for the release from the care, trouble, risk and responsibility attending a full execution of the contract.⁸¹ Where the breach of contract causes the closing down of a going manufacturing concern, the damages are best ascertained on the basis of interest on capital invested which is unproductive for the time and the other expenses which are necessarily incident to the situation.⁸²

§ 2139. Loss of profits—Examples of profits disallowed for remoteness.—On the theory that the anticipated profits

⁷⁹ *Cincinnati Gas Illum. Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. 523. The case of *Seymour v. McCormick*, 16 How. (U. S.) 480, 14 L. ed. 1024, is in point. Actual damage is what the law gave in case of an infringement (*Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802); actual damage is all the law gives in case of a breach of contract.

⁸⁰ *Robinson v. Bullock*, 66 Ala. 548; *Cusachs v. Sewerage & Board*, 116 La. 510, 40 So. 855; *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219; *Rosenbloom v. Maas*, 97 N. Y. S. 210.

⁸¹ *Harris v. Faris-Kesl Const. Co.*, 13 Idaho 211, 89 Pac. 760. See also, post § 2149.

⁸² *Harper Furniture Co. v. Southern Exp. Co.*, 148 N. Car. 87, 62 S. E. 145, 128 Am. St. 588.

were remote, speculative and conjectural, their recovery has been denied in these cases: the profits of a traveling man working on commission,⁸³ the loss of profits by a tenant while keeping boarders on being compelled to abandon the premises,⁸⁴ the loss of profits by the holder of a concession on exposition grounds from decrease of the space allotted to him under his contract,⁸⁵ the profits likely to be made from the operation of a threshing machine taken under a chattel mortgage,⁸⁶ the profits likely to result from the operation of street cars on breach of contract to furnish them within a specified time,⁸⁷ the loss of profits to be realized from an enhancement of real estate value by the completion of a railroad within a certain time where there was a breach of a contract to complete the railroad in such time,⁸⁸ the profits to be made from retailing whisky which was not delivered within the time fixed by the contract,⁸⁹ the loss of profits to a proposed lessee from the failure of an owner to erect a store he had agreed to rent,⁹⁰ the profits likely to be made from the sale of goods where a contract to supply them was not fulfilled,⁹¹ and the profits likely to have been made from the operation of machinery had it been furnished at the time agreed on.⁹²

§ 2140. Loss of profits—Examples of profits allowed.—

On the ground that the anticipated profits were capable of proof and within the contemplation of the parties, their allowance has been sustained in these cases: where the operation of an established skating rink was interrupted for a fixed time;⁹³ where loss resulted from the

⁸³ *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28.

⁸⁴ *Hedrich v. Smith* (Tex. Civ. App.), 146 S. W. 305.

⁸⁵ *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605.

⁸⁶ *Truman v. J. I. Case Threshing Mach. Co.*, 169 Mich. 153, 135 N. W. 89.

⁸⁷ *Washington & G. R. Co. v. American Car Co.*, 5 App. D. C. 524.

⁸⁸ *Coos Bay &c. Nav. Co. v. Nosler*, 30 Ore. 547, 48 Pac. 361.

⁸⁹ *Young v. Cureton*, 87 Ala. 727, 6 So. 352.

⁹⁰ *Red v. Augusta*, 25 Ga. 386.

⁹¹ *Loeb v. Kamak*, 1 Mont. 152; *Denver, T. & G. R. Co. v. Hutchins*, 31 Nebr. 572, 48 N. W. 398.

⁹² *Boyle v. Reeder*, 23 N. Car. 607.

⁹³ *Mensing v. Wright*, 86 Kans. 98, 119 Pac. 374.

abandonment of a profitable lumber contract;⁹⁴ where a copartner breached his contract to continue a partnership for a fixed period;⁹⁵ where a stockman violated his contract to furnish a certain number of steers to be cared for in consideration of a division of the profits from fattening the cattle;⁹⁶ where the profits were lost to a sawyer by reason of a failure to comply with an agreement to supply him with logs to be manufactured into lumber at a fixed price;⁹⁷ where the profits were to be realized from the erection of a building under a construction contract;⁹⁸ and where the profits were to be made from the sale of goods which were to be furnished to a dealer at a fixed price for a certain period.⁹⁹

§ 2141. Prospective damages for breach of contract.—

Where a contract is entire the general rule is that all the damages for a breach of such contract must be recovered in a single action.¹ And the rule is the same where the contract is a continuing contract and the breach is total. All the damages in such a case are recoverable at once, both present and prospective.² The injured party is not

⁹⁴ *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477.

⁹⁵ *Bagley v. Smith*, 10 N. Y. 489, 19 How. Pr. (N. Y.) 1, 61 Am. Dec. 756, Seld. Notes (N. Y.) 109.

⁹⁶ *Rule v. McGregor*, 115 Iowa 323, 88 N. W. 814.

⁹⁷ *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. 976. See also, *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. 263.

⁹⁸ *Jenkins v. Charleston St. R. Co.*, 58 S. Car. 373, 36 S. E. 703.

⁹⁹ *Federal &c. Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418.

¹ *Just v. Greve*, 13 Ill. App. 302; *Jacobs v. Davis*, 34 Md. 204; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. 460; *Fish v. Folley*, 6 Hill. (N. Y.) 54; *East Tennessee &c. R. Co. v. Staub*, 7 Lea (Tenn.) 397; *Tarbox v. Hartenstein*, 4 Baxt. (Tenn.) 78; *Morey v. King*, 51 Vt. 383.

² *Richardson v. Mellish*, 2 Bing. 229; *Planché v. Colburn*, 8 Bing.

14; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140; *Roper v. Johnson*, L. R. 8 C. P. 167; *Fail v. McRee*, 36 Ala. 61; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Hale v. Trout*, 35 Cal. 229; *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553; *Rogers v. Parham*, 8 Ga. 190; *Seaton v. Second Municipality*, 3 La. Ann. 44; *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. 460; *Ashley v. Warner*, 11 Gray (Mass.) 43; *Rathbone &c. Co. v. Wheelihan*, 82 Minn. 30, 84 N. W. 638; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105, 46 N. W. 314; *American Mfg. Co. v. Klarquist*, 47 Minn. 344, 50 N. W. 243; *Moore v. Winter*, 27 Mo. 380; *Stille v. Jenkins*, 15 N. J. L. 302; *Atwood v. Norton*, 27 Barb. (N. Y.) 638; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *James v. Allen County*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep.

required to wait until the time for full performance has elapsed, but he may sue immediately upon the breach.⁸

§ 2142. Prospective damages — Continuing contracts.— Difficulty, however, is encountered in the matter of determining in all cases what would constitute a total breach of a continuing contract.⁴ "The true criterion whether a party in such action can recover damages for a nonperformance of the whole contract, and so for damages not sustained when the action is brought and suit tried, is whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to the contract. Whether this is so or not must depend upon the facts of each particular case, and often it is nice and difficult to determine whether the breach of such continuing contract is entire and total, so as to entitle the party to recover damages for an entire nonfulfilment, or only partial and temporary, so that a party can recover only such damages as he has already sustained, and he must still accept the performance of the residue of the contract, if the other party will fulfill it."⁵ The question in most cases will turn upon whether there has been such a breach of the contract as will authorize the injured party to put an end to the contract.⁶

821; *Keck v. Bieber*, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. 846; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. St. 45, 20 Atl. 937; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Royalton v. Royalton &c. Tpk. Co.*, 14 Vt. 311; *James v. Kibler's Admr.*, 94 Va. 165, 26 S. E. 417.

⁸ *Richardson v. Mellish*, 2 Bing. 229; *Fail v. McRee*, 36 Ala. 61; *Hale v. Trout*, 35 Cal. 229; *Thomas v. Richards*, 124 Ga. 942, 53 S. E. 400; *Standard Oil Co. v. Denton*, 24 Ky. L. 906, 70 S. W. 282; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. 460; *Conlon v. McGraw*, 66 Mich. 194, 33 N. W. 388; *Terry v. Beatrice Starch Co.*, 43 Nebr. 866, 62 N. W. 255; *Empie v. Empie*, 35

App. Div. (N. Y.) 51, 54 N. Y. S. 402; *Mortimer v. Otto* (N. Y.), 99 N. E. 189; *Taylor v. Bradley*, 39 N. Y. 129, 1 Abb. Dec. (N. Y.) 363, 100 Am. Dec. 415; *Massie v. State National Bank*, 11 Tex. Civ. App. 280, 32 S. W. 797; *Parker v. McKannon*, 76 Vt. 96, 56 Atl. 536.

⁴ *Just v. Greve*, 13 Ill. App. 302; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

⁵ *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

⁶ *Just v. Greve*, 13 Ill. App. 302; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Massie v. State National Bank*, 11 Tex. Civ. App. 280, 32 S. W. 797.

§ 2143. Prospective damages—Breach of contract not to engage in competitive business.—In cases where the contract binds one not to engage in a rival business the decisions incline to the view that such a contract is susceptible of successive breaches and that prospective damages may not be recovered.⁷

§ 2144. Mental anguish as damages for breach of contract.—As a general rule, damages are not recoverable for mental anguish suffered as an incident of a breach of contract.⁸ But the rule is not universal, and cases are numerous which recognize this species of injury as an element of damages for breach of contract,⁹ and this would seem not improper in cases where mental suffering is clearly shown to be the natural and probable consequence of the breach, and to have been within the contemplation of the parties, as a consequence of the breach, at the time the contract was entered into.¹⁰

⁷ *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Just v. Greve*, 13 Ill. App. 302; *Hunt v. Tibbetts*, 70 Maine 221.

⁸ *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *Wilcox v. Richmond & D. R. Co.*, 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. 575; *Norton v. Kull*, 74 Misc. (N. Y.) 476, 132 N. Y. S. 387; *Wells, Fargo & Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938; *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376.

⁹ *Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. 249; *Lewis v. Holmes*, 109 La. 1030, 34 So. 66, 61 L. R. A. 274; *Fillebrown v. Hoar*, 124 Mass. 580; *Aaron v. Ward*, 203 N. Y. 351, 96 N. E. 736; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6

Am. St. 864; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. 850; *St. Louis A. & T. R. Co. v. Berry*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 166, 15 S. W. 48; *Dunn v. Smith* (Tex. Civ. App.), 74 S. W. 576. See post § 2188.

¹⁰ *Coppin v. Braithwaite*, 8 Jur. 875; *Browning v. Fies* (Ala. App.) 58 So. 931; *East Tennessee & C. R. Co. v. Lockhart*, 79 Ala. 315; *Louisville & C. R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796; *Alabama City, G. & A. R. Co. v. Brady*, 160 Ala. 615, 49 So. 351; *Beasley v. Western Union Tel. Co.*, 39 Fed. 181; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. 249; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, (overruled in *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674); *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 12 Ky. L. 265, 13 S. W. 880; *Fillebrown v. Hoar*, 124 Mass. 580; *Young v. Western Union Tel. Co.*, 107 N. Car. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. 883; *Wadsworth v. Western Union Tel.*

§ 2145. **Mental anguish—Where allowed.**—"The cases," says the Indiana Supreme Court, "rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part."¹¹ But on the other hand, it is said: "The parties contemplate nothing of the kind. The courts that laid down the rule contemplate it for them. The parties know that a contract is a bargain for the breach of which the law affords exact pecuniary redress. An injury to the feelings, independently and alone, * * * is not, in any legitimate or judicial sense, a natural and proximate consequence."^{11a} In a case where the mother, brothers and sisters of a deceased person united in buying a coffin and robe in which to bury him and the defendant substituted a pine box for the coffin purchased, which was too small to contain the remains, but in which they were buried, it was held that the relatives, who paid for a decent interment, were entitled to recover for the mental anguish they sustained by reason of the breach of the contract.¹² Damages of this character may not, however, be recovered by persons not privy to the contract.¹³ And there are very few cases in which they can be recovered at all.

§ 2146. **Damages where contract partially performed.**—Generally speaking, the measure of damages in cases of partial performance is the difference between the contract-

Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. 864; St. Louis, A. & T. R. Co. v Berry, 4 Willson Civ. Cas. Ct. App. (Tex.) § 166, 15 S. W. 48; Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

¹¹ Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. 249. See also, Wright

v. Beardsley, 46 Wash. 16, 89 Pac. 172.

^{11a} Curtin v. Western Union Tel. Co., 13 App. Div. (N. Y.) 253, 42 N. Y. S. 1109.

¹² Dunn v. Smith (Tex. Civ. App.), 74 S. W. 576.

¹³ Wells-Fargo & Co.'s Exp. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Nichols v. Eddy (Tex. Civ. App.), 24 S. W. 316.

price and the value of the work done, estimated upon the contract-price.¹⁴ This difference will ordinarily be the amount reasonably necessary to complete the structure in accordance with the contract.¹⁵ But the contractor can not be held for an increased expenditure caused by the completion of the work with a higher and more costly class of work or material than contracted for.¹⁶ Where a contract is terminated with the consent of the party, ordinarily his right to recovery is limited to the contract-price, and the amount recoverable depends on the ratio of the value of the labor and materials furnished to the total cost of the work completed according to the contract.¹⁷ The rule in connection with building contracts is thus stated by the Supreme Court of Nebraska: Where a contractor agrees with the owner of real estate to furnish the material and labor and erect for him an improvement thereon, and such contractor voluntarily abandons the work before completion, the owner may charge the contractor with (a) the necessary costs of completing the improvement as the contractor agreed to complete it, (b) the amount of all payments made to the contractor on the contract, (c) the amount of all valid liens on the real estate for labor and material furnished the contractor and used by him in such improvement, and (d) the amount of actual damages the owner has sustained by reason of the contractor's default. The difference between the total of these items and the contract-price is the measure of damages of both the owner and contractor. If such total ex-

¹⁴ Bush v. Jones, 2 Tenn. Ch. 190.

¹⁵ Hampson v. Lewis, 49 Md. 178; Newton v. Devlin, 134 Mass. 490; People v. Detroit, 34 Mich. 201; Nestor v. Swift, 50 Mich. 42, 14 N. W. 692; Carli v. Seymour, 26 Minn. 276, 3 N. W. 348; Van Dorn v. Mengedoh, 41 Nebr. 525, 59 N. W. 800; Watts v. Board of Education, 9 App. Div. (N. Y.) 143, 41 N. Y. S. 141, 75 N. Y. St. 599; New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Savage v. Glenn, 10 Ore.

440; A. J. Anderson Electric Co. v. Cleburne & Co. Lighting Co. (Tex. Civ. App.), 44 S. W. 929; Carroll v. Caine, 27 Wash. 402, 67 Pac. 993.

¹⁶ Southern Bridge Co. v. Bogen-shot (Tenn.), 48 S. W. 97.

¹⁷ Wiegel v. Boone, 64 Ark. 228, 41 S. W. 763; Connolly v. Sullivan, 173 Mass. 1, 53 N. E. 143; Griffith v. Blackwater Boom & Co., 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124.

ceeds the contract-price, such excess is the amount the owner may recover of the contractor. If the contract-price exceeds such total, such excess is the amount the contractor may recover from the owner.¹⁸

§ 2147. Damages for defective performance.—The measure of damages usually adopted for the defective performance of work is the difference between its value as done and what its value would have been if properly done.¹⁹ Another method of determining the damages is to charge the defaulting contractor with the cost of making the work or structure conform to the contract.²⁰ But this does not authorize an entire replacement of defective work in cases where the defects are of such a character that they may be remedied at a slight expense.²¹ In

¹⁸ Von Dorn v. Mengedoht, 41 Nebr. 525, 59 N. W. 800.

¹⁹ Sunman v. Clark, 120 Ind. 142, 22 N. E. 113; Culbertson v. Ashland Cement &c. Co., 144 Ky. 614, 139 S. W. 792; Short v. Moore, 19 Ky. L. 1225, 43 S. W. 211; Taulbee v. Moore, 106 Ky. 749, 51 S. W. 564; Cairy v. Randolph, 6 La. Ann. 202; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Clark v. Russell, 110 Mass. 133; Gleason v. Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Moulton v. McOwen, 103 Mass. 587; Norway Plains Saving Bank v. Moors, 134 Mass. 129; White v. McLaren, 151 Mass. 553, 24 N. E. 911; Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; Eaton v. Gladwell, 121 Mich. 444, 80 N. W. 292; White v. Brockway, 40 Mich. 209; Wheaton v. Lund, 61 Minn. 94, 63 N. W. 251; Marsh v. Richards, 29 Mo. 99; North Bergen Board of Education v. Jaeger, 67 N. J. L. 39, 50 Atl. 583; Walter v. Hangen, 71 App. Div. (N. Y.) 40, 75 N. Y. S. 683; Olsen v. Henderson, 113 App. Div. (N. Y.) 676, 99 N. Y. S. 917; Morton v. Harrison, 52 N. Y. Super. Ct. 305; Lord v. Comstock, 52 N. Y. Super. Ct. 548; Barretts' P. & H. Dyeing Establishment v. Wharton, 101 N. Y. 631, 4 N. E. 344, revg. 29 Hun (N. Y.) 279;

Twitty v. McGuire, 7 N. Car. 501; Chamberlain v. Hibbard, 26 Ore. 428, 38 Pac. 437; Fagan v. Whitcomb, 4 Willson Civ. Cas. Ct. App. (Tex.) § 27, 14 S. W. 1018. But there are some cases where this rule can not well be applied, and a somewhat different rule is often adopted in case of substantial but defective performance of building contracts. See ante, vol. 2, § 1607, and vol. 5, tit. "Building, Construction and Working Contracts."

²⁰ White v. Sisters of Charity, 79 Ill. App. 646; Black v. Des Moines Mfg. & Supply Co. (Iowa), 77 N. W. 504; Smith v. Bristol, 33 Iowa 24; Leathers v. Sweeney, 41 La. Ann. 287, 5 So. 662; Wright v. Sanderson, 20 Mo. App. 534; Somerby v. Tappan, Wright (Ohio) 229; Wade v. Haycock, 25 Pa. St. 382; Larrimore v. Comanche County (Tex. Civ. App.), 32 S. W. 367; Graves v. Allert (Tex.), 142 S. W. 869; Lambert v. Jenkins, 112 Va. 376, 71 S. E. 718. See also Traves v. Allert (Tex.), 142 S. W. 869, 39 L. R. A. (N. S.) 591 and note; Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327 and note; ante, vol. 2, § 1607.

²¹ Carpenter v. Ibbetson, 1 Cal. App. 272, 81 Pac. 1114.

case a contractor for the construction of a building substitutes an inferior material for that called for by his contract, the damages will be the difference between the price of the substituted material and the material actually called for by the contract.²² Where the contractor is called on to repair a building and performs his work so negligently that the building can not be used, then he may be held liable in addition to the loss of the rents for the time necessary to make the repairs properly.²³ It has been held in the case of a building defectively constructed that the measure of damages recoverable by the proprietor was the reasonable cost of remedying such defects as were remediable without unreasonable expenditure and the diminished value of the building when so completed, deducted from the value of a building constructed in all respects according to the contract.²⁴ Where the building as erected does not conform to the specifications and can not be made to do so without its entire demolition, and the building is of less value than the one contracted for, it has been held, in a case where the owner had taken possession, that the measure of damages was the value of the building so completed, not exceeding the contract-price, less the damages the owner sustained by the failure of the contractor to perform his contract.²⁵ In a case where the breach of contract in supplying machinery resulted in an explosion which rendered the plant useless for the season, it was held that the measure of damages for loss of use of the plant was its rental value for the season.²⁶

§ 2148. Damages for delay — Building contracts. — For failure to complete a building within the time fixed by the contract, the measure of damages is the value of the use of the building, which is ordinarily its rental value as it

²² *Marsh v. Richards*, 29 Mo. 99.

²³ *Hawley v. Florsheim*, 44 Ill. App. 320; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911.

²⁴ *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136. Compare, *Foeller v. Heintz*, 137 Wis. 169, 118 N. W.

543, 24 L. R. A. (N. S.) 327, and note.

²⁵ *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292.

²⁶ *Livermore Foundry & Co. v. Union Storage Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482.

ought to have been constructed, from the time the contractor should have finished it to the time he notified the owner of its completion.²⁷ It is not required that the owner should show that he had an opportunity to rent the building.²⁸ Where no particular time is fixed for the completion of the building, then the rental liability runs from the expiration of a reasonable time for completion until the building is completed.²⁹ Where the delay is due to the act of a materialman, the contractor may recover from such materialman the amount he has been required to pay the owner, and this though the materialman was unaware of the time within which the building was to be constructed.³⁰

§ 2149. Damages where contractor is prevented from performing contract.—As a general rule, a contractor prevented from performing a contract by the other party may recover the difference between the cost of performing the work and the price agreed to be paid for the work, in other words, what he would have made on the contract. Reasonable deductions should be made, however, for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.³¹ Where there is a partial performance before

²⁷ *McIntire v. Barnes*, 4 Colo. 285; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983; *Korf v. Lull*, 70 Ill. 420; *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 247; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa 524, 55 N. W. 518; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Covode v. Principaal*, 110 Mich. 672, 68 N. W. 987; *Cochran v. People's R. Co.*, 113 Mo. 359, 21 S. W. 6; *McConey v. Wallace*, 22 Mo. App. 377; *Dengler v. Auer*, 55 Mo. App. 548; *Consaul v. Sheldon*, 35 Nebr. 247, 52 N. W. 1104; *Wagner v. Corkhill*, 40 Barb. (N. Y.) 175; *Ansonia Brass & Copper Co. v. Gerlach*, 8 Misc. (N. Y.) 256, 59 N. Y. St. 197, 28 N. Y. S. 546; *Schlachter v. Hopkins*, 84 Hun (N. Y.) 402, 65 N. Y. St. 562, 32 N. Y.

S. 364; *Ruff v. Rinaldo*, 55 N. Y. 664; *Reich v. Colwell Lead Co.*, 66 Hun (N. Y.) 634, 50 N. Y. St. 298, 21 N. Y. S. 495; *Rogers v. Bemus*, 69 Pa. St. 432; *Bounds v. Hickerson*, 26 Tex. Civ. App. 608, 63 S. W. 887.

²⁸ *Covode v. Principaal*, 110 Mich. 672, 68 N. W. 987.

²⁹ *Scribner v. Jacobs*, 56 Hun (N. Y.) 649, 31 N. Y. St. 794, 9 N. Y. S. 856.

³⁰ *Murdock v. Jones*, 3 App. Div. (N. Y.) 221, 73 N. Y. St. 617, 38 N. Y. S. 461. See also, *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168.

³¹ *Danforth v. Tennessee &c. R. Co.*, 93 Ala. 614, 11 So. 60; *Bates v. Birmingham Paint &c. Co.*, 143 Ala. 198, 38 So. 845; *Anderson v. Brammer* (Ala. App.), 58 So. 941;

the work is stopped, the contractor is entitled to the value of the work performed, in addition to the expenses incurred and the value of the materials he has furnished;³² the value of the work and materials is generally measured by the contract-price and not by the market-price.³³ Where the contract is of such a nature that the price can not be known until the completion of the contract, the measure of damages is generally held to be such an amount as will compensate the contractor for the labor done, the loss of time and the

Bonifay v. Hassell, 100 Ala. 269, 14 So. 46; George v. Cohawba & Marion R. Co., 8 Ala. 234; Gibney v. Turner, 52 Ark. 117, 12 S. W. 201; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Ryan v. Miller, 52 Ill. App. 191, affd. 153 Ill. 138, 38 N. E. 642; Hayes v. Wagener, 220 Ill. 256, 77 N. E. 211; Bertram v. Bergquist, 153 Ill. App. 43; Dunn v. Johnson, 33 Ind. 54, 5 Am. Rep. 177; Richter v. Meyer, 5 Ind. App. 33, 31 N. E. 582; Cincinnati, I., St. L. & C. R. Co. v. Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706; Thompson v. Jackson, 14 B. Mon. (Ky.) 114; Baltimore & Catonsville Const. Co. v. Bush, 88 Md. 665, 41 Atl. 1092; Baltimore & O. R. Co. v. Stewart, 79 Md. 487, 29 Atl. 964; Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88; Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378; Scheible v. Klein, 89 Mich. 376, 50 N. W. 857; Silberstein v. Duluth News-Tribune Co., 68 Minn. 430, 71 N. W. 622; Beach v. Johnson (Miss.), 59 So. 800; Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo. 325, 13 S. W. 503; Jewett v. Wilmot, 51 Nebr. 700, 71 N. W. 775; Boyd v. Meighan, 48 N. J. L. 404, 4 Atl. 778; Masterton v. Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Devlin v. New York, 63 N. Y. 8, 50 How. Pr. (N. Y.) 1; Riley v. Black, 1 Misc. (N. Y.) 288, 48 N. Y. St. 759, 20 N. Y. S. 695; Dunham v. Hastings Pavement Co., 95 App. Div. (N. Y.) 360, 88 N. Y. S. 835; Oldham v. Kerchner, 79 N. Car. 106, 28 Am. Rep. 302; Cofield v. E. A. Jenkins Motor Co., 89 S. Car. 419, 71 S. E. 969; Feaster v. Rich-

land Cotton Mills, 51 S. Car. 143, 28 S. E. 301; Singleton v. Wilson, 85 Tenn. 344, 2 S. W. 801; Porter v. Burkett, 65 Tex. 383; United States v. Speed, 8 Wall. (U. S.) 77, 19 L. ed. 449, 7 Ct. Cl. (U. S.) 93; Myers v. York & Cumberland R. Co., 2 Curt. (U. S.) 28; Hare v. Parkersburg, 24 W. Va. 554; Barrett v. Raleigh Coal & Coke Co., 55 W. Va. 395, 47 S. E. 154; Allen v. Murray, 87 Wis. 41, 57 N. W. 979; Nash v. Hoxie, 59 Wis. 384, 18 N. W. 408; Walsh v. Myers, 92 Wis. 397, 66 N. W. 250.

³² Danforth v. Tennessee & C. R. Co., 93 Ala. 614, 11 So. 60; Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587; Mimms v. J. L. Betts Co., 9 Ga. App. 718, 72 S. E. 271; Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581; Southern Pac. R. Co. v. American Well Works, 172 Ill. 9, 49 N. E. 575; Black v. Woodrow, 39 Md. 194; North v. Mallory, 94 Md. 305, 51 Atl. 89; Connolly v. Sullivan, 173 Mass. 1, 53 N. E. 143; Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474; Thompson v. Gaffey, 52 Nebr. 317, 72 N. W. 314; Rosepaugh v. Vredenburg, 16 Hun (N. Y.) 60; Brady v. Oliver (Tenn.), 147 S. W. 1135; Preble v. Bottom, 27 Vt. 249; Allen v. Thrall, 36 Vt. 711; Chase v. Smith, 35 Wash. 631, 77 Pac. 1069.

³³ Nashotah Mines Co. v. Dyer, 21 Colo. App. 446, 122 Pac. 60; Demme & C. Furniture Co. v. McCabe, 49 Ill. App. 453; Hoyle v. Stellwagen, 28 Ind. App. 681, 63 N. E. 780; Wilson v. Borden, 68 N. J. L. 627, 54 Atl. 815.

material used, up to the time the work is interrupted.⁸⁴ Under some of the authorities, the measure of damages is not the price stipulated to be paid on full performance, but is the actual injury sustained in consequence of the default.⁸⁵ In one of the very recent cases it was held that the rental value of the plant used in the performance of a contract rendered idle by interference of the other party should be considered on the question of the amount of the damages sustained.⁸⁶

§ 2150. Measure of damages determined by the contract.

—The measure of damages for breach of contract may be determined and limited by the contract itself, and this is the case where the contract is for a stipulated amount.⁸⁷ It is generally held error for the court to set up a different measure of damages,⁸⁸ unless the measure fixed by the contract is unconscionable or the contract was obtained by fraud.⁸⁹ If it is contemplated by the parties that more

⁸⁴ *Thompson v. Brown*, 106 Iowa 367, 76 N. W. 819.

⁸⁵ *McClair v. Austin*, 17 Colo. 576, 31 Pac. 225; *Wood v. Morgan*, 6 Bush (Ky.) 507; *Chamberlin v. McCallister*, 6 Dana (Ky.) 352; *Friedlander v. Pugh*, 43 Miss. 111, 5 Am. Rep. 478.

⁸⁶ *Strobel Steel Const. Co. v. Sanitary Dist. of Chicago*, 160 Ill. App. 554.

⁸⁷ *Smith v. Davis*, 150 Ala. 106, 43 So. 729; *St. Louis, I. M. & S. R. Co. v. Mudford*, 44 Ark. 439; *Camp v. Behlow*, 2 Cal. App. 699, 84 Pac. 251; *Coffee v. Meiggs*, 9 Cal. 363; *Baldwin v. Bennett*, 4 Cal. 392; *Tyler v. Marsh*, 1 Day (Conn.) 1; *Brigham v. Hawley*, 17 Ill. 38; *Folliott v. Hunt*, 21 Ill. 654; *Anglo-Wyoming Oil Fields v. Miller*, 117 Ill. App. 552, affd. 216 Ill. 272, 74 N. E. 821; *Beam v. Cleveland & C. R. Co.*, 97 Ill. App. 24; *McClelland v. Snider*, 18 Ill. 58; *Brown v. Maulsby*, 17 Ind. 10; *Goodpaster v. Porter*, 11 Iowa 161; *Elliott v. Elliott*, 15 Ky. L. 274, 23 S. W. 216; *Leland v. Stone*, 10 Mass. 459; *Webber v. Randall*, 89 Mich. 531, 50 N. W. 877; *Spink v.*

Mueller, 77 Mo. App. 85; *Hax v. Hax*, 84 Mo. App. 306; *Drown v. Smith*, 3 N. H. 299; *Whitfield v. Levy*, 35 N. J. L. 149; *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525; *Thomson-Houston Electric Co. v. Durant Co.*, 144 N. Y. 34, 39 N. E. 7; *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Holmes Mach. Co. v. Chalkey*, 143 N. Car. 181, 55 S. E. 524; *Courcier v. Graham*, 1 Ohio 330; *Zachary v. Swanger*, 1 Ore. 92; *Louis v. Brown*, 7 Ore. 326; *Dunham v. Haggerty*, 110 Pa. St. 560, 1 Atl. 667; *Sessions v. Richmond*, 1 R. I. 298; *Evans v. Blakeney*, 1 Cranch. (U. S.) 126, Fed. Cas. No. 4553, affd. 2 Cranch. (U. S.) 185, 2 L. ed. 248; *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010; *Childs Lumber & Co. v. Page*, 32 Wash. 250, 73 Pac. 353; *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408.

⁸⁸ *Dunham v. Haggerty*, 110 Pa. St. 560, 1 Atl. 667.

⁸⁹ *Wambaugh v. Bimer*, 25 Ind. 368; *Baxter v. Wales*, 12 Mass. 365; *Cutler v. How*, 8 Mass. 257; *Commerce Milling & Co. v. Morris*, 27 Tex. Civ. App. 553, 65 S. W. 1118.

than actual damages are to be recovered, provision therefor should be made in the contract.⁴⁰ Where the work is done under a contract fixing the price to be paid therefor, the contract-price will generally be taken to furnish the measure of damages, though the contract has been only partially performed and the party sues on a quantum meruit.⁴¹ The stipulation may not only provide the measure of damages, but also the manner in which the amount shall be ascertained. This is the case with contracts which provide, in case of delay, that the owner of a building in process of construction may complete it at the cost of the contractor.⁴² But the owner must complete the structure under such a contract. He can not abandon the work altogether and recover the amount that it would require to complete the building.⁴³ Where there is an inexcusable violation of a valid contract the defaulting party must respond in damages to the extent of fair compensation for the injury suffered, whether there be any express stipulation to that effect or not.⁴⁴

§ 2151. Duty to mitigate damages.—The principle is firmly settled that the party injured by the breach of a contract can recover only such damages as by reasonable exertion and expense he could not prevent. In other words, where the party injured by the breach of a specified contract can protect himself from damages by the use of ordinary efforts or at moderate expense he is entitled to recover only such damages as he could not have prevented by the exercise of such diligence.⁴⁵ "The law, for wise

⁴⁰ Crescent Horse Shoe &c. Co. v. Eynon, 95 Va. 151, 27 S. E. 935.

⁴¹ Brigham v. Hawley, 17 Ill. 38; Folliott v. Hunt, 21 Ill. 654; Gillies v. Manhattan Beach Imp. Co., 73 Hun (N. Y.) 507, 56 N. Y. St. 206, 26 N. Y. S. 381, affd. 147 N. Y. 420, 42 N. E. 196.

⁴² American Surety Co. v. Woods, 105 Fed. 741, 45 C. C. A. 282, affd. 106 Fed. 263, 45 C. C. A. 282; Robinson v. Chinese Charitable &c. Assn., 35 App. Div. (N. Y.) 439, 54 N. Y. S. 858; McGrath v. Hor-

gan, 72 App. Div. (N. Y.) 152, 76 N. Y. S. 412.

⁴³ American Surety Co. v. Woods, 105 Fed. 741, 45 C. C. A. 282, affd. 106 Fed. 263, 45 C. C. A. 282.

⁴⁴ Hull v. Augus, 60 Ore. 95, 118 Pac. 284.

⁴⁵ Werten v. Koosa, 169 Ala. 258, 53 So. 98; Dryer v. Lewis, 57 Ala. 551; Western Union Tel. Co. v. Ivy (Ark.), 143 S. W. 1078; Hitchcock v. Hunt, 28 Conn. 343; Cunningham Iron Co. v. Warren Mfg. Co., 80 Fed. 878; Lawrence v. Por-

reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or wilfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him."⁴⁶ The principle does not require that a party should anticipate that a wrong will be done him by the other party to the contract. He has a right to rely upon a performance of duty until he has knowledge to the contrary.⁴⁷

§ 2152. Duty to mitigate reasonably construed—Illustrations.—The principle of mitigation of damages does not require the injured party to do anything unreasonable.⁴⁸

ter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; *Hodges v. Fries*, 34 Fla. 63, 15 So. 682; *Aiken v. Perry*, 119 Ga. 263, 46 S. E. 93; *Woodward v. George N. Pierce Co.*, 147 Ill. App. 339; *Garrett v. Winterich* (Ind. App.), 87 N. E. 161; *Cincinnati & C. Air Line R. Co. v. Rodgers*, 24 Ind. 103; *Beymer v. McBride*, 37 Iowa 114; *Graves v. Glass*, 86 Iowa 261, 53 N. W. 231; *Nye v. Iowa City & C. Works*, 51 Iowa 129, 50 N. W. 988, 33 Am. Rep. 121; *Hanson v. Atchison & C. R. Co.* (Kans.), 128 Pac. 184; *Halstead Lumber Co. v. Sutton*, 46 Kans. 192, 26 Pac. 444; *Sherman Center Town Co. v. Leonard*, 46 Kans. 354, 26 Pac. 717, 26 Am. St. 101; *Frick Co. v. Falks*, 50 Kans. 644, 32 Pac. 360; *Kentucky & S. A. R. Co. v. Jarvis*, 7 Ky. L. (abstract) 676; *Wood Mosaic Co. v. Britt*, 150 Ky. 357, 150 S. W. 355; *Cable v. Leeds*, 6 La. Ann. 293; *Campbell v. Miltenberger*, 26 La. Ann. 721; *Borden Min. Co. v. Barry*, 17 Md. 419; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930, 30 Am. St. 463; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264; *Haysler v. Owen*, 61 Mo. 270; *Tigerman v. Butte*, 44 Mont. 138, 119 Pac. 477; *Loomer v. Thomas*, 38

Nebr. 277, 56 N. W. 973; *Taylor v. Read*, 4 Paige (N. Y.) 561; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Worth v. Edmonds*, 52 Barb. (N. Y.) 40; *Dillon v. Anderson*, 43 N. Y. 231; *Bowen v. King*, 146 N. Car. 385, 59 S. E. 1044; *Hunter v. Southern R. Co.* (S. Car.), 73 S. E. 1017; *Cobb v. Western Union Tel. Co.*, 85 S. Car. 430, 67 S. E. 549; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Telfener v. Russ*, 145 U. S. 522, 36 L. ed. 800, 12 Sup. Ct. 930; *United States v. Burnham*, 1 Mas. (U. S.) 57, Fed. Cas. No. 14690; *Stonega Coke & Coal Co. v. Addington*, 112 Va. 809, 73 S. E. 257; *Griffith v. Blackwater & C. Lumber Co.*, 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124; *Bradley v. Denton*, 3 Wis. 557; *Hammond v. Sandwich Mfg. Co.*, 146 Wis. 485, 131 N. W. 1097; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576.
⁴⁶ *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.

⁴⁷ *Garrett v. Winterich* (Ind. App.), 87 N. E. 161; *Cranor Smith Lumber Co. v. Frith* (Ky.), 118 S. W. 307; *Illinois Cent. R. Co. v. Doss*, 137 Ky. 659, 126 S. W. 349.
⁴⁸ *Northern Colorado Irr. Co. v. Pouppirt* (Colo. App.), 127 Pac. 125; *The Thomas Sheldon*, 113 Fed. 779; *National Refrigerator &*

Thus, a tenant on breach of an express covenant of his landlord to erect a building on the premises was not required to erect such building where the cost was quite considerable.⁴⁹ So, in a more recent case where the breach of contract was the failure to furnish continuous work for teams for a specified period at a fixed rate per day, it was held that the plaintiff was not bound, in order to lessen the damages, to accept a new contract offered by the other party where the offered contract was quite different in nature from the broken agreement, although the work was substantially of the same nature.⁵⁰ So, where there was a breach of a contract to purchase milk at wholesale at a specified price per gallon for five years, it was held that the plaintiff was not required to change the character of his business and sell his milk at retail in order to reduce his damages.⁵¹ But the party injured by the breach of the contract can not recover damages enhanced by his own lack of care. Thus, for example the purchaser of seed which proves to be defective in quality can not recover losses caused by planting such seed after he became fully acquainted with its defective quality.⁵² So, where the owner of premises knew of the faulty construction of a furnace and continued to use it without having it repaired, he was denied a recovery from the builder of the furnace for the value of his house which was destroyed by reason of a fire caused by the defect in the furnace.⁵³ It is the duty of the party to obtain other like contracts if he can do so by ordinary means and the use of proper opportunities.⁵⁴ Where there is a breach of a construction contract it is the duty of the owner of the premises to lessen the

Butchers' Supply Co. v. Parmalee, 9 Ga. App. 725, 72 S. E. 191; *Sanitary Dist. v. McMahon*, 110 Ill. App. 510; *Western Union Tel. Co. v. Federolf* (Tex. Civ. App.), 145 S. W. 314.

⁴⁹ *Ingalls v. Beall*, 68 Wash. 247, 122 Pac. 1063.

⁵⁰ *Waldrip v. Hill* (Wash.), 126 Pac. 409.

⁵¹ *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339.

⁵² *Oliver v. Hawley*, 5 Nebr. 439.

⁵³ *Uhlrig v. Barnum*, 43 Nebr. 584, 61 N. W. 749.

⁵⁴ *Murrell v. Whiting*, 32 Ala. 54; *Benziger v. Miller*, 50 Ala. 206; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Ryan v. Miller*, 52 Ill. App. 191, affd. 153 Ill. 138, 38 N. E. 642; *Heavilon v. Kramer*, 31 Ind. 241; *Pond v. Wyman*, 15 Mo. 175; *Medbery v. Sweet*, 3 Pin. (Wis.) 210, 3 Chand. (Wis.) 231.

consequences of the defective construction.⁵⁵ And though a landlord is bound to keep the rented premises in repair in the absence of an agreement to the contrary, the tenant can not recover damages for a failure to repair which he could by ordinary care have avoided.⁵⁶

§ 2153. Interest on damages.—As a general rule, interest can not be allowed on damages for breach of contract where such damages are unliquidated and can not be ascertained by computation and they are so uncertain in amount that they can only be established by litigation.⁵⁷ The rule is subject, however, to exception as to demands based upon market value and susceptible of each proof.⁵⁸

⁵⁵ *Mather v. Butler*, 28 Iowa 253; *Gibson v. Carlin*, 13 Lea (Tenn.) 440.

⁵⁶ *Aikin v. Perry*, 119 Ga. 263, 46 S. E. 93; *Rose v. Butler*, 69 Hun (N. Y.) 140, 53 N. Y. St. 405, 23 N. Y. S. 375; *Cook v. Soule*, 56 N. Y. 420.

⁵⁷ *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. 164; *Hooper v. Patterson*, 97 Cal. XVII, 32 Pac. 514; *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Ferreira v. Chabot*, 121 Cal. 233, 53 Pac. 689, 1092; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166; *Buckmaster v. Grundy*, 3 Gilm. (Ill.) 626; *Harvey v. Hamilton*, 155 Ill. 377, 40 N. E. 592; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Doctor v. Darling*, 68 Hun (N. Y.) 70, 52 N. Y. St. 221, 22 N. Y. S. 594; *Button v. Kinnitz*, 88 Hun (N. Y.) 35, 68 N. Y. St. 305, 34 N. Y. S. 522; *Riss v. Messmore*, 30 N. Y. St. 250, 58 N. Y. Super. Ct. 23, 9 N. Y. S. 320, affd. 130 N. Y. 681, 29 N. E. 1034; *Mansfield v. New York Cent. & C. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; *Trice v. Turrentine*, 35 N. Car. 212; *Fowler v. Davenport*, 21 Tex. 626; *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205. See also, *Arkansas & L. R. Co. v. Stroude*, 82 Ark. 117, 100 S. W. 760; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac.

190, 1 Am. St. 75; *Louisville & N. R. Co. v. Alford*, 5 Ga. App. 428, 63 S. E. 524; *Tifton, T. & G. R. Co. v. Butler*, 4 Ga. App. 191, 60 S. E. 1087; *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61, 64 N. E. 332; *Dady v. Condit*, 209 Ill. 488, 70 N. E. 1088; *State v. Kelly*, 78 Kans. 42, 96 Pac. 40; *Underwood Typewriter Co. v. Century Realty Co. (Mo.)*, 146 S. W. 448; *Gerst v. St. Louis*, 185 Mo. 191, 84 S. W. 34, 105 Am. St. 580; *Bell v. Arndt*, 24 Nebr. 261, 38 N. W. 750; *Wittenberg v. Mollyneaux*, 59 Nebr. 203, 80 N. W. 824; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151; *Gray v. Central R. Co.*, 157 N. Y. 483, 52 N. E. 555; *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752; *Crawford v. Mail & C. Pub. Co.*, 163 N. Y. 404, 57 N. E. 616; *H. G. Vogel Co. v. Lockport Glass Co.*, 118 N. Y. S. 351; *Munson v. Smith Woolen Machine Co.*, 118 App. Div. (N. Y.) 398, 103 N. Y. S. 502; *Devine v. Kerwin*, 52 Misc. (N. Y.) 535, 102 N. Y. S. 841; *Markham v. David Stevenson Brewing Co.*, 97 N. Y. S. 604; *Whitaker v. Poston*, 120 Tenn. 207, 110 S. W. 1019; *Shipman v. State*, 44 Wis. 458.

⁵⁸ *Stoudenmeier v. Williamson*, 29 Ala. 558; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. 164; *Swinerton v. Argonaut Land & C. Co.*, 112 Cal. 375, 44 Pac. 519; *Pujol v. McKinlay*, 42 Cal. 559; *Mayo v. Wahlgreen*, 9 Colo. App.

Many jurisdictions also make an exception in cases where the damages for the breach of the contract are capable of ascertainment by computation merely.⁵⁹ Interest is sometimes allowed in cases of breach of contract to deliver personal property;⁶⁰ on the damages recovered for breach of warranty as to the quality of property or goods sold;⁶¹ for the detention of money;⁶² and in some states under statutes for the vexatious withholding of money from a creditor.⁶³ Where the damages are liquidated the right to interest is clear.⁶⁴

506, 50 Pac. 40; *Sullivan v. McMillan*, 37 Fla. 134, 19 So. 340, 53 Am. St. 239; *Bartee v. Andrews*, 18 Ga. 407; *Murray v. Doud*, 167 Ill. 368, 47 N. E. 717, 59 Am. St. 297; *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485; *Nelson v. Hirsch Iron & Co.*, 102 Mo. App. 498, 77 S. W. 590; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Spencer v. Tilden*, 5 Cow. (N. Y.) 144; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Webb v. Novelty Hosiery Co.*, 231 Pa. 297, 80 Atl. 173; *Richards v. Citizens' Natural Gas Co.*, 130 Pa. St. 37, 18 Atl. 600; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53; *Barrow v. Reab*, 9 How. (U. S.) 366, 13 L. ed. 177; *Rawlins v. Murphy* (Wyo.), 115 Pac. 436; *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

⁵⁹ *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; *Fowle v. Park*, 48 Fed. 789; *Crosby Lumber Co. v. Smith*, 51 Fed. 63, 2 C. C. A. 97; *Ward's Admr. v. Grayson's Widow & Admr.*, 9 Dana (Ky.) 280; *New York Bank-Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 78 N. E. 463; *Goodman v. Missouri & C. R. Co.*, 71 Mo. App. 460; *McCormack v. Lynch*, 69 Mo. App. 524; *Robinson v. Gilman*, 43 N. H. 485; *Stiles v. Benjamin*, 92 Hun (N. Y.) 102, 36 N. Y. S. 910; *Clegg v. New York Newspaper Union*, 72 Hun (N. Y.) 395, 55 N. Y. St. 464, 25 N. Y. S. 565; *Woods v. Cramer*, 34 S. Car. 508, 13 S. E. 660; *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021; *Butler Bros.-Hoff Co. v. Virginian R. Co. (Va.)*, 73 S. E.

441; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

⁶⁰ *Bartee v. Andrews*, 18 Ga. 407; *Murray v. Doud*, 167 Ill. 368, 47 N. E. 717, 59 Am. St. 297; *Nelson v. Hirsch Iron & Co.*, 102 Mo. App. 498, 77 S. W. 590; *Goodman v. Missouri & C. R. Co.*, 71 Mo. App. 460; *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Bicknell v. Waterman*, 5 R. I. 43; *Ryan v. Baldrick*, 3 McCord (S. Car.) 498; *Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. 666; *Barrow v. Reab*, 9 How. (U. S.) 366, 13 L. ed. 177; *Gallun v. Seymour*, 76 Wis. 251, 45 N. W. 115; *Kuhn v. McKay*, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

⁶¹ *Stoudenmeier v. Williamson*, 29 Ala. 558; *Brown v. Doyle*, 69 Minn. 543, 72 N. W. 814.

⁶² *Cooke v. Farinholt*, 3 Ala. 384; *Central Bank & Trust Corp. v. State (Ga.)*, 76 S. E. 587; *McCreery v. Green*, 38 Mich. 172; *Owsley v. Greenwood*, 18 Gil. (Minn.) 386; *Swamscot Machine Co. v. Partidge*, 25 N. H. 369; *National Lancers v. Lovering*, 30 N. H. 511; *Adams v. Ft. Plain Bank*, 36 N. Y. 255; *Smith v. Sherwood*, 2 Tex. 460; *Gleason v. Briggs*, 28 Vt. 135.

⁶³ *Corson v. Neatheny*, 9 Colo. 212, 11 Pac. 82; *Devine v. Edwards*, 101 Ill. 138; *Rogers v. West*, 9 Ind. 400.

⁶⁴ *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165, 97 Pac. 177; *Loomis v. Norman Printers' Supply Co.*, 81 Conn. 343, 71 Atl. 358; *Council v. Hixon* (Ga. App.), 76 S. E. 603; *Rutherford v. Irby*, 1 Ga. App. 499, 57 S. E. 927; *Bauer v. Jerolman*, 124 Ill. App. 151; *Leg-*

(c) *DAMAGES IN PARTICULAR RELATIONS.***§ 2154. Damages for breach of employment contract.—**

An employé wrongfully discharged before the expiration of the term of his employment is entitled to the wages actually earned by him under the terms of the contract to the time of his discharge,⁶⁵ and to wages for the unexpired portion of the term of his employment less the amount he has earned or might, by reasonable effort, have earned in other employment in the same line of business during such unexpired term. This is the rule in all cases where he brings his action after expiration of the term of employment.⁶⁶

§ 2155. Breach of employment contract—Action instituted before expiration of term.—The recovery will be ac-

gat v. Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. (N. S.) 1238n; Parkins v. Missouri Pac. R. Co., 76 Nebr. 242, 107 N. W. 260; Locomobile Co. v. De Witt, 110 N. Y. S. 413.

⁶⁵ Archard v. Hornor, 3 C. & P. 349, 14 E. C. L. 604; Fowler v. Armour, 24 Ala. 194; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; Louisville & C. R. Co. v. Harvey, 15 Ky. L. 809; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moody v. Leverich, 4 Daly (N. Y.) 401, 14 Abb. Pr. (N. S.) (N. Y.) 145; Elliott v. Miller, 43 N. Y. St. 536, 17 N. Y. S. 526.

⁶⁶ Moss v. Decatur Land Improvement & Co., 93 Ala. 269, 9 So. 188, 30 Am. St. 55; Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218; Hitchens v. School District No. 180, 5 Pennew. (Del.) 325, 62 Atl. 897; McCormick Harvesting Mach. Co. v. Cordsiemon, 101 Ill. App. 140; Hessel v. Thompson, 65 Ill. App. 44; McKinley v. Goodman, 67 Ill. App. 374; Fuller v. Little, 61 Ill. 21; School Directors v. Crews, 23 Ill. App. 367; Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243; Jones v. Dunton, 7 Ill. App. 580; Pape v. Lathrop, 18 Ind. App. 633, 46 N. E. 154; Bridgeford v. Meagher, 144 Ky. 479, 139 S. W. 750; Hayworth v. Haldeman, 14 Ky. L. (Abstract) 202; Olmstead v. Bach, 78

Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. 273; H. J. McGrath Co. v. Marchant (Md.), 83 Atl. 912; Baltimore Base Ball Club & Co. v. Picett, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. 304; Norton v. Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331; Cumberland & P. R. Co. v. Slack, 45 Md. 161; Hamill v. Foute, 51 Md. 419; Busell Trimmer Co. v. Coburn, 188 Mass. 254, 74 N. E. 334, 69 L. R. A. 821; Alberts v. Stearns, 50 Mich. 349, 15 N. W. 505; Horn v. Western Land Assn., 22 Minn. 233; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678; Birdsong v. Ellis, 62 Miss. 418; Nearns v. Herbert, 25 Mo. 352; Posey v. Garth, 7 Mo. 94, 37 Am. Dec. 183; Hansard v. Menderson Clothing Co., 73 Mo. App. 584; Wirth v. Calhoun, 64 Nebr. 316, 89 N. W. 785; Decker v. Hassel, 26 How. Pr. (N. Y.) 528; Cohen v. Walker, 38 Misc. (N. Y.) 114, 77 N. Y. S. 105, 11 N. Y. Ann. Cas. 135; Richardson v. Hartmann, 68 Hun (N. Y.) 9, 52 N. Y. St. 41, 22 N. Y. S. 645; Helfferich v. Sherman (S. Dak.), 134 N. W. 815; East Tennessee, V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397; Winkler v. Racine Wagon & Co., 99 Wis. 184, 74 N. W. 793; Littlefield v. Bergenthal, 87 Wis. 394, 58 N. W. 743; Gordon v. Brewster, 7 Wis. 355.

cording to the foregoing rule in cases where action is commenced before but tried after the expiration of the term.⁶⁷ In many of the jurisdictions the recovery is according to this rule, though the action is commenced and tried before the expiration of the term.⁶⁸ In these jurisdictions it is the doctrine "that there can be but a single action for damages for the breach of an executory contract for services, and that all damages sustained by the discharged employé in consequence of the wrongful act of the employer, whether present or prospective, must be included in the recovery, and a judgment obtained for such injury bars all other claims. The suit may be brought at any time after the breach and before the action is barred by the statute of limitations, and the measure of damages is the same whether the action is brought and the trial held before or after the expiration of the term of the contract."⁶⁹ Elsewhere it is the rule that the damages are limited to those that have accrued up to the time of the trial where the trial is held before the expiration of the term.⁷⁰

⁶⁷ *Howay v. Going-Northrup Co.*, 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 48, 85 Am. St. 942; *Mount Hope Cemetery Assn. v. Weidenmann*, 139 Ill. 67, 28 N. E. 834; *Catholic Press Co. v. Ball*, 69 Ill. App. 591; *Halsey v. Meinrath*, 54 Mo. App. 335; *Sommer v. Conhaim*, 25 Misc. (N. Y.) 166, 54 N. Y. S. 146; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319.

⁶⁸ *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. 384; *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271, 16 Am. St. 403; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. 154; *DeCamp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204; *Sutherland v. Wyer*, 67 Maine 64; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010; *Paige v. Barrett*, 151 Mass. 67, 23 N. E. 725; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. 460; *Miller v. Woolman-Todd Boot & Co.*, 26 Mo. App. 57; *Lally v. Cantwell*, 40 Mo. App. 44; *Lambert v. Hartshorne*, 65 Mo. 549; *Boland v. Glendale Quarry Co.*, 127 Mo. 520,

30 S. W. 151; *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Smith v. Gilbert Lock Co.*, 4 N. J. L. J. 312; *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598; *Wilke v. Harrison*, 166 Pa. St. 202, 30 Atl. 1125; *Pierce v. Tennessee Coal I. & R. Co.*, 173 U. S. 1, 43 L. ed. 591.

⁶⁹ *Inland Steel Co. v. Harris* (Ind. App.), 95 N. E. 271.

⁷⁰ *Davis v. Ayres*, 9 Ala. 292; *Wright v. Falkner*, 37 Ala. 274; *Little Butte & Mining Co. v. Girard* (Ariz.), 123 Pac. 309; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; *Gates v. School District*, 57 Ark. 370, 21 S. W. 1060, 38 Am. St. 249; *Schroeder v. California Yukon Trading Co.*, 95 Fed. 296; *Darst v. Mathieson Alkali Works*, 81 Fed. 284; *Roberts v. Crowley*, 81 Ga. 429, 7 S. E. 740; *Mount Hope Cemetery Assn. v. Weidenmann*, 139 Ill. 67, 28 N. E. 834; *Louisville & C. R. Co. v. Offutt*, 15 Ky. L. (Abstract) 301; *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. 511; *Weber Gas & Engine Co. v. Bradford*, 34 Tex. Civ.

§ 2156. Breach of employment contract—Duty to seek other employment.—In all cases it is the duty of the discharged servant to make reasonable efforts to secure other employment, for he can not voluntarily remain idle at the expense of his employer.⁷¹ The search should be for like employment,⁷² though the damages will be reduced by amounts earned at any employment during the unexpired term.⁷³ The burden of proof to show employment after discharge is usually placed on the master.⁷⁴ The servant wrongfully discharged is not required to accept new employment from the same master, unless the work is in the same general line as the first employment and the offer is so made that the acceptance will not amount to a modification of the original agreement.⁷⁵ It is the holding of one of the cases that the employé is not bound to seek other employment where he is waiting in reasonable expectation of being called into service by his employer at any time.⁷⁶ In a case where a servant was employed for a fixed term and the contract stipulated that he was to re-

App. 543, 79 S. W. 46; Pacific Express Co. v. Walters, 42 Tex. Civ. App. 355, 93 S. W. 496; Gordon v. Brewster, 7 Wis. 355.

⁷¹ Utter v. Chapman, 38 Cal. 659; Leatherberry v. O'Dell, 7 Fed. 641; Alaska Fish & Co. v. Chase, 128 Fed. 886, 64 C. C. A. 1; Hill v. Hager Bros. 7 Ky. L. (Abstract) 519; Raine v. Newberger, 14 Ky. L. (Abstract) 524; Ware Brothers Co. v. Cortland & Co. Carriage Co., 148 App. Div. (N. Y.) 546, 133 N. Y. S. 60; Coates v. Allegheny Steel Co., 234 Pa. 199, 83 Atl. 77; Young v. Watson (Tex. Civ. App.), 140 S. W. 840; Kramer v. Wolf Cigar Store Co., 99 Tex. 597, 91 S. W. 775; Gulf & Co. R. Co. v. Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89.

⁷² Wilkinson v. Black, 80 Ala. 329; Alaska Fish & Co. v. Chase, 128 Fed. 886, 64 C. C. A. 1; McKinley v. Goodman, 67 Ill. App. 374; Hinchcliffe v. Koontz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. 403; Hill v. Hager Bros., 7 Ky. L. (Abstract) 518; Fuchs v. Koerner, 107 N. Y. 529, 14 N. E. 445; Briscoe v. Litt, 19 Misc. (N. Y.)

5, 42 N. Y. S. 908; Simon v. Allen, 76 Tex. 398, 13 S. W. 296.

⁷³ Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341; Toplitz v. Ullman, 20 N. Y. S. 50, 46 N. Y. St. 294; affd. 2 Misc. (N. Y.) 130, 20 N. Y. S. 863, 49 N. Y. St. 226.

⁷⁴ Van Winkle v. Satterfield, 58 Ark. 67, 25 S. W. 1113, 23 L. R. A. 853; Rosenberger v. Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963; Saxonia Mining & Co. v. Cook, 7 Colo. 569, 4 Pac. 1111; Leatherberry v. Odell, 7 Fed. 641; Fuller v. Little, 61 Ill. 21; Hinchcliffe v. Koontz, 121 Ind. 422, 23 N. E. 271; 16 Am. St. 403; Farrell v. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053; Horn v. Western Land Assn., 22 Minn. 233; Odeneal v. Henry, 70 Miss. 172, 12 So. 154; Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630.

⁷⁵ Jackson v. Independent School District (Iowa), 77 N. W. 860; Trawick v. Peoria & Ft. C. St. R. Co., 68 Ill. App. 156; Chisholm v. Preferred Bankers' Life Assur. Co., 112 Mich. 50, 70 N. W. 415.

⁷⁶ Mathews v. Wallace, 104 Mo. App. 96, 78 S. W. 296.

ceive nothing thereunder during time that he was ill, and he was discharged before the expiration of the term, but was too ill to do any work during the residue of the term, it was held that the employer was not liable for any damages.⁷⁷ Where the breach of the contract is on the part of the employé, the measure of damages is the difference between the contract-price for the services and the cost of procuring another equally skilled workman.⁷⁸

§ 2157. Damages for breach of teacher's contract.—The measure of damages for the breach of a contract of employment of a teacher is *prima facie* the wages agreed to be paid, less what the teacher earned, or might, by reasonable diligence, have earned in the same line of employment.⁷⁹ The school district has the burden of showing that the teacher might have obtained other employment in the same line and thereby have reduced the damages for the wrongful discharge.⁸⁰ Where the teacher is unable by the exercise of diligence to secure another position, then the measure of damages is the full compensation at the contract-price for the remainder of the term.⁸¹ In one of the cases it was held not a sufficient defense that the district tendered the teacher a position to teach in another department, where it did not appear that the teacher could have accepted such new position without modifying the original contract.⁸² In another case where the directors dismissed a teacher on sufficient evidence of immoral conduct, it was held that their action on a rehearing in finding him innocent, on further evidence, did not authorize his recovery of salary for the time intervening between the dismissal and the finding of innocence.⁸³

⁷⁷ *Grindeman v. Woodland Shingle Co.*, 66 Wash. 240, 119 Pac. 615.

⁷⁸ *Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.) 914n; *Eastern R. Co. v. Tuteur*, 127 Wis. 382, 105 N. W. 1067.

⁷⁹ *School Directors v. Kimmel*, 31 Ill. App. 537; *School Directors v. Birch*, 93 Ill. App. 499; *Underwood v. School Commissioners*, 103 Md. 181, 63 Atl. 221; *Carver v. School*

Dist. No. 6, 113 Mich. 524, 71 N. W. 859.

⁸⁰ *School Directors v. Kimmel*, 31 Ill. App. 537; *Carver v. School Dist. No. 6*, 113 Mich. 524, 71 N. W. 859.

⁸¹ *Worthington v. Oak & Highland Park Imp. Co.*, 100 Iowa 39, 69 N. W. 258.

⁸² *Jackson v. Independent School District*, 100 Iowa 313, 81 N. W. 596.

⁸³ *Kellison v. School District*, 20 Mont. 153, 50 Pac. 421.

§ 2158. Damages for breach of contract of employment of real estate agent.—The right of a real estate agent to recover damages on the revocation of his agency is held in a recent case to depend on whether, before the revocation, he had commenced negotiations with a purchaser able and willing to buy at the stipulated price.⁸⁴ No more than nominal damages can be recovered where the agent fails to show that he could have made the sale on the terms laid down by his principal.⁸⁵ Where the agent has produced a customer ready to take and pay the price and his principal refuses to pay the commission, the broker is entitled to the commission he would have received had his principal consummated the contract.⁸⁶

§ 2159. Damages for breach of duty of abstractor.—An abstractor is not a guarantor of title,⁸⁷ and is liable only for want of ordinary care and skill,⁸⁸ and this liability is owed, in general, only to the other party to the contract or his privies.⁸⁹ The measure of damages for the negligent performance of duties by the abstractor is the actual loss sustained by the employer,⁹⁰ and this will usually be the amount which he has had to pay to get the title,⁹¹ or the amount which it has cost to have the unreported incumbrance re-

⁸⁴ *Anderson v. Shaffer*, 87 Kans. 346, 124 Pac. 423.

⁸⁵ *Milligan v. Owen*, 123 Iowa 285, 98 N. W. 792.

⁸⁶ *Atkinson v. Pack*, 114 N. Car. 597, 19 S. E. 628. See also, *Cavender v. Waddingham*, 2 Mo. App. 551; *Heimbürger v. Rudd* (S. Dak.), 138 N. W. 374. Under an agreement to pay a reasonable commission for sale of stock, the price realized from the sale has been held a proper basis on which to estimate the commission. *Warnekos v. Bowman* (Ariz.), 128 Pac. 49.

⁸⁷ *Dundee Mortg. & Trust Inv. Co. v. Hughes*, 20 Fed. 39; *Wacek v. Frink*, 51 Minn. 282, 53 N. W. 633, 38 Am. St. 502.

⁸⁸ *Dundee Mortg. & Trust Inv. Co.*

v. Hughes, 20 Fed. 39; *Chase v. Heaney*, 70 Ill. 268; *Smith v. Holmes*, 54 Mich. 104, 19 N. W. 767; *Rankin v. Schaeffer*, 4 Mo. App. 108.

⁸⁹ *Mechanics' Building Assn. v. Whitacre*, 92 Ind. 547; *Mallory v. Ferguson*, 50 Kans. 685, 32 Pac. 410, 22 L. R. A. 99; *Zweigardt v. Birdseye*, 57 Mo. App. 462; *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576; *Lockwood v. Title Ins. Co.*, 73 Misc. (N. Y.) 296, 13 N. Y. S. 824; *Day v. Reynolds*, 23 Hun (N. Y.) 131; *Houseman v. Girard & Co. Loan Assn.*, 81 Pa. St. 256; *National Saving Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

⁹⁰ *Keuthan v. St. Louis Trust Co.*, 101 Mo. App. 1, 73 S. W. 334; *Bremerton Dev. Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69.

⁹¹ *Allen v. Clark*, 7 L. T. 781.

moved.⁹² The abstractor's liability in all cases is contractual.⁹³

§ 2160. Damages for vendee's breach of contract to purchase land.—As a general rule, the measure of damages for the breach of a contract by the vendee to buy land is the difference between the contract-price and the fair cash value of the land at the time of the breach.⁹⁴ Where the value of the land exceeds the stipulated price, only nominal damages may be recovered,⁹⁵ and this would be the case where the land was sold to another for the price fixed in the contract with the defaulting original purchaser.⁹⁶ In determining the value of the land under this rule it is the general cash value that must be taken and not the value of the land for a particular purpose or an on-time sale.⁹⁷ Some jurisdictions hold to the view that the measure of damages in a case of this character is the contract-price and interest thereon.⁹⁸ This would seem the proper

⁹² *Dodd v. Williams*, 3 Mo. App. 278; *Morange v. Mix*, 44 N. Y. 315.

⁹³ *Thomas v. Guarantee Title & Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210; *Bremerton Dev. Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69.

⁹⁴ *Hazelton v. LeDuc*, 10 App. D. C. 379; *Smith v. Newell*, 37 Fla. 147, 20 So. 249; *Gilbert v. Cherry*, 57 Ga. 128; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630; *Lewis v. Lee*, 15 Ind. 499; *Porter v. Travis*, 40 Ind. 556; *Farmers' & Co. Loan Fund & Savings Assn. v. Rector*, 22 Ind. App. 101, 53 N. E. 297; *Goodwine v. Kelley*, 33 Ind. App. 57, 70 N. E. 832; *Prichard v. Mulhall*, 127 Iowa 545, 103 N. W. 774; *Harmon v. Thompson*, 119 Ky. 528, 27 Ky. L. 181, 84 S. W. 569; *Old Colony R. Corp. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. 126; *Davis v. Watson*, 89 Mo. App. 15; *Baerenklau v. Peerless Realty Co.* (N. J. Eq.), 83 Atl. 375; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Hurd v. Dunsmore*, 63 N. H. 171; *Richards v. Edick*, 17 Barb. (N. Y.) 260; *Con-*

gregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Pr. (N. S.) (N. Y.) 484; *Scheer v. Schlomowitz*, 88 N. Y. S. 170; *Kuntz v. Schnugg*, 99 App. Div. (N. Y.) 191, 90 N. Y. S. 933; *Ellett v. Paxson*, 2 Watts & S. (Pa.) 418; *Kempner v. Heindenheimer*, 65 Tex. 587, 1 S. W. 869, 58 Am. Rep. 775; *Monroe v. South* (Tex. Civ. App.), 64 S. W. 1014; *Smith v. Lander* (Tex. Civ. App.), 89 S. W. 19; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910.

⁹⁵ *Evrit v. Bancroft*, 22 Ohio St. 172.

⁹⁶ *Monroe v. South* (Tex. Civ. App.), 64 S. W. 1014.

⁹⁷ *Lewis v. Lee*, 15 Ind. 499.

⁹⁸ *Gilpin Co. Min. Co. v. Drake*, 8 Colo. 586, 9 Pac. 787; *Gray v. Meek*, 149 Ill. 136, 64 N. E. 1020; *Goodpaster v. Porter*, 11 Iowa 161; *Oatman v. Walker*, 33 Maine 67; *Alna v. Plummer*, 4 Maine 258; *Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829; *Curran v. Rogers*, 35 Mich. 221; *Garrard v. Dollar*, 49 N. Car. 175, 67 Am. Dec. 271.

rule in cases where the vendee has been put in possession and the vendor is tendered a proper deed.⁹⁹

§ 2161. Vendee's breach of contract to buy land—Sale at auction.—Where the breach consists of a failure to comply with a bid at an auction sale, the measure of damages is generally the difference between the contract-price and the amount received on a resale where this amount is less than the amount bid.¹ The true criterion in these cases, according to one of the decisions, "is, in addition to the cost and expense of the second sale, the difference between the amount which defendant bid at the first sale, and became legally bound to pay for the land, and the highest bid obtained at the second sale, which should and appears to have been made publicly, with reasonable care and diligence, in good faith and after being duly advertised. It is not to be assumed that the land brought at the first sale more than its actual value, or at the second less than its value."²

§ 2162. Damages for vendor's breach of contract to convey lands.—Under the prevailing rule in this country, in cases where the vendor refuses to convey according to his contract, the vendee may recover the market value of the land at the time of the breach, with interest, less the amount of the purchase-price remaining unpaid.³ But this

⁹⁹ Curran v. Rogers, 35 Mich. 221. See also, Smith Granite Co. v. Newhall, 22 R. I. 295, 47 Atl. 597.

¹ McBrayer v. Cohen, 92 Ky. 479, 13 Ky. L. 667, 18 S. W. 123; Gardner v. Armstrong, 31 Mo. 535.

² McBrayer v. Cohen, 92 Ky. 479, 13 Ky. L. 667, 18 S. W. 123.

³ Hamaker v. Coons, 117 Ala. 603, 23 So. 655; Eads v. Murphy, 52 Ala. 520; Whiteside v. Jennings, 19 Ala. 784; Kempner v. Cohn, 47 Ark. 519; Wells v. Abernethy, 5 Conn. 222; Gibson v. Carreker, 82 Ga. 46, 9 S. E. 124; Irwin v. Askew, 74 Ga. 581; Brooks v. Miller, 103 Ga. 712, 30 S. E. 630; Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261; Buckmaster v. Grundy, 1 Scam. (Ill.) 310; McKee

v. Brandon, 2 Scam. (Ill.), 339; Dady v. Condit, 188 Ill. 234, 58 N. E. 900; Sanderson v. Read, 75 Ill. App. 190; Case v. Wolcott, 33 Ind. 5; Shirk v. Lingeman, 26 Ind. App. 630, 59 N. E. 941; Hampe v. Sage, 87 Kans. 536, 125 Pac. 53; Doherty v. Dolan, 65 Maine 87, 20 Am. Rep. 677; Warren v. Wheeler, 21 Maine 484; Russell v. Copeland, 30 Maine 332; Hill v. Hobart, 16 Maine 164; Adams v. North American Ins. Co., 210 Mass. 550, 96 N. E. 1094; Atwood v. Walker, 179 Mass. 514, 61 N. E. 58; Roche v. Smith, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. 345; Hallett v. Taylor, 177 Mass. 6, 58 N. E. 154; Donlon v. Evans, 40 Minn. 501, 42 N. W. 472; Scheerschmidt v.

rule is not everywhere accepted. In numerous jurisdictions the recovery is limited to the purchase-price paid, with interest and the expenses of investigating the title,⁴ unless the vendor is chargeable with fraud or a wilful refusal to convey, in which case substantial damages may be recovered.⁵ In these jurisdictions it is the rule, where the vendor acts in good faith and a breach results, that the vendee can recover only the amount which he has paid, with interest thereon, and if he has paid nothing and incurred no expense, he can recover only nominal damages, unless the vendor has, since the sale to the purchaser, voluntarily put it beyond his power to comply with the contract; or if, having good title, he refuses to convey, he will

Smith, 74 Minn. 224, 77 N. W. 34; Gridley v. Tucker, Freem. Ch. (Miss.) 209; Fleckten v. Spicer, 63 Minn. 454, 65 N. W. 926; Hartzell v. Crumb, 90 Mo. 629, 3 S. W. 59; Kirkpatrick v. Downing, 58 Mo. 32, 17 Am. Rep. 678; Krepp v. St. Louis & C. R. Co., 99 Mo. App. 94, 72 S. W. 479; Nolde v. Gray, 73 Nebr. 373, 102 N. W. 759, 104 N. W. 165; Seaver v. Hall, 50 Nebr. 87; Fairchild v. Llewellyn Realty Co. (N. J.), 82 Atl. 924; Goodman v. Wolf, 95 App. Div. (N. Y.) 522, 88 N. Y. S. 934; Nichols v. Freeman, 33 N. Car. 99; Neppach v. Oregon & C. R. Co., 46 Ore. 374, 80 Pac. 482; Barbour v. Nichols, 3 R. I. 187; Shaw v. Wilkins' Admr., 8 Humph. (Tenn.) 647; Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. ed. 218; Muenchow v. Roberts, 77 Wis. 520, 46 N. W. 802; Darlington v. Gates Land Co. (Wis.), 138 N. W. 72; Johnson v. McMullin, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670. Or, in other words, the difference between the value and the contract price, where there is an entire breach and no part of the price has been paid. Beck v. Staats (Nebr.), 114 N. W. 633, 16 L. R. A. (N. S.) 768, and note.

⁴Wilson v. White, 161 Cal. 453, 119 Pac. 895; Stewart v. Noble, 1 Greene (Iowa) 26; Sweem v. Steele, 5 Iowa 352; Cox's Heirs v. Strode, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; Duncan v. Tanner, 2 J. J. Marsh. (Ky.) 399; Combs v. Tarlton's

Admr., 2 Dana. (Ky.) 464; Herndon v. Venable, 7 Dana. (Ky.) 371; Baltimore Permanent Bldg. & C. Soc. v. Smith, 54 Md. 187, 39 Am. Rep. 374; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Gerbert v. Congregation, 59 N. J. L. 160, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. 578; Conger v. Weaver, 20 N. Y. 140; Margraf v. Muir, 57 N. Y. 155; Northridge v. Moore, 118 N. Y. 419, 23 N. E. 570; Fletcher v. Butler, 49 Hun (N. Y.) 610, 19 N. Y. St. 651, 4 N. Y. S. 930; Bitner v. Brough, 11 Pa. St. 127, 2 Am. Law J. (N. S.) 90; Burk v. Serrill, 80 Pa. St. 413, 21 Am. Rep. 105; Bowser v. Cessna, 62 Pa. St. 148; Gray v. Howell, 205 Pa. St. 211, 54 Atl. 774; Hall v. York, 22 Tex. 641; Roberts v. McFaddin, 32 Tex. Civ. App. 47, 74 S. W. 105; Stuart v. Pennis, 100 Va. 612, 42 S. E. 667; Thompson's Exr. v. Guthrie's Admr., 9 Leigh. (Va.) 101, 33 Am. Dec. 225; Marsh v. Cavanaugh, 15 Wash. 282, 46 Pac. 239.

⁵Cullumber v. Winter (Iowa), 134 N. W. 601; Sweem v. Steele, 5 Iowa 352; Tracy v. Gunn, 29 Kans. 508; Hartsock v. Mort, 76 Md. 281, 25 Atl. 303; Allen v. Atkinson, 21 Mich. 351; Dikeman v. Arnold, 71 Mich. 656, 40 N. W. 42; Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463; Sloan v. Baird, 162 N. Y. 327, 56 N. E. 752; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343; Dustin v. Newcomer, 8 Ohio 49.

be liable in substantial damages, the measure being the market value of the land at the time of the breach, less the unpaid purchase-money and interest on such sum from that time.⁶ Nominal damages only are recoverable where the breach is shown, but the damages are not proved, or if proved are inconsequential.⁷

§ 2163. Breach of contract of vendor to convey lands—Profits from resale.—Special damages resulting from a failure of the vendee to make a profitable resale are not recoverable unless knowledge was brought to the vendor at the time of entering into the contract that the purchase was for the purpose of resale. A sufficient reason is that a loss of this character could not reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of its breach.⁸

§ 2164. Damages for breach of contract of carrier to furnish cars.—A shipper may not recover special damages for the failure of a carrier to furnish cars as agreed unless the facts showing the special damages are made known to the carrier.⁹ Where the carrier is made acquainted with these facts, the measure of damages usually adopted is the profits lost to the shipper by reason of the breach of the contract.¹⁰ Where, for example, the carrier, having notice of a contract of the shipper to deliver cattle at their destination on a certain day, failed to furnish the cars as agreed and the cattle depreciated in value by reason of the delay, it was held that the shipper was entitled to the difference

⁶ Mullen v. Cook, 69 W. Va. 456, 71 S. E. 566. See also, Flureau v. Thornhill, 2 W. Bl. 1078; note in 16 L. R. A. (N. S.) 771.

⁷ Dady v. Condit, 188 Ill. 234, 58 N. E. 900; Sharp v. Colgan, 4 Mo. 29; Carver v. Taylor, 35 Nebr. 429, 53 N. W. 386; Place v. Dudley, 41 App. Div. (N. Y.) 540, 58 N. Y. S. 671; Stephens v. Barnes, 30 Pa. Super. Ct. 127; Hennerschoitz v. Gallagher, 124 Pa. 1, 16 Atl. 518, 23 Wkly. Notes Cas. 280.

⁸ Lynch v. Wright, 94 Fed. 703;

Violet v. Rose, 39 Nebr. 660, 58 N. W. 216; Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93.

⁹ Choctaw O. & G. R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870. See also, Steffen v. Mississippi River & B. T. R. Co., 156 Mo. 322, 56 S. W. 1125.

¹⁰ Baxley v. Tallassee & C. R. Co., 128 Ala. 183, 29 So. 451; Houston & C. R. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225; Gulf & C. R. Co. v. Hodge (Tex. Civ. App.), 39 S. W. 986. But not when speculative or too remote.

between the contract-price of the cattle at their destination and their market value in their damaged condition at the point of shipment, less the freight.¹¹

§ 2165. Damages for breach of contract of carrier to carry goods.—The generally accepted rule makes the measure of damages for refusal to receive and transport goods or for a breach of a contract for the transportation of goods by failure to furnish cars the difference between their market-price or value at the destination to which they were to have been carried at the time they would have arrived there, if the carrier had performed his contract or duty, and their value at the same time at the place from which they were to have been carried, deducting the transportation charges.¹² In addition to these damages, there may often be a recovery of special damages where the carrier has clear notice that these damages will result from a breach of the contract.¹³ But mere knowledge that the goods are for sale at the destination is not sufficient to warrant a recovery of the profits on these contemplated sales.¹⁴ Manifestly, the shipper can not recover both the profits he might have made if his property had been shipped and the expense incurred in preparing it for transportation.¹⁵ It has been held proper to show in such an action

¹¹ *International &c. R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575.

¹² *St. Louis A. & T. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963; *Galena &c. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Michigan Southern & N. I. R. Co. v. Caster*, 13 Ind. 164; *Bridgman v. The Emily*, 18 Iowa 509; *Newport News & M. V. R. Co. v. Mercer*, 96 Ky. 475, 16 Ky. L. 555, 29 S. W. 301; *Armistead v. Shreveport &c. R. Co.*, 108 La. 171, 32 So. 456; *Harvey v. Connecticut &c. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Ward's Central & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Cowley v. Davidson*, 13 Minn. 92 (Gil. 86); *Birney v. Wabash &c. R. Co.*, 20 Mo. App. 470; *People v. New York, L. E. & W. R. Co.*, 22 Hun (N. Y.) 533; *Pennsylvania R.*

Co. v. Titusville &c. Road Co., 71 Pa. St. 350; *Missouri, K. & T. R. Co. v. Witherspoon* (Tex. Civ. App.), 38 S. W. 833; *Inman v. St. Louis S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37.

¹³ *Hadley v. Baxendale*, 9 Exch. 341; *International &c. R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. 575; *Gulf &c. R. Co. v. Martin* (Tex. Civ. App.), 28 S. W. 576.

¹⁴ *Harrison v. New Orleans &c. R. Co.*, 28 La. Ann. 777; *Harvey v. Connecticut &c. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673.

¹⁵ "Appellees can not be permitted to recover the profit they would have made had there been no breach of the contract, and at the same time recover for the expense they would have incurred had the contract been performed by appel-

that because of the refusal to transport plaintiff's grain it became heated and spoiled, although this resulted from something inherent in the nature of the grain itself.¹⁶ Where, however, the goods were to be shipped to a consignee at a price less than the market-price at the point of destination, it was held that the contract-price should govern in determining the damages, and not the market-price.¹⁷ Where the shipment is accepted after a wrongful refusal, the shipper may recover as part of his damages the expense of carrying it to the depot the second time.¹⁸ But it is to be observed that while the shipper, under a general contract with a carrier to ship his property, rests under the obligation to reduce his damages by procuring other conveyance for his goods on the failure of the carrier to furnish facilities, he is not ordinarily obliged to take this step until he is notified that the carrier can not or will not transport his goods within a reasonable time.¹⁹ It has been held that exemplary damages were recoverable by the shipper where the railroad company refused to carry his goods out of ill will or in wilful disregard of his rights.²⁰

§ 2166. Breach of contract to carry goods—Refusal to carry at rate previously agreed upon.—Where the carrier refuses transportation to a shipper at a rate previously agreed upon, it has been held that the shipper can not immediately sue for loss of prospective profits on contracts for the sale of the goods offered. His duty is to perform

lant. Had appellant performed its alleged obligation, appellees would have expended for machinery, lumber, labor, etc., as much as or more than they did expend; and therefore it is manifest that such expenditures were not a result of the breach of the alleged contract, and appellees can not recover both the profit they would have made upon and the expenditures involved in procuring, shelling, and shipping the corn." *Gulf & C. R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829.

¹⁶ *Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

¹⁷ *Missouri, K. & T. R. Co. v. Witherspoon* (Tex. Civ. App.), 38 S. W. 833.

¹⁸ *Inman v. St. Louis S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37. And where goods were at first refused and afterwards accepted and decreased in value in the meantime, it was held that the shipper could recover the difference. *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70.

¹⁹ *Louisville & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674.

²⁰ *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716.

his contracts and make shipments at the regular rates and then hold the carrier for the excess over the rate agreed upon.²¹

§ 2167. Damages for delay of carrier in delivery of shipment.—The measure of damages for delay of a carrier in the transportation and delivery of goods is the difference in the value of the goods at the time and place they ought to have been delivered and their value at the time of their actual delivery,²² and a like rule governs the measure of

²¹ *Steffen v. Mississippi & B. T. R. Co.*, 156 Mo. 322, 56 S. W. 1125. So, increased cost of transportation by other means may be all that can be recovered in some cases. *Ogden v. Marshall*, 8 N. Y. 340, *Seld. Notes* (N. Y.) 125, 59 Am. Dec. 497; *O'Connor v. Forster*, 10 Watts (Pa.) 418. See also, *Crouch v. Great Northern R. Co.*, 11 Exch. 742. Compare *Shores Lumber Co. v. Starke*, 100 Wis. 498, 76 N. W. 366.

²² *The Georg Dumois*, 88 Fed. 537; *East Tennessee, V. & G. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *Scott v. Boston &c. Steamship Co.*, 106 Mass. 468; *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *New Orleans, J. & G. N. R. Co. v. Tyson*, 46 Miss. 729; *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405; *East Tennessee, V. & G. R. Co. v. Hale*, 85 Tenn. 69, 1 S. W. 620; *Garlington v. Ft. Worth &c. R. Co.*, 34 Tex. Civ. App. 274, 78 S. W. 368; *Newell v. Smith*, 49 Vt. 255. And interest. *New York &c. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. ed. 292; *Houston &c. R. Co. v. Jackson*, 62 Tex. 209; 4 *Elliott R. R.* (2d ed.) § 1730. In an action against a carrier for failing to deliver goods within a reasonable time, the plaintiff can not recover more than the difference between the market value of the goods when they

should have been delivered, and their value when they were delivered, by showing a special contract with a third person, of which the carrier knew nothing. *Columbus & W. R. Co. v. Flourney*, 75 Ga. 745. In an action against a carrier to recover for damage to grain, resulting from unreasonable delay in its transportation, if the grain was to be delivered under a contract of sale by the shipper, the contract-price should be taken as the basis for estimating the damages; otherwise, the market-price at the place of delivery, at the time the grain should have reached there, should govern. *Illinois &c. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *G. S. Roth Clothing Co. v. Maine Steamship Co.*, 44 Misc. (N. Y.) 237, 88 N. Y. S. 987; *Lee v. St. Louis &c. R. Co.*, 136 N. Car. 533, 48 S. E. 809; *Chicago, R. I. & T. R. Co. v. Halsell* (Tex. Civ. App.), 81 S. W. 1241; *Chicago, R. I. & P. R. Co. v. C. C. Mill Elevator & Light Co.* (Tex. Civ. App.), 87 S. W. 753; *Gulf &c. R. Co. v. Beattie* (Tex. Civ. App.), 88 S. W. 367; *Houston &c. R. Co. v. Foster* (Tex. Civ. App.), 86 S. W. 44; *Missouri, K. & T. R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168; *Missouri, K. & T. R. Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632; *St. Louis, I. M. & S. R. Co. v. Burns* (Tex. Civ. App.), 80 S. W. 104; *St. Louis, I. M. & S. R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938; *Texas & P. R. Co. v. Stephens* (Tex. Civ. App.), 86 S. W. 933; *Texas Central R. Co. v. Miller* (Tex. Civ. App.), 88 S.

damages where cattle are the subject of the shipment.²³ The shipper of live stock is entitled to recover on the basis of the value of the stock at destination when they should have arrived, though they were not intended for immediate sale, but for feeding.²⁴ The shipper may recover what he paid for extra feed because of the delay in addition to the difference between their value in the condition in which they arrived and the condition in which they should have arrived.²⁵ In the absence of a special agreement by the carrier to deliver goods at any particular time, the law implies an agreement to deliver within a reasonable time.²⁶

§ 2168. Delay of carrier in delivery of shipment—Recovery of necessary expenses.—The consignees may, in addition to these damages, recover for other necessary expenses,²⁷ incurred by reason of the delay, such as telegrams,²⁸ but not for expenses incurred in going to the station prepared to receive the shipment before its arrival, where the carrier used due and reasonable diligence in making the delivery.²⁹ For delay in the delivery of household goods, the owner is generally held entitled to recover the reasonable value of the use of the property during the time of the delay.³⁰ Special damages for delay in transportation of freight are not recoverable unless the carrier

W. 499; *Texas & P. R. Co. v. Sherrod* (Tex. Civ. App.), 87 S. W. 363, *affd.* 99 Tex. 382, 89 S. W. 956.

²³ *Missouri, K. & T. R. Co. v. Truskett*, 104 Fed. 728, 44 C. C. A. 179, *affd.* 186 U. S. 480, 46 L. ed. 1259, 22 Sup. Ct. 943; *Perry v. Chicago & C. R. Co.*, 89 Mo. App. 49; *Sloop v. Wabash R. Co.*, 93 Mo. App. 605, 67 S. W. 956; *Galveston & C. R. Co. v. Botts* (Tex. Civ. App.), 70 S. W. 113; *Southern Kansas R. Co. v. Crump*, 32 Tex. Civ. App. 222, 74 S. W. 335; *Texas & P. R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272; *Texas & P. R. Co. v. Scharbauer* (Tex. Civ. App.), 52 S. W. 590; *Missouri, K. & T. R. Co. v. Truskett*, 186 U. S. 480, 46 L. ed. 1259, 22 Sup. Ct. 943, *affg.* 104 Fed. 728, 44 C. C. A. 179.

²⁴ *Missouri, K. & T. R. Co. v.*

Kyser, 38 Tex. Civ. App. 355, 87 S. W. 389.

²⁵ *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127, 80 S. W. 970.

²⁶ *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405.

²⁷ *San Antonio & A. P. R. Co. v. Josey* (Tex. Civ. App.), 71 S. W. 606.

²⁸ *Murrell v. Pacific Exp. Co.*, 54 Ark. 22, 14 S. W. 1098, 26 Am. St. 17; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. 288, 8 Am. & Eng. R. Cas. (N. S.) 512.

²⁹ *Thompson v. Alabama Midland R. Co.*, 122 Ala. 378, 24 So. 931.

³⁰ *Missouri, K. & T. R. Co. v. Clifton* (Tex. Civ. App.), 80 S. W. 386.

had notice before or at the time the contract of shipment was entered into of the special circumstances rendering prompt transportation necessary.³¹ Thus, it was held that a consignee of ice could not recover for the loss of fish for the packing of which it was intended to use the ice, in the absence of any evidence that the carrier knew or should have known that the ice was intended for that purpose.³²

§ 2169. Damages for delay in delivering shipment—Special damages.—It is well settled that special or peculiar damages claimed to have resulted from the carrier's delay can not be recovered unless the carrier has notice before or at the time of accepting the goods of the special circumstances rendering prompt transportation necessary, or at least ought to know of the same.³³ After a thorough review of the authorities bearing on this question, the Supreme Court of Mississippi in a case involving delay in the transportation of an essential part of a machine has said that it may be accepted as settled: "1st. The proximate and natural consequences of the breach must always be considered; 2d. Such consequences as from the nature and

³¹ *Crutcher v. Choctaw &c. R. Co.*, 74 Ark. 358, 85 S. W. 770; *American Exp. Co. v. Jennings*, 86 Miss. 329, 38 So. 374, 109 Am. St. 708; *Brown v. Weir*, 95 App. Div. (N. Y.) 78, 88 N. Y. S. 479; *Traywick v. Southern R. Co.*, 71 S. Car. 82, 50 S. E. 549, 110 Am. St. 563; *Gulf &c. R. Co. v. Cole*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 97, 16 S. W. 176; *Chicago, R. I. & P. R. Co. v. C. C. Mill Elevator & Light Co.* (Tex. Civ. App.), 87 S. W. 753; *Choctaw O. & G. R. Co. v. Bourland* (Tex. Civ. App.), 87 S. W. 173, revd. 90 S. W. 483, 3 L. R. A. (N. S.) 1111; *Daube v. Chicago, R. I. & T. R. Co.*, 39 Tex. Civ. App. 24, 86 S. W. 797; *Missouri, K. & T. R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168.

³² *Lewark v. Norfolk &c. R. Co.*, 137 N. Car. 383, 49 S. E. 882.

³³ *Hadley v. Baxendale*, 9 Exch. 341; *Crutcher v. Choctaw &c. R. Co.*, 74 Ark. 358, 85 S. W. 770;

American Exp. Co. v. Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. 708; *Brown v. Weir*, 95 App. Div. (N. Y.) 78, 88 N. Y. S. 479; *Traywick v. Southern R. Co.*, 71 S. Car. 82, 50 S. E. 549, 110 Am. St. 563; *Gulf &c. R. Co. v. Cole*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 97, 16 S. W. 176; *Chicago, R. I. & P. R. Co. v. C. C. Mill, Elevator & Light Co.* (Tex. Civ. App.), 87 S. W. 753; *Choctaw O. & G. R. Co. v. Bourland* (Tex. Civ. App.), 87 S. W. 173, revd. 90 S. W. 483, 3 L. R. A. (N. S.) 1111; *Daube v. Chicago, R. I. & T. R. Co.*, 39 Tex. Civ. App. 24, 86 S. W. 797; *Missouri, K. & T. R. Co. v. Allen*, 39 Tex. Civ. App. 236, 87 S. W. 168. But see, *Bourland v. Choctaw &c. R. Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. 647, as to delay in delivery after reaching destination and right to recover special damages therefor on notice at that time.

subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into; 3d. Damages, which fairly may be supposed not to have been the necessary and natural sequence of the breach, shall not be recovered unless, by terms of the agreement, or by direct notice, they are brought within the expectation of the parties; 4th. Losses of profits in a business can not be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from non-performance; 5th. If the contract is made with reference to embarking in a new business (such as sawing lumber for the market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, can not be looked to as an element of damages. These are dependent largely upon other contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather, or breakage of machinery; 6th. If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time; 7th. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him."³⁴ This subject is also considered in a comparatively recent case in Kentucky, wherein it is held that

³⁴ Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458.

notice to the agent of the carrier, at the place of delivery, after the shipment had failed to arrive on time, of the use to which the shipment, consisting of cotton-seed meal and hulls, was intended to be put by the consignee, was not sufficient to render the carrier liable.³⁵

§ 2170. Damages for loss of goods in transportation.—

The general rule allows the owner of goods lost or destroyed during transit to recover from the carrier, as damages, the value of the goods at destination, less the unpaid

³⁵ *Illinois Cent. R. Co. v. Nelson* (Ky.), 97 S. W. 757; and to same effect, see *Patterson v. Illinois Cent. R. Co.*, 123 Ky. 783, 97 S. W. 426; *Bradley v. Chicago & C. R. Co.*, 94 Wis. 44, 68 N. W. 410. But compare *Bourland v. Choctaw & C. R. Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. 647. In the course of the opinion in *Illinois Cent. R. Co. v. Nelson* (Ky.), 97 S. W. 757, it is said: "It is true that common carriers are liable in damages for the unreasonable delay in the transportation of property of all kinds—the extent of the liability being generally the difference between the market value of the goods when they should have been delivered, and their value at the time of their delivery; but when the carrier at the time the goods are received by it has notice of the use for which they are intended, or such use can be reasonably inferred from the character of the goods, and it may fairly be said that the special use to which the goods are to be put was within the contemplation of both parties at the time the contract was entered into, then special damages may be recovered. But it can not reasonably be said that cotton seed meal and hulls are such character of goods as to put the carrier on notice that their prompt delivery was necessary to avoid loss on cattle being fed by the shipper." See also, *Crutcher v. Choctaw & C. R. Co.*, 74 Ark. 358, 85 S. W. 770; *Wells v. National Life Assn.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A.

33; *Newport News & M. V. R. Co. v. Mercer*, 96 Ky. 475, 16 Ky. L. 555, 29 S. W. 301; *Duntley v. Boston & M. R. Co.*, 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. 610; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; *Illinois Cent. R. Co. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. 933. For cases in which special damages were or could be recovered, see *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583, 33 S. W. 835, 17 Ky. L. 1126; *Louisville & C. Packet Co. v. Bottorff*, 25 Ky. L. 1324, 77 S. W. 920; *Illinois Cent. R. Co. v. Mossbarger*, 28 Ky. L. 1217, 91 S. W. 1121; *Gulf & C. R. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320. There are also cases in which the measure of damages where the consignee refuses to accept because of the delay is the difference between the contract-price and their value when actually delivered. See *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267; and *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834. And where the goods are not for sale or the like, but are merely intended for some special purpose of the owner, the value of their use during the delay may be the measure of damages, usually their rental value. *Benton v. Fay*, 64 Ill. 417. See *La Conner & C. Co. v. Widmer*, 136 Fed. 177, 69 C. C. A. 193; *Texas & P. R. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54.

transportation charges, and, in addition, such incidental damages as naturally and proximately flow from the loss, and interest on the value of the goods from the time they should have been delivered.³⁶ But it seems that the general rule thus stated has its exceptions and is to be understood as qualified by another rule of damages to the effect that the damages for a failure to perform can not exceed the benefit which would have resulted from a performance of the contract.³⁷ Hence, there may be cases where the damages will be less than the value at the point of destination as where for example the goods are consigned to a purchaser for a price under the market.³⁸ And on the other hand, the damages may exceed those fixed by the general rule, as, for example, where the goods are converted by the carrier and sold for more than their market value at the point of destination. Here the shipper will be entitled to the amount realized by the carrier.³⁹ Wearing apparel is valued according to its condition at the time of the accident, without reference to its original cost.⁴⁰ The measure of damages for the loss of museum specimens has been held to be their value at the nearest market, rather than the value of the owner's time in collecting them.⁴¹

³⁶ *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. 654; *St. Louis, I. M. & S. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. 21; *Ringgold v. Haven*, 1 Cal. 108; *The Arctic Bird*, 109 Fed. 167; *Little v. Boston & C. R. Co.*, 66 Maine 239; *Atchison & C. R. Co. v. Lawler*, 40 Nebr. 356, 58 N. W. 968; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Louisville & C. R. Co. v. Mason*, 11 Lea (Tenn.) 116; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. 566; *Chesapeake & C. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161. See also, *Walker v. Southern R. Co.*, 76 S. Car. 308, 56 S. E. 952; and *Gulf, C. & S. F. R. Co. v. Graves*, 45 Tex. Civ. App. 375, 101 S. W. 488 (allowing interest).
³⁷ *Sturgess v. Bissell*, 46 N. Y. 462.

³⁸ *Magnin v. Dinsmore*, 62 N. Y. 35, 50 How. Pr. (N. Y.) 457, 20 Am. Rep. 442. See also, *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601.

³⁹ *Ewart v. Kerr*, 2 McMul. (S. Car.) 141.

⁴⁰ *Walsh v. New York City R. Co.*, 93 N. Y. S. 552; *Brooke v. Cunard Steamship Co.*, 93 N. Y. S. 369.

⁴¹ *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411. Market value at the place of shipment may sometimes be taken under contract or special circumstances. *Chicago & E. I. R. Co. v. Katzenbach*, 118 Ind. 174, 20 N. E. 709; *Evansville & T. H. R. Co. v. Montgomery*, 85 Ind. 494; *Lakeman v. Grinnell*, 5 Bosw. (N. Y.) 625. See also, *Rome R. Co. v. Sloan*, 39 Ga. 636.

§ 2171. **Damages for loss of commercial paper during transportation.**—The measure of damages for the loss of a chose in action, as a bill, note or other security for the payment of money, is prima facie that amount due thereon, but the defendant may reduce the damages by proof of payment, the maker's insolvency, or any fact tending to invalidate the security.⁴² In an action for a loss of this character a statement in the complaint is sufficient if it states the sum for which the instrument was drawn, but a mere averment that it was "valuable" or of a certain value, has been held insufficient. The complaint should describe the lost paper by stating its date, the amount for which it was drawn, the time when it was payable and to whom payable.⁴³

§ 2172. **Damages for delay of carrier in giving notice of arrival of goods.**—In places where a railroad company has established the custom of notifying consignees of the arrival of their freight at the depot, it seems that patrons have a right to rely on the custom. And it has been held that a consignee not notified may recover—not the value of the goods at the time of their arrival, when notice should have been given, as this would virtually compel the railroad to purchase all such freight—but the difference between the then value and their value at the date of the notice to the consignee.⁴⁴ In this connection it may be well to note also a comparatively recent case in which, notwithstanding the general rule requiring notice to the carrier at or before shipment in order to recover special damages, a distinction is made and it is held that a carrier may be liable for special damages for delay in delivering cattle food after its arrival where the carrier is given notice that such delay will result in injury to the cattle, although such notice is not given until after it reaches its destination.⁴⁵

⁴² Zeigler v. Wells, 23 Cal. 179, 83 Am. Dec. 87. See also, 1 Sedgwick Damages, § 256.

⁴³ Zeigler v. Wells, 23 Cal. 179, 83 Am. Dec. 87.

⁴⁴ New Orleans, J. & G. N. R. Co. v. Tyson, 46 Miss. 729.

⁴⁵ Bourland v. Choctaw &c. R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. 647.

§ 2173. Damages for nondelivery of shipment by carrier.—The measure of damages where the carrier fails to deliver or delivers to one not entitled to the goods is, as a general rule, the value of the goods at the place of destination at the time they should have been delivered, with interest from that time, deducting the unpaid cost of transportation.⁴⁶ Damages of a special character beyond this are not usually recoverable unless the peculiar circumstances from which the damages may ensue are communicated to the carrier when the contract is made.⁴⁷ Although the value to be considered is the value at the point of destination, it would seem that the carrier can not complain of evidence of the value of the goods at the point of shipment since the presumption is that the value there is less than at the point of destination.⁴⁸

§ 2174. Damages for nondelivery of goods—Seizure under legal process.—Generally speaking, a railroad company is excused from liability for not transporting and delivering property, when, without fault or collusion on its part, the property is seized by legal process and taken out of its possession.⁴⁹ Where, however, the liability of the carrier is clear, the damages, ordinarily, would be measured by the value of the goods at the place where they were taken and not at their destination.⁵⁰

⁴⁶ *Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44; *Atlantic & B. R. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530; *Cincinnati O. & S. W. R. Co. v. Webb*, 8 Ky. L. 44; *Baltimore & C. R. Co. v. Pumphrey*, 59 Md. 390; *Forbes v. Boston & L. R. Co.*, 133 Mass. 154; *Horne v. Missouri Pac. R. Co.*, 70 Mo. App. 285; *Baltimore & C. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. 579; *Carter v. International & G. N. R. Co.* (Tex. Civ. App.), 93 S. W. 681; *Missouri, K. & T. R. Co. v. C. H. Rines* (Tex. Civ. App.), 84 S. W. 1092.

⁴⁷ *Hadley v. Baxendale*, 9 Exch. 341; *Grayson County Nat. Bank v. Nashville & C. R. Co.* (Tex. Civ. App.), 79 S. W. 1094; *Williamsport*

Hardwood L. Co. v. Baltimore & C. R. Co. (W. Va.), 77 S. E. 333. But in *Clements v. Burlington, C. R. & N. R. Co.*, 74 Iowa, 442, 38 N. W. 144, it was held that evidence of the price at which the plaintiff had contracted to sell the goods at destination was admissible as affording some evidence of their value at that point.

⁴⁸ *Echols v. Louisville & N. R. Co.*, 90 Ala. 366, 7 So. 655; *Rome R. Co. v. Sloan*, 39 Ga. 636.

⁴⁹ *Pittsburg, C. & St. L. R. Co. v. Cox*, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377. See also, vol. 4, tit. Bailments, ch. on "Carriers of Goods."

⁵⁰ *Van Winkle v. United States Mail Steamship Co.*, 37 Barb. (N. Y.) 122. See, generally, as to

§ 2175. Exemplary damages for refusal of carrier to deliver.—Exemplary or punitive damages can not, of course, be recovered in ordinary cases for mere delay, failure to carry, loss or injury to the goods, or the like. Where, however, it is pleaded and shown that the carrier wantonly and, in reckless disregard of the rights of the consignee, wilfully refused to deliver his goods, the jury, in some jurisdictions at least, may allow exemplary damages in addition to the compensatory damages proved.⁵¹ But where there is doubt about the person entitled to the goods, the carrier has a reasonable time to investigate the matter and is not to be made liable in exemplary damages because of mere brusqueness of the agent, not amounting to insult, in refusing to turn the goods over pending investigation.⁵²

§ 2176. Damages for refusing to carry passenger according to the contract.—If the carrier fails to perform his contract of carriage, he will be liable in damages for what the passenger necessarily expended in completing the trip from the place where he was abandoned, together with compensation for time lost, beyond the reasonable length of time which it would have taken the carrier to carry the passenger to his destination, the value of which is to be computed by the reasonable value of the services of the passenger in his usual occupation at the place of destination.⁵³ It is another statement of the principle to say that where special damages are not demanded, the measure of damages for breach of an ordinary contract of carriage is what it would cost the passenger to get from the point of departure to his destination in the most feasible and reasonable way.⁵⁴ It is the duty of an injured passenger to

seizure of goods by legal process, *Pittsburg, C., C. & St. L. R. Co. v. Cox*, 36 Ind. App. 291, 73 N. E. 120, 114 Am. St. 377 and note.
⁵¹ *Silver v. Kent*, 60 Miss. 124; *Texas & C. R. Co. v. Curry*, 2 Wills. Civ. Cas. Ct. App. (Tex.) § 453. See also, *Stricker v. Leathers*, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600n; *Avinger v. South Carolina*

R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716.

⁵² *Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252.

⁵³ *Ransberry v. North American Transp. & C. Co.*, 22 Wash. 476, 61 Pac. 154.

⁵⁴ *Rose v. King*, 76 App. Div. (N. Y.) 308, 78 N. Y. S. 419.

minimize his damages and he can not recover for injuries which he might have prevented by ordinary care.⁵⁵

§ 2177. Refusal to carry passenger according to contract—Damages limited to proximate consequences.—The damages are limited, in ordinary cases, to those which naturally and ordinarily follow as a proximate result of the breach of the contract.⁵⁶ The damages are limited to compensation for actual loss sustained unless the case contains some element of gross disregard of the rights of the passenger or facts showing insult or abuse, or is a proper one for special damages duly pleaded. The carrier may be held responsible for discomfort, mental distress, expenses and charges proximately resulting from the breach of the contract whether the passenger is carried beyond his station,⁵⁷ or is let off the train short of his destination.⁵⁸ The damages for failure to stop a train at a station and take on a passenger are the cost of the ticket,⁵⁹ and inconvenience directly resulting from the negligent act.⁶⁰ The passenger may likewise recover for personal injury sustained by him as a result of the breach of the contract to transport him in

⁵⁵ *Southern R. Co. v. Miller*, 33 Ky. L. 505, 110 S. W. 351; *Carter v. Southern R. Co.*, 75 S. Car. 355, 55 S. E. 771.

⁵⁶ *Barney v. Delaware, L. & W. R. Co.*, 61 Misc. (N. Y.) 62, 113 N. Y. S. 138; *Missouri, K. & T. R. Co. v. Morgan*, 49 Tex. Civ. App. 212, 108 S. W. 724.

⁵⁷ *Central of Georgia R. Co. v. Morgan*, 161 Ala. 483, 49 So. 865; *Blackburn v. Alabama & C. R. Co.*, 143 Ala. 346, 39 So. 345; *St. Louis & C. R. Co. v. Evans*, 94 Ark. 324, 126 S. W. 1058; *St. Louis Southwestern R. Co. v. Knight*, 81 Ark. 429, 99 S. W. 684; *Sappington v. Atlanta & West Point R. Co.*, 127 Ga. 178, 56 S. E. 311; *Dalton v. Kansas City, F. S. & M. R. Co.*, 78 Kans. 232, 96 Pac. 475, 17 L. R. A. (N. S.) 1226n; *Chesapeake & O. R. Co. v. Lynch*, 28 Ky. L. 467, 89 S. W. 517; *Tennessee Cent. R. Co. v. Brasher's Guardian*, 29 Ky. L. 1277,

97 S. W. 349; *Hayes v. Wabash R. Co.*, 163 Mich. 174, 128 N. W. 217, 31 L. R. A. (N. S.) 229n; *Smith v. St. Louis & S. F. R. Co.*, 127 Mo. App. 53, 106 S. W. 108; *Black v. Atlantic Coast Line R. Co.*, 82 S. Car. 478, 64 S. E. 418.

⁵⁸ *St. Louis Southwestern R. Co. v. Knight*, 77 Ark. 20, 88 S. W. 1035; *Morris v. Colorado Midland R. Co.*, 48 Colo. 147, 109 Pac. 430, 139 Am. St. 268; *Southern R. Co. v. Miller*, 33 Ky. L. 505, 110 S. W. 351; *Taber v. Seaboard Air Line R. Co.*, 81 S. Car. 317, 62 S. E. 311; *Pullman Co. v. Cox*, 56 Tex. Civ. App. 327, 120 S. W. 1058.

⁵⁹ *Caldwell v. Atlantic Coast Line R. Co.*, 75 S. Car. 74, 55 S. E. 131.

⁶⁰ *Milhouse v. Southern R. Co.*, 72 S. Car. 442, 52 S. E. 41, 110 Am. St. 620; *Berley v. Seaboard Air Line R. Co.*, 83 S. Car. 411, 65 S. E. 456.

safety,⁶¹ and where the negligent act shows wantonness or wilfulness, punitive damages may be allowed.⁶²

§ 2178. Breach of contract for transportation—Delay of passenger.—The passenger compelled to delay his journey at a junction point because of error in the sale of his ticket by the initial carrier may recover the expenses incurred by such delay,⁶³ and the passenger may recover damages for discomfort, exposure and sickness sustained as a result of the failure of a railway company to give him the ticket contracted for.⁶⁴ The measure of damages for the failure of an initial carrier to return to a passenger that part of his ticket entitling him to transportation over a connecting line is the extra fare demanded and paid by him.⁶⁵ Damages for negligent delay in furnishing transportation are merely compensation for the loss of time and for any expenses incurred during the delay.⁶⁶

§ 2179. Damages for loss of baggage.—The measure of damages for loss or injury to baggage is the actual value of the articles destroyed and the damage to articles partially destroyed and no account is to be taken of the deprivation of the use of the articles nor the mental distress occasioned by the loss.⁶⁷ The value is the fair market-

⁶¹ *El Paso & N. E. R. Co. v. Sawyer*, 54 Tex. Civ. App. 387, 119 S. W. 110; *El Paso & N. E. R. Co. v. Landon* (Tex. Civ. App.), 124 S. W. 744.

⁶² *Cook v. Southern R. Co.*, 153 Ala. 118, 45 So. 156; *Southern R. Co. v. Wooley*, 158 Ala. 447, 48 So. 369; *St. Louis Southwestern R. Co. v. Pearson*, 88 Ark. 200, 114 S. W. 211; *Williamson v. Central of Georgia R. Co.*, 127 Ga. 125, 56 S. E. 119; *Indiana Union Traction Co. v. Heller*, 44 Ind. App. 385, 89 N. E. 419; *Cincinnati, N. O. & T. P. R. Co. v. Strosnider* (Ky.), 121 S. W. 971; *Tennessee Cent. R. Co. v. Brasher's Guardian*, 29 Ky. L. 1277, 97 S. W. 349; *Yazoo & M. V. R. Co. v. Hughes*, 100 Miss. 95, 50 So. 627; *St. Louis & S. F. R. Co. v. Garnar*, 96 Miss. 577, 51 So.

273; *Harris v. Delaware L. & W. R. Co.* (N. J.), 72 Atl. 50; *Hutchinson v. Southern R. Co.*, 140 N. Car. 123, 52 S. E. 263; *Trapp v. Southern & C. R. Co.*, 72 S. Car. 343, 51 S. E. 919; *Milhouse v. Southern R. Co.*, 72 S. Car. 442, 52 S. E. 41, 110 Am. St. 620.

⁶³ *International & C. R. Co. v. Doolan* (Tex. Civ. App.), 120 S. W. 1118.

⁶⁴ *Texas & P. R. Co. v. Wynn*, 44 Tex. Civ. App. 29, 97 S. W. 506.

⁶⁵ *St. Louis & C. R. Co. v. Cates*, 87 Ark. 162, 112 S. W. 202.

⁶⁶ *Illinois Cent. R. Co. v. Head*, 119 Ky. 809, 27 Ky. L. 270, 84 S. W. 751. But here, too, there may be exceptional cases in which special damages may be recovered.

⁶⁷ *Houston & C. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W.

value of the property.⁶⁸ It is not allowed the passenger to recover the expense incurred by him in making search for his baggage,⁶⁹ nor for the amount spent in purchasing clothing and other articles of immediate necessity caused by the loss of the baggage.⁷⁰ Neither can the passenger recover as part of his compensation a loss of profits which he expected in any way to derive from the contents of the trunk for the very sufficient reasons that such articles are not baggage and such profits constitute speculative or remote damages.⁷¹ It has been held that where the articles of baggage are second-hand, as to which there is no market-value, the measure of damages is not their supposed value in the public market,⁷² but is the actual loss which the passenger sustained by being deprived of them.⁷³ The amount and extent of the damages must be set forth clearly with respect of each of the articles contained in the lost trunk.⁷⁴

§ 2180. Damages for loss of baggage—Sample cases.— Damages for breach of contract in the transportation of sample cases cover only those in contemplation of the parties at the time of making the contract. A notice by the passenger to the baggageman that he had a large sample trunk which he wished checked has been held insufficient to charge the carrier with knowledge that any special reason existed for expediting the delivery of the trunk, so as to render the carrier liable for damages caused by the inability of the passenger to fulfill engagements already made to meet prospective customers to whom no goods could be sold without the samples.⁷⁵

437; *Wall v. Atlantic Coast Line R. Co.*, 71 S. Car. 337, 51 S. E. 95.

⁶⁸ *Anderson v. Northeastern R. Co.*, 4 L. T. 216; *Illinois & C. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *New Orleans, J. & G. N. R. Co. v. Moore*, 40 Miss. 39; *Fralloff v. New York C. & H. R. Co.*, 10 Blatchf. (U. S.) 16.

⁶⁹ *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671.

⁷⁰ *New Orleans, J. & G. N. R. Co. v. Moore*, 40 Miss. 39.

⁷¹ *Michigan Southern & N. I. R. Co. v. Oehm*, 56 Ill. 293; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

⁷² *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 382.

⁷³ *International & C. R. Co. v. Nicholson*, 61 Tex. 550.

⁷⁴ *Houston & C. R. Co. v. Seale*, 28 Tex. Civ. App. 364, 67 S. W. 437.

⁷⁵ *Katz v. Cleveland & C. R. Co.*, 46 Misc. (N. Y.) 259, 91 N. Y. S. 720.

§ 2181. Damages for breach of contract by sleeping-car company.—The measure of damages for the breach of a contract for a berth in a sleeping-car is not the money paid for the sleeping-car ticket. The damages recoverable are those which may fairly be supposed to have been in the contemplation of the parties to the contract at the time of making it, as likely to result from a breach of it. It seems very plain that such damages should include compensation for the inconvenience and the suffering or illness of the passenger who is excluded from the berth which he has purchased in the sleeping-car.⁷⁶ If a sleeping-car company sells to a passenger who has purchased and exhibits a coupon ticket over a particular route a ticket for a berth, in its sleeping-car, to be hauled over that route, and the car is hauled over another route and the passenger, refusing to pay train fare over the route which the car actually takes, is ejected therefrom, the sleeping-car company will be liable to him for a breach of its representation and warranty that its car would be hauled over the route for which he has purchased his ticket.⁷⁷ Where a sleeping-car company has agreed to furnish a designated section to a passenger it can not excuse its failure to comply with its agreement on the ground that other passengers demanded the particular section before the passenger to whom the company agreed to furnish it presented herself to pay for or to occupy the berth.⁷⁸

§ 2182. Damages for breach of contract to construct railroads and stations.—The measure of damages where a railroad company breaks its agreement with a landowner to build a station on his land is the enhanced value of the land had the depot been erected.⁷⁹ In a case where the

⁷⁶ Pullman Palace-Car Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

⁷⁷ Pullman Palace-Car Co. v. King, 99 Fed. 380, 39 C. C. A. 573.

⁷⁸ Pullman Palace-Car Co. v. Booth (Tex. Civ. App.), 28 S. W. 719. See also, Mann Boudoir Car

Co. v. Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289; Pullman Palace-Car Co. v. Marsh, 24 Ind. App. 129, 53 N. E. 782.

⁷⁹ Louisville, A. & P. U. Elec. R. Co. v. Whipps, 118 Ky. 121, 25 Ky. L. 2312, 80 S. W. 507.

contract bound a railroad company to erect a depot on land and also to construct a sufficient fence on each side of a strip of land conveyed by the owner, and this contract was broken, the measure of damage was held to be the value of the strip of land and the damage occasioned to the balance of the farm by the failure to fence it.⁸⁰ The proper measure of damages for failure to construct and operate an extension of an electric line to reach outlying lands under a contract for such construction is the difference between the value of the land with the contract carried out and its value with the contract unfulfilled.⁸¹ For breach of a contract with a city to make the city the end of a division, the damages recoverable where a definite amount has been paid by the city as a consideration for the performance of the contract have been held to be that sum and interest thereon, and where the contract called for the erection of buildings in the city it was held that the value of such building for taxation could be treated as the measure of damages.⁸²

§ 2183. Damages for breach of contract in the transmission and delivery of telegrams.—The damages recoverable for breach of the contract between a telegraph company and the sender of the message are those damages which may fairly and reasonably be considered to arise naturally from the breach of the contract or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach.⁸³ The damages must be the natural

⁸⁰ Rockford, R. I. & St. L. R. Co. v. Beckemeier, 72 Ill. 267.

⁸¹ Belt v. Washington Water Power, 24 Wash. 387, 64 Pac. 525. See also, Smith v. Los Angeles & P. R. Co., 98 Cal. 210, 33 Pac. 53.

⁸² Missouri, K. & T. R. Co. v. Ft. Scott, 15 Kans. 435.

⁸³ Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Pacific Postal Tel. Cable Co. v. Fleischer, 66 Fed. 899, 14 C. C. A. 166; McBride v. Sunset Tel. Co., 96 Fed. 81; Western Union Tel.

Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775; Squire v. Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; MacColl v. Western Union Tel. Co., 44 N. Y. Super. Ct. 487; Abeles v. Western Union Tel. Co., 37 Mo. App. 554; Hughes v. Western Union Tel. Co., 79 Mo. App. 133; First National Bank v. Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Houston & C. Tel. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605; Primrose v. Western Union Tel. Co.,

and direct or proximate consequence of the default complained of.⁸⁴ The rule of the common law limiting damages to those which are the direct and proximate result of the breach of the contract is not abrogated by statutes making telegraph companies liable for all damages occasioned by the negligence of their operators in receiving, transmitting or delivering messages;⁸⁵ nor by statutes allowing the recovery of damages for mental anguish though unaccompanied by bodily injury.⁸⁶

§ 2184. Transmission and delivery of messages—Notice of importance.—There can be no recovery of special damages for breach of the contract unless the telegraph company had notice of the importance of the message and the probable consequences that would result from its negligent transmission, and this notice may be implied from the language of the message itself.⁸⁷ Death messages,⁸⁸ telegrams inquiring as to the condition of one's family (in some jurisdictions)⁸⁹ and telegrams importing on their face a proposal to buy or sell, are generally regarded as sufficient to charge the company with the necessity of prompt transmission and delivery.⁹⁰ But a telegram addressed to a doctor asking him to meet an incoming passenger at a station will not have this effect where there is nothing on its face to indicate that the service of a doctor as a physician was required.⁹¹

154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. 1098; Candee v. Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452.

⁸⁴ Parks v. Alta California Telegraph Co., 3 Cal. 422, 73 Am. Dec. 589; Western Union Tel. Co. v. Woods, 56 Kans. 737, 44 Pac. 989; Barnes v. Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666, 103 Am. St. 776; Pegram v. Western Union Tel. Co., 100 N. Car. 28, 6 S. E. 770, 6 Am. St. 557; Western Union Tel. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. 835; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. 843; Western Union Tel. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052.

⁸⁵ Fisher v. Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545.

⁸⁶ Arial v. Western Union Tel. Co., 70 S. Car. 418, 50 S. E. 6.

⁸⁷ Newsome v. Western Union Tel. Co., 137 N. Car. 513, 50 S. E. 279; Capers v. Western Union Tel. Co., 71 S. Car. 29, 50 S. E. 537.

⁸⁸ Harrison v. Western Union Tel. Co., 136 N. Car. 381, 48 S. E. 772.

⁸⁹ Willis v. Western Union Tel. Co., 69 S. Car. 531, 48 S. E. 538, 104 Am. St. 828.

⁹⁰ Western Union Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432; Brooks v. Western Union Tel. Co., 26 Utah 147, 72 Pac. 499; Beatty Lumber Co. v. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

⁹¹ Williams v. Western Union Tel. Co., 136 N. Car. 82, 48 S. E. 559.

§ 2185. Transmission and delivery of messages—Cipher and unintelligible messages.—Where the message as delivered for transmission is in cipher and unintelligible except to the sender and addressee and the company has no information otherwise as to its character or purport nor of its importance and urgency, the party injured can recover no more than nominal damages or at most the sum paid by the sender for the service.⁹²

§ 2186. Transmission and delivery of telegrams—Loss of profits.—It is also the general doctrine of the courts that where a message is delivered to a telegraph company for transmission which on its face orders affirmative action by the addressee—as where it orders a purchase or sale of property—and it is not delivered within a reasonable time, the sender of the message, or the addressee where it is sent for his benefit—may maintain an action for damages and may recover the loss of the profits which would have accrued to him if the message had been correctly sent, and if the transaction therein directed had been carried out.⁹³ The profits intended by this principle are the certain profits of a transaction and not profits depend-

⁹² *Horne v. Midland R. Co.*, L. R. 7 C. P. 583; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60; *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Beaupre v. Pacific & C. Tel. Co.*, 21 Minn. 155; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *McKay v. Western Union Tel. Co.*, 16 Nev. 222; *MacColl v. Western Union Tel. Co.*, 7 Abb. N. Cas. (N. Y.) 151; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300, 6 S. E. 731, 6 Am. St. 590; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. 37; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305; *Houston & C. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334,

39 S. W. 605; *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131, Fed. Cas. No. 1234; *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

⁹³ *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Brewster v. Western Union Tel. Co.*, 65 Ark. 537, 47 S. W. 560; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. DuBois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. 109; *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8; *True v. International Tel. Co.*, 60 Maine 9, 11 Am. Rep. 156; *Pearshall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. 662; *Rittenhouse v. Independent Line*, 44 N. Y. 263, 4 Am. Rep. 673; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751; *Washington & N. O. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

ent upon fluctuations of the market and the hazards and chances of business. These are too remote and speculative.⁹⁴ Where the telegraph company makes a mistake in quoting prices in transmitting a message and the addressee buys or sells to his loss, the telegraph company must as a general rule make good his loss.⁹⁵ The measure of damages for delay in delivering a message accepting an offer to sell goods at a certain price in consequence of which a bargain is lost is the additional sum which the sender of the message would have been compelled to pay in the same place in order to obtain the same quality of similar goods.⁹⁶ The sender of the message is, of course, entitled to recover the fee paid by him to the company for the transmission of the message.⁹⁷

§ 2187. Transmission and delivery of telegrams—Illustrations of remote damages.—Damages have been held too remote for recovery in the following cases: where, owing to the delay of a telegraph company in delivering a message a barge did not reach a lot of staves in time to prevent their being lost by a flood;⁹⁸ where the plaintiff, by reason of the nondelivery of a message, was obliged to take a rough vehicle to reach his destination after arrival at a station, instead of the family carriage, in consequence of

⁹⁴ *Western Union Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949; *Fisher v. Western Union Tel. Co.*, 119 Ky. 885, 27 Ky. L. 340, 84 S. W. 1179; *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223; *Texas & W. Tel. & C. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *Brooks v. Western Union Tel. Co.*, 26 Utah 147, 72 Pac. 499.

⁹⁵ *Swan v. Western Union Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *Hollis v. Western Union Tel. Co.*, 91 Ga. 801, 18 S. E. 287; *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. 36; *Western Union Tel. Co. v. Hart*, 62 Ill. App. 120; *Fisher v. Western Union Tel. Co.*, 119 Ky. 885, 27 Ky.

L. 340, 84 S. W. 1179; *Hays v. Western Union Tel. Co.*, 70 S. Car. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. Rep. 731; *Western Union Tel. Co. v. Spivey*, 98 Tex. 308, 83 S. W. 364.

⁹⁶ *True v. International Tel. Co.*, 60 Maine 9, 11 Am. Rep. 156; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Beaupre v. Pacific & C. Tel. Co.*, 21 Minn. 155; *Leonard v. New York & C. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

⁹⁷ *Taliferro v. Western Union Tel. Co.*, 21 Ky. L. 1290, 54 S. W. 825; *Kennon v. Western Union Tel. Co.*, 126 N. Car. 232, 35 S. E. 468.

⁹⁸ *Bodkin v. Western Union Tel. Co.*, 31 Fed. 134.

which he sustained numerous bruises;⁹⁰ where the message announced to the plaintiff the last illness of his father and by its nondelivery the plaintiff lost a note which his father would have given him had the plaintiff been able to see him before his death;¹ where the message ordered a saw, and a mill lay idle for want of it, and the message did not show for whom it was intended and the agent was not told that a sawmill was lying idle on that account.²

§ 2188. Transmission and delivery of telegrams—Mental anguish.—The cases are not in entire harmony on the question of the right to damages for mental anguish caused by breach of the contract. Many of the states allow the recovery of damages of this character on the ground that they are actual damages. Such damages are sanctioned by the courts of Texas,³ Tennessee,⁴ Alabama,⁵ Kentucky,⁶ Iowa,⁷ Louisiana,⁸ Nevada,⁹ and South Carolina.¹⁰ They are refused in Florida,¹¹ Georgia,¹² Indiana,¹³ Kansas,¹⁴

⁹⁰ *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

¹ *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 12 Ky. L. 265, 13 S. W. 880.

² *Elliott v. Western Union Tel. Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. 872.

³ *Sorelle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Gulf, C. & Santa Fe R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

⁴ *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. 864; *Western Union Telephone Co. v. Mellon*, 96 Tenn. 72, 33 S. W. 725; *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. 706.

⁵ *Telephone Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. 148; *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517.

⁶ *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 12 Ky. L. 265, 13 S. W. 880; *Western Union Telephone Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. 366; *Western Union Telephone Co. v. Fisher*, 107 Ky. 513, 21 Ky. L. 1293, 54 S. W. 830.

⁷ *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. 294; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. 268.

⁸ *Grayham v. Western Union Tel. Co.*, 109 La. 1069, 34 So. 91.

⁹ *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666, 103 Am. St. 776; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

¹⁰ *Simmons v. Western Union Tel. Co.*, 63 S. Car. 425, 41 S. E. 521, 57 L. R. A. 607. See also, *Bailey v. Western Union Tel. Co.*, 150 N. Car. 316, 63 S. E. 1044; *Cates v. Western Union Tel. Co.*, 151 N. Car. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286; note in *Ann. Cas.* 1912D, 839.

¹¹ *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

¹² *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. 183; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638.

¹³ *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846.

¹⁴ *West v. Western Union Tel.*

Minnesota,¹⁵ Mississippi,¹⁶ Ohio,¹⁷ West Virginia,¹⁸ Wisconsin,¹⁹ Oklahoma,^{19a} and Virginia.²⁰

§ 2189. Transmission and delivery of telegrams—Exemplary damages.—Exemplary damages may be recovered in cases where the failure of the telegraph company to perform its duty arose from the wantonness or malice of its agent or servants,²¹ but it is held essential to this recovery that actual damages be shown.²²

§ 2190. Damages for breach of contracts of bailment generally.—Where the subject of the bailment is money, the measure of damages for the conversion of the money is the interest on the money for the time it is withheld.²³ Where the receipt for a bailment states its value, the measure of damages for its conversion has been held the amount set out in the receipt.²⁴ For the unauthorized use of the bailment, the bailee is generally liable for the value of the use itself and any damages that may be done to the property in so using it, or if the use amounts to a conversion, then he is

Co., 39 Kans. 93, 17 Pac. 807, 7 Am. St. 530n. But see *Western Union Tel. Co. v. Bodkin*, 79 Kans. 793, 101 Pac. 652.

¹⁵ *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. 507.

¹⁶ *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859, 24 Am. St. 300.

¹⁷ *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. 648.

¹⁸ *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

¹⁹ *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. 17.

^{19a} *Western Union Tel. Co. v. Chouteau*, 28 Okla. 664, 115 Pac. 879, Ann. Cas. 1912D, 824.

²⁰ *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. 919. See also, *Rowan v. Western Union Tel. Co.*, 149 Fed. 550; *Kyle v. Chicago & C. R. Co.*, 182 Fed. 613, 165 C. C. A. 151.

²¹ *Western Union Tel. Co. v. Seed*, 115 Ala. 670, 22 So. 474; *American Union Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. 660; *Beasley v. Western Union Tel. Co.*, 39 Fed. 181; *West v. American Union Tel. Co.*, 39 Kans. 93, 7 Am. St. 530n, 17 Pac. 807; *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. 461; *Hellams v. Western Union Tel. Co.*, 70 S. Car. 83, 49 S. E. 12; *Lewis v. Western Union Tel. Co.*, 57 S. Car. 325, 35 S. E. 556.

²² *Schippel v. Norton*, 38 Kans. 567; *Davis v. Western Union Tel. Co.*, 13 Ohio Dec. 440, 1 Cin. Super. Ct. 100; *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. 919.

²³ *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474, 74 S. W. 1038.

²⁴ *Drew v. King*, 76 N. H. 184, 80 Atl. 642; *Whittredge v. Maxam*, 68 N. H. 323, 44 Atl. 491; *National Cash Register Co. v. Caillias*, 84 N. Y. S. 166.

liable for the value of the property. The measure of damages in such a case is not the value that may be produced by the labor and investment of the bailee combined with such use of the property.²⁵ Where an article is delivered to a workman for alteration or repair and the work is so unskilfully done that the article is rendered unfit for the use of the owner, he may refuse to accept it and may recover its value from the workman to whom it was delivered.²⁶ Where the breach in such a case does not amount to rendering the article entirely unfit for use, the measure of damages is the cost of making the article fit for use and this is usually the difference between the actual value of the article and what it would have been worth if repairs had been properly made.²⁷ In a case where the buyer has paid the purchase-price and the title to the goods has passed to him and they are afterwards injured or destroyed through the negligence of the seller acting as bailee, the buyer has been held entitled to the value of the goods or the amount of injury to them.²⁸ Where the bailment is stolen from the bailee, the measure of damages is the market value of the bailment at the time of the larceny.²⁹

§ 2191. Damages for conversion of pledged commercial paper.—The value of the property at the date of the conversion is the true criterion of damages.³⁰ If at the maturity of the debt for which the pledge was made the

²⁵ *State v. State Journal Co.*, 75 Nebr. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174.

²⁶ *May v. Gunther*, 20 Misc. (N. Y.) 659, 46 N. Y. S. 379.

²⁷ *May v. Georger*, 21 Misc. (N. Y.) 622, 47 N. Y. S. 1057.

²⁸ *Cook &c. Contracting Co. v. Bell* (Ala.), 59 So. 273.

²⁹ *Third National Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35. See also, *Oregon Imp. Co. v. Seattle Gas Light Co.*, 4 Wash. 634, 30 Pac. 672.

³⁰ *Hamburg Bank v. George*, 92 Ark. 472, 123 S. W. 654; *Harrell v. Citizens' Banking Co.*, 111 Ga. 846, 36 S. E. 460; *Fisher v. George S. Jones Co.*, 108 Ga. 490, 34 S.

E. 172; *Loomis v. Stave*, 72 Ill. 623; *Eisendrath v. Knauer*, 64 Ill. 396; *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497n; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658; *Hennessey v. Stempel*, 108 La. 159, 32 So. 394; *Iler v. Baker*, 82 Mich. 226, 46 N. W. 377; *August v. O'Brien*, 50 App. Div. (N. Y.) 626, 63 N. Y. S. 989; *In re Jamison's Estate*, 163 Pa. St. 143, 29 Atl. 1003, revg. 3 Pa. Dist. 217; *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112, 20 Atl. 203, 9 L. R. A. 260; *Ainsworth v. Bowen*, 9 Wis. 348. Interest may also be recovered in a proper case.

debtor tenders payment of it, and demands the return of the security, and this is not returned, the conversion is made at that time, and the valuation of it in a suit for such conversion should be made as of the time of such demand and refusal.³¹ It may be shown in mitigation of damages in an action by the pledgor for the conversion of a pledge that the pledgee has applied the proceeds thereof to the use of the pledgor in payment of the debt secured or of other debts due from him to the pledgee.³² This is upon the principle that the owner of property who has received the value of the property wrongfully converted or kept from him shall not recover that value a second time in an action therefor.

§ 2192. **Damages for conversion of pledge by pledgee or third person.**—The measure of damages in an action against the pledgor or one acting under his authority for a conversion of the pledge is in like manner the value of the pledge with interest from the time of conversion, unless such amount exceeds the sum due from him to the pledgee, in which case that sum is the proper measure of damages.³³ In an action by a pledgee of goods against a third party for their conversion, the measure of damages is the full value of the goods.³⁴ This rule is founded on

³¹ *Hennessey v. Stempel*, 108 La. 159, 32 So. 394; *Reynolds v. Witte*, 13 S. Car. 5, 36 Am. Rep. 678. Where the pledgee of collateral security notes collects them, he knows the dates of such collections as well as the amount received by him and if in an action by him on the principal debt he fails to show such dates and amounts, he will be charged with face value of such collateral notes as of the date of their maturity. *Farm Inv. Co. v. Wyoming College*, 10 Wyo. 240, 68 Pac. 561. In an action against pledgee for conversion of mortgage, the mortgagor not being shown to be insolvent, no error is committed by the court in refusing to instruct the jury that the value of the converted security must be determined by the value of the

mortgaged property. *Barber v. Hathaway*, 169 N. Y. 575, 61 N. E. 1127.

³² *Bailey v. Godfrey*, 54 Ill. 507, 5 Am. Rep. 157; *Baldwin v. Bradley*, 69 Ill. 32; *Belden v. Perkins*, 78 Ill. 449; *Loomis v. Stave*, 72 Ill. 623; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14.

³³ *Hurst v. Coley*, 15 Fed. 645; *Holmes v. Langston*, 110 Ga. 861, 36 S. E. 251; *Russell v. Kearney*, 27 Ga. 96; *Bigelow v. Young*, 30 Ga. 121; *Jones v. Hicks*, 52 Miss. 682; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248; *Einstein v. Dunn*, 171 N. Y. 648, 63 N. E. 1116, affg. 32 Civ. Proc. (N. Y.) 64, 61 App. Div. (N. Y.) 195, 70 N. Y. S. 520.

³⁴ *Swire v. Leach*, 18 C. B. (N. S.) 479; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *United*

the consideration that for all beyond the debt for which the goods are pledged the pledgee is responsible to the pledgor.³⁵

§ 2193. Damages for conversion of pledge—Seizure under legal process.—If the goods held in pledge be seized and sold on execution by a creditor of the pledgor, without statutory authority, the measure of damages in a suit by the pledgee against the officer is the value of the property and not the amount of his demand secured by the pledge.³⁶ In such case the officer is a trespasser, and must be regarded as a stranger and therefore liable for the full value of the goods. But, on the other hand, if the officer seize the goods in a lawful manner, he is to be regarded as acting in privity with the pledgor; and in that case the pledgee would not be answerable over for the surplus above the debt due to himself, and the officer would be answerable to the pledgee for only the value of his special interest in the goods. The solution of the question whether the officer is answerable to the pledgee for the full value of the goods or only for the value of his interest as pledgee, depends upon the question whether the officer is pursuing a proper and legal course in seizing the goods. If the pledgor has an interest which is subject to execution, and the officer properly levies upon this, he is deemed to be acting in privity with the pledgor, and is liable to the pledgee only for the value of his special interest. On the contrary, if the pledgor has no interest that is subject to execution, or if the officer proceeds in an unlawful manner in seizing the goods, he becomes a trespasser, and is to be treated as a stranger, liable for the full value of the property.³⁷

States Exp. Co. v. Meints, 72 Ill. 293; Baldwin v. Bradley, 69 Ill. 32; Benjamin v. Strempfle, 13 Ill. 466; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Ullman v. Barnard, 7 Gray (Mass.) 554; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Einstein v. Dunn, 171 N. Y. 648, 63 N. E. 1116, affg. 32 Civ.

Proc. (N. Y.) 64, 61 App. Div. (N. Y.) 195, 70 N. Y. S. 520.

³⁵ Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Lyle v. Barker, 5 Binn. (Pa.) 457.

³⁶ Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Soule v. White, 14 Maine 436.

³⁷ Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

§ 2194. **Damages for wrongful conversion of corporate stock by pledgee.**—The general rule of damages in actions at law for wrongful conversion of stock by a pledgee is the value of the stock at the time of its conversion, with interest.³⁸ This rule follows the general rule that in an action on a contract to deliver goods, stocks and other personal property, the measure of damages is the value of the property at the time and place of delivery.³⁹ “In trover, the general rule, both in England and in the United States, undoubtedly is, that the current or market value of property at the time of conversion, with interest from that time until the trial, is the true measure of damages.”⁴⁰

§ 2195. **Damages for loss of collateral securities.**—In relation to the measure of damages for loss of collateral securities there has been some difference of opinion whether

³⁸ Terry v. Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. 87; Burks v. Hubbard, 69 Ala. 379; Linam v. Reeves, 68 Ala. 89; Seymour v. Ives, 46 Conn. 109; Waring v. Gaskill, 95 Ga. 731, 22 S. E. 659; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842, 59 Am. Rep. 823; Loomis v. Stave, 72 Ill. 623; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497n; Safely v. Gilmore, 21 Iowa 588, 89 Am. Dec. 592; Freeman v. Harwood, 49 Maine 195; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Baltimore City Pass. R. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402; Fowle v. Ward, 113 Mass. 548, 18 Am. Rep. 534; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Kennedy v. Whitwell, 4 Pick. (Mass.) 466; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; Wyman v. American Powder Co., 8 Cush. (Mass.) 168; Washburn v. Pond, 2 Allen (Mass.) 474; Bickell v. Colton, 41 Miss. 368; Reardon v. Patterson, 19 Mont. 231, 47 Pac. 956; Boylan v. Huguet, 8 Nev. 345; Carlyon v. Lannan, 4 Nev. 156; O'Meara v. North American Mining Co., 2 Nev. 112; Pinkerton v. Manchester &c. R. Co., 42 N. H.

424; Rand v. White Mountains R. Co., 40 N. H. 79; Frothingham v. Morse, 45 N. H. 545; Jamison's Estate, 163 Pa. St. 143, 29 Atl. 1003, revg. 3 Pa. Dist. 217; Blood v. Erie Dime Sav. &c. Co., 164 Pa. St. 95, 30 Atl. 362; Neiler v. Kelley, 69 Pa. St. 403; Hill v. Smith, 32 Vt. 433; Orange & A. R. Co. v. Fulvey, 17 Grat. (Va.) 366.

³⁹ Field Damages, § 245. Where the bonds of a railroad company were pledged to secure a construction contract and by agreement of both pledgee and pledgor they were repledged to one agreeing to make advances to a subcontractor and this pledgee wrongfully pledged them to a bank to secure advances beyond those required by the original pledge contract, the contractor, after redeeming them, sued the original pledgee for damages, it was held that he might recover the difference between what he was required to pay to redeem them and the amount of money used in the construction of the road. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

⁴⁰ Suydam v. Jenkins, 3 Sandf. (N. Y.) 614. See also, Scrivner v. Woodward, 139 Cal. 314, 73 Pac. 863.

the value of the securities should be taken as of the time when they were lost, or as of the time when a demand is made for their return. Inasmuch as the value of collateral securities, such as stocks and bonds, is liable to large fluctuations, the time fixed for ascertaining it may become of much importance, and has been the subject of considerable discussion. The rule of damages in actions of trover is generally applied by analogy to cases of the loss of the collateral securities through want of care on the part of the creditor; but the rule of damages in trover is by no means uniform in the different states. In Maryland the courts, following the rule of damages prevailing in that state in actions of trover, making the measure of damages the value of the property at the time of conversion, hold that the true measure of damages for the failure of a creditor to exercise due care in the custody of bonds deposited with him as collateral security is their market value at the time of their loss. The legal obligation of the creditor in such case is declared to be to keep the bonds safely, and to return them when the debt secured was paid. "Strictly," says the court, "this obligation could not be discharged by the payment of their value in money; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect in determining the rights of the parties. These had become fixed when the breach occurred by the loss of the bonds, and in our judgment the proper measure of damages is their value computed at that time."⁴¹ According to other authorities, if securities be lost through the negligence of the creditor, the rule of damages is their value at the time their return is properly demanded.^{41a}

⁴¹ Third National Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35. The case of Maury v. Coyle, 34 Md. 235, is distinguished. A pledgee when the debt is paid must return collaterals held or account for them at their face value, when there is no proof to show them uncol-

lectible. Union Bank v. Elliott, 14 Man. 187.

^{41a} Second National Bank v. Smith, 8 Phila. (Pa.) 68, 3 Brewst. (Pa.) 9. In an action by the pledgor against a pledgee for conversion of bonds where the facts justify it there should be judgment

§ 2196. Damages for breach of marriage promise.—The damages recoverable for the breach of a marriage contract are such damages as will place the plaintiff in as good a condition pecuniarily as she would have been if the contract had been fulfilled.⁴² The damages will include compensation for pain, mortification and wounded feelings,⁴³ injury to the affections,⁴⁴ the loss of time and expenses incurred in preparation for the marriage,⁴⁵ injury to health,⁴⁶ the length of time the marriage engagement existed and consequent injury to feelings or reputation due to the breach of the contract.⁴⁷

§ 2197. Breach of marriage promise—Wealth and social standing of defendant.—The pecuniary benefit and worldly advantage of the marriage to the plaintiff is an element of damages,⁴⁸ and for this purpose it is permissible to show the wealth and social standing of the defendant.⁴⁹ On this

for the value of the bonds when converted less the amount of the debt at the date of conversion. *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729. See also, as to measure of recovery from pledgee for conversion, *Meyer Bros. Drug Co. v. Matthews*, 69 Ark. 483, 64 S. W. 264.

⁴² *Grubbs v. Pence*, 24 Ky. L. 2183, 73 S. W. 785; *Lawrence v. Cooke*, 56 Maine 187, 96 Am. Dec. 443.

⁴³ *Collins v. Mack*, 31 Ark. 684; *Graves v. Rivers*, 123 Ga. 224, 51 S. E. 318; *Parker v. Forehand*, 99 Ga. 743, 28 S. E. 400; *Robinson v. Craver*, 88 Iowa 381, 55 N. W. 492; *Coolidge v. Neat*, 129 Mass. 146; *Harrison v. Swift*, 13 Allen (Mass.) 144; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Waddell v. Wallace*, 32 Okla. 140, 121 Pac. 245; *Huggins v. Carey* (Tex. Civ. App.), 149 S. W. 390; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581.

⁴⁴ *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925.

⁴⁵ *Smith v. Sherman*, 4 Cush. (Mass.) 408.

⁴⁶ *Yale v. Curtiss*, 71 Hun (N. Y.) 436, 24 N. Y. S. 981, 54 N. Y. St. 538, revd. 151 N. Y. 598, 45 N. E. 1125; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581.

⁴⁷ *Grant v. Willey*, 101 Mass. 356; *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936.

⁴⁸ *Lauer v. Banning*, 152 Iowa 99, 131 N. W. 783.

⁴⁹ *Collins v. Mack*, 31 Ark. 684; *Humphrey v. Brown*, 89 Fed. 640; *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557; *Hunter v. Hatfield*, 68 Ind. 416; *Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835; *Vierling v. Binder*, 113 Iowa 337, 85 N. W. 621; *McKee v. Mouser*, 131 Iowa 203, 108 N. W. 228; *McKenzie v. Gray*, 143 Iowa 112, 120 N. W. 71; *Kennedy v. Rodgers*, 2 Kans. App. 764, 44 Pac. 47; *Lawrence v. Cook*, 56 Maine 187, 96 Am. Rep. 443; *Rutter v. Collins*, 103 Mich. 143, 61 N. W. 267; *Miller v. Rosier*, 31 Mich. 475; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. 217; *Birum v. Johnson*, 87 Minn. 362, 92 N.

inquiry evidence is admissible as to the general reputation for wealth.⁵⁰ "It would seem," says the Supreme Court of Minnesota, "from the very nature of the inquiry, and the difficulty of proving the value of a person's property, that oftentimes reputation might furnish, from necessity, the only means by which a *prima facie* showing thereof could be made."⁵¹

§ 2198. Breach of marriage promise — Aggravation of damages.—In aggravation of damages the plaintiff may show her seduction by the defendant under promise of marriage.⁵² The jury may further consider the fact that the

W. 1; *Casey v. Gill*, 154 Mo. 181, 55 S. W. 219; *Stratton v. Dole*, 45 Nebr. 472, 63 N. W. 875; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; *Kniffen v. McConnell*, 30 N. Y. 285; *Allen v. Baker*, 86 N. Car. 91, 40 Am. Rep. 444; *Jarvis v. Johnson*, 2 Ohio Dec. 212; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581; *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726; *Fisher v. Kenyon*, 56 Wash. 8, 104 Pac. 1127; *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; *Olson v. Solverson*, 71 Wis. 663, 38 N. W. 329. Where the plaintiff introduces no proof as to the pecuniary condition of the defendant, the defendant can not introduce such testimony on his own behalf to reduce the amount of the damages. *Wilbur v. Johnson*, 58 Mo. 600.

⁵⁰ *Humphrey v. Brown*, 89 Fed. 640; *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835; *Vierling v. Binder*, 113 Iowa 337, 85 N. W. 621; *Birum v. Johnson*, 87 Minn. 362, 92 N. W. 1; *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55; *Kniffen v. McConnell*, 30 N. Y. 285.

⁵¹ *Birum v. Johnson*, 87 Minn. 362, 92 N. W. 1.

⁵² *Espy v. Jones*, 37 Ala. 379; *Hattin v. Chatman*, 46 Conn. 607; *Anderson v. Kirby*, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185; *Tubbs v. Van Kleek*, 12 Ill. 446; *Fidler v. McKinley*, 21 Ill. 308; *Whalen v. Layman*, 2 Blackf. (Ind.) 194, 18

Am. Dec. 157; *King v. Kersey*, 2 Ind. 402; *Haymond v. Saucer*, 84 Ind. 3; *Lauer v. Banning*, 152 Iowa 99, 131 N. W. 783; *Sramek v. Sklenar*, 73 Kans. 450, 85 Pac. 566; *Johnson v. Levy*, 122 La. 118, 47 So. 422; *Smith v. Braun*, 37 La. Ann. 225; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Sherman v. Rawson*, 102 Mass. 395; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; but see *Sheahan v. Barry*, 27 Mich. 217; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; *Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672; *Clemons v. Seba*, 131 Mo. App. 378, 111 S. W. 522; *Hill v. Maupin*, 3 Mo. 323; *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Musselman v. Barker*, 26 Nebr. 737, 42 N. W. 759; *Coil v. Wallace*, 24 N. J. L. 291; *Kniffen v. McConnell*, 30 N. Y. 285; *Matthews v. Cribbitt*, 11 Ohio St. 330; *Osmun v. Winters*, 25 Ore. 260, 35 Pac. 250; *Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876; *Conn v. Wilson*, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663; *Williams v. Hollingsworth*, 65 Tenn. 12; *Daggett v. Wallace*, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; *Stokes v. Mason* (Vt.), 81 Atl. 162; *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55; *Giese v. Schultz*, 69 Wis. 521, 34 N. W. 913. But see, *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. 63.

defendant, without reasonable belief of success, charged plaintiff in his answer with unchaste conduct with other men.⁵³ According to one of the decisions, this "is a worse case than if there had been simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials."⁵⁴ But the failure to prove the bad character of the plaintiff should not be considered in aggravation of damages if the defense was pleaded in good faith and with a reasonable expectation of its establishment.⁵⁵ It may also be shown in aggravation of damages that the defendant entered into the contract with knowledge of the fact that he was affected with a loathesome disease.⁵⁶ So, it may be shown for this purpose that the defendant had written scurrilous letters, attacking the character of the plaintiff.⁵⁷

§ 2199. Breach of marriage promise—Mitigation of damages.—Any condition of mind or body which was unknown to the defendant and which renders a man unfit to fill the position of husband or a woman to fill the position of wife may be given in mitigation of damages.⁵⁸ The defendant may show, for example, in a proper case, that at the time of the breach he was afflicted with an incurable disease.⁵⁹ But it has been held that the defendant could not show in mitigation of damages that there was a taint of insanity in the family of the plaintiff where the defendant knew that fact when he made the promise.⁶⁰ It is likewise held in some

⁵³ Reed v. Clark, 47 Cal. 194; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Fidler v. McKinley, 21 Ill. 308; Blackburn v. Mann, 85 Ill. 222; Haymond v. Saucer, 84 Ind. 3; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Duvall v. Fuhrman, 3 Ohio C. C. 305, 2 Ohio C. D. 174; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25; Leavitt v. Cutler, 37 Wis. 46; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Simpson v. Black, 27 Wis. 206.

⁵⁴ Osmun v. Winters, 30 Ore. 177, 46 Pac. 780.

⁵⁵ Denslow v. Van Horn, 16 Iowa 476.

⁵⁶ Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

⁵⁷ Osmun v. Winters, 30 Ore. 177, 46 Pac. 780.

⁵⁸ Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

⁵⁹ Sprague v. Craig, 51 Ill. 288.

⁶⁰ Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591, but holding that it would be otherwise if he did not know it.

cases that the defendant may show in mitigation of damages that he made plaintiff an offer of marriage subsequently to the breach,⁶¹ but he must show that the offer was made in good faith.⁶² The motive which induced the defendant to break the engagement is usually not material,⁶³ and evidence of this character, if admitted at all, will have bearing only where exemplary damages are demanded and then only for the purpose of mitigating such damages.⁶⁴ Improprieties between the parties before the promise of marriage can not be considered in mitigation of the damages.⁶⁵ There is authority that the jury may consider undesirable traits and objectionable characteristics in the plaintiff in mitigation of the damages.⁶⁶ The lewd character of the plaintiff may be shown where the promise was made in the belief that she was a woman of modest and chaste character.⁶⁷

§ 2200. Breach of marriage promise—Exemplary damages.—Some of the cases allow the imposition of exemplary damages where the defendant has been guilty of fraud, deceit or evil motives in the making of the contract or in its breach.⁶⁸ In other jurisdictions matters of this character are

⁶¹ *Kelley v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275 (but not as a complete defense).

⁶² *McCarty v. Heryford*, 125 Fed. 46.

⁶³ *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871.

⁶⁴ *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871.

⁶⁵ *Fleetford v. Barnett*, 11 Colo. App. 77, 52 Pac. 293. See also, *Boyn-ton v. Kellogg*, 3 Mass. 189.

⁶⁶ *Gross v. Hochstim*, 72 Misc. (N. Y.) 343, 130 N. Y. S. 315. See also, *Alberts v. Albertz*, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

⁶⁷ *Espy v. Jones*, 37 Ala. 379; *Butler v. Eschleman*, 18 Ill. 44; *Fidler v. McKinley*, 21 Ill. 308; *Burnett v. Simpkins*, 24 Ill. 264; *Kantzler v. Grant*, 2 Ill. App. 236; *Doubet v. Kirkman*, 15 Ill. App. 622; *Denslow v. Van Horne*, 16 Iowa 476; *Cole v. Holliday*, 4 Mo.

App. 94; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925; *Van Storch v. Griffin*, 71 Pa. St. 240; *Williams v. Hollingsworth*, 65 Tenn. 12; *Alberts v. Albertz*, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

⁶⁸ *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557; *Kutz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. 745; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. 217; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 624; *Coryell v. Colbaugh*, 1 N. J. L. 77, 1 Am. Dec. 192; *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; *Goodall v. Thurman*, 28 Tenn. 209. See also, *Roberts v. Drui-lard*, 123 Mich. 286, 82 N. W. 49; *Osmun v. Winters*, 25 Ore. 260, 35 Pac. 250.

considered only as in aggravation to increase compensatory damages.⁶⁹

§ 2201. Damages for conversion of property by mortgagor of chattels.—The damage which a mortgagee is entitled to recover is the full value of the property converted at the time of the conversion. He is not obliged to look to the personal responsibility of his debtor, nor to show his insolvency before recovering of the wrongdoer. Neither is he required to first look to any other security he may hold.⁷⁰ In an action against a stranger who shows no right to the property, the mortgagee may recover the full value, though this exceeds the amount of the mortgage debt.⁷¹ Replacing mortgaged property, innocently taken, with other property and the sale of it for the benefit of the mortgagee have been held not to mitigate the damages which the mortgagee can recover against a stranger for the conversion of the property.⁷² In an action against a sheriff who has seized the property upon an attachment or execution against the mortgagor, the mortgagee is entitled to recover the amount of the mortgage debt and interest thereon not exceeding the value of the goods at the time of their taking.⁷³ In a judgment for a return of chattels wrongfully replevied from a mortgagee, he is entitled to recover any damages suf-

⁶⁹ *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302. See also, *Fleetford v. Barnett*, 11 Colo. App. 77, 52 Pac. 293; *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921.

⁷⁰ *Sherman v. Finch*, 71 Cal. 68, 11 Pac. 847; *Worthington v. Hanna*, 23 Mich. 530; *Huellmantel v. Vinton*, 112 Mich. 47, 70 N. W. 412; *Ganong v. Green*, 64 Mich. 488, 31 N. W. 461; *Peckinbaugh v. Quillin*, 12 Nebr. 586, 12 N. W. 104; *Morgan v. Kidder*, 55 Vt. 367; *Longey v. Leach*, 57 Vt. 377.

⁷¹ *Adamson v. Petersen*, 35 Minn. 529, 29 N. W. 321; *Bigelow v. Goble*, 9 App. Div. (N. Y.) 391, 75 N. Y. St. 711, 41 N. Y. S. 299.

⁷² *Smith v. Anderson*, 70 Vt. 424, 41 Atl. 441.

⁷³ *De Costa v. Comfort*, 80 Cal. 507, 22 Pac. 218; *Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601; *Showman v. Lee*, 86 Mich. 556, 49 N. W. 578; *Ganong v. Green*, 71 Mich. 1, 38 N. W. 661; *Hamilton v. Lau*, 24 Nebr. 59, 37 N. W. 688; *Brotton v. Langert*, 1 Wash. 227, 23 Pac. 803; *Sheehan v. Levy*, 1 Wash. St. 149, 23 Pac. 802. In the *De Costa* case the attorney's fees provided for in the mortgage were included. *Collins v. Hutchinson*, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. 298; *McDaniel v. State*, 118 Ind. 239, 20 N. E. 739; *Slifer v. State*, 114 Ind. 291, 14 N. E. 595, 16 N. E. 623; *Chicago Title & Trust Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.

ferred from the taking, up to the amount of the mortgage debt; but he can not have judgment for the full value of the property if that exceeds the mortgage debt and costs.⁷⁴ A mortgagee is not entitled to recover the value of the use of the mortgaged property as special damages for its detention. His right to the possession is only for the purpose of foreclosure or sale under the mortgage in order to satisfy the debt secured by it, and not for the purpose of using the property.⁷⁵ In trover by the mortgagee of crops against a purchaser with notice, or a special action for damages in the nature of trover, the unauthorized sale and conversion being admitted, the defendant can not be allowed to prove, in abatement or reduction of damages, that a part of the proceeds of sale received by the mortgagor was applied by him to the landlord's claim for rent, the lien of which was superior to the mortgage.⁷⁶ Under codes which allow equitable defenses in actions at law, a mortgagor or any one standing in his place can, when sued for the mortgaged property, claim the right to redeem, and may mitigate the recovery against him by reducing the judgment to the amount actually due on the mortgage.⁷⁷ A mortgagee may bring an action for damages to his reversionary interest, although he has not a right to immediate possession.⁷⁸ Trespass on the case, or trespass if all dis-

⁷⁴ *Smith v. Phillips*, 47 Wis. 202, 2 N. W. 285.

⁷⁵ *Thompson v. Scheid*, 39 Minn. 102, 38 N. W. 801, 12 Am. St. 619.

⁷⁶ *Keith v. Ham*, 89 Ala. 590, 7 So. 234.

⁷⁷ *McGowen v. Young*, 2 Stew. & P. (Ala.) 160; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Bailey v. Godfrey*, 54 Ill. 507, 5 Am. Rep. 157; *McFadden v. Hopkins*, 81 Ind. 459; *Slifer v. State*, 114 Ind. 291, 14 N. E. 595, 16 N. E. 623; *Williams v. Bresnahan*, 66 Mich. 634, 33 N. W. 739; *Ganong v. Green*, 64 Mich. 488, 31 N. W. 461, 71 Mich. 1, 38 N. W. 661; *Williams v. Dobson*, 26 S. Car. 110, 1 S. E. 421; *Smith v. Konst*, 50 Wis. 360, 7 N. W. 293; *Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892; *Illinois*

Trust & Sav. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777; *Klinkert v. Fulton, Storage & Mercantile Co.*, 113 Wis. 493, 89 N. W. 507; *Ward v. Henry*, 15 Wis. 239. An officer seizing the mortgaged property on execution is liable for the amount of the mortgage debt. *Wood v. Franks*, 56 Cal. 217. But it has been held that if the officer leave property enough to satisfy the mortgage, the mortgagee can recover only the value of the property taken. *Keith v. Haggart*, 4 Dak. 438, 33 N. W. 465.

⁷⁸ *Googins v. Gilmore*, 47 Maine 9, 74 Am. Dec. 472; *Welch v. Whittemore*, 25 Maine 86; *Manning v. Monaghan*, 23 N. Y. 539, revg. 14 N. Y. Super. Ct. 459.

inction between these forms of action be abolished, is a proper form of action for such damages; but a suit in trover may be amended and maintained by adding a count in case.⁷⁹

§ 2202. Damages for conversion of property by mortgagee or third person.—In an action by the mortgagor against a third person for a conversion of the mortgaged property, the measure of damages is ordinarily the value of the property converted at the time of the conversion.⁸⁰ But if, after the bringing of the action, the mortgagee takes possession of the property for a breach of the condition, such taking is regarded as an application of the property for the benefit of the mortgagor, and should be considered by the jury in mitigation of damages, although the foreclosure was not complete at the time of the trial.⁸¹ The making of a second mortgage of the property, after the bringing of such action by the mortgagor, is not an abandonment of the cause of action, and does not affect the amount of damages recoverable, unless the mortgagee applies the property to the satisfaction of such mortgage.⁸² In an action by the mortgagor against the mortgagee for taking possession of the mortgaged property wrongfully and prematurely, the plaintiff can recover only the value of his interest or equity in the property, which is the value of the property, less the amount of the liens upon it, together with damages for detention, which would be the reasonable value of the use of the property.⁸³

§ 2203. Damages for refusal of mortgagor of chattels to

⁷⁹ *George Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641, 60 C. C. A. 579; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Forbes v. Parker*, 16 Pic. (Mass.) 462; *Cox v. Patten* (Tex.), 66 S. W. 64.
⁸⁰ *Gray v. Bailey*, 10 Gray (Mass.) 87.

⁸¹ *Ullman v. Barnard*, 73 Mass. 554; *Dahill v. Booker*, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465. See *Conway v. Sherman*, 78 Iowa 588, 43 N. W. 541.

⁸² *Dahill v. Booker*, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465.

⁸³ *Brink v. Freoff*, 40 Mich. 610, 44 Mich. 69, 6 N. W. 94; *Daggett, Bassett & Hills Co. v. McClintock*, 56 Mich. 51, 22 N. W. 105; *Bearss v. Preston*, 66 Mich. 11, 32 N. W. 912; *Rall v. Cook*, 77 Mich. 681, 43 N. W. 1069; *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Deal v. Osborne*, 42 Minn. 102, 43 N. W. 835.

surrender property under decree.—The measure of damages for the refusal of the mortgagor to surrender the property upon a decree to that effect in a suit in equity to foreclose a mortgage is the value of the property at the time of the failure to obey the decree. The damages are given in place of the specific property. In this respect the measure of damages is different from that given in an action of trover or trespass for the conversion of the mortgaged property; for the injury consists in the former case in not giving up the property when called for by the decree, while in the latter case it consists in unlawfully taking the property at some former time and not paying its value at that time.⁸⁴ A decree foreclosing a chattel mortgage, so long as the property has not been seized or sold under it, does not affect the rights of third persons in the goods.⁸⁵

§ 2204. Damages for breach of contract of partnership.—A partner who wrongfully brings about the dissolution of a partnership is liable to his copartners for damages suffered thereby.⁸⁶ The measure of damages is the value of the partnership to a partner at the time of the wrongful dissolution and is not the share of the partner in the profits which the remaining partner made on thereafter carrying on the business.⁸⁷ The measure of damages for breach of a covenant to continue the partnership for a fixed period depends on the extent of the injury as well as in all other cases of broken covenant.⁸⁸ In an action for damages for wrongful dissolution it is competent in estimating the value of the contract as a measure of damages to show the actual

⁸⁴ *Fowler v. Merrill*, 11 How. (U. S.) 375, 13 L. ed. 736; *Merrill v. Dawson, Hempst.* (U. S.) 563, Fed. Cas. No. 9469.

⁸⁵ *Catlin v. Currier*, 1 Sawy. (U. S.) 7, Fed. Cas. No. 2518.

⁸⁶ *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *Corcoran v. Sumption*, 79 Minn. 108, 81 N. W. 761, 79 Am. St. 428. Generally the measure of damages in an action for the breach of a partnership contract is the value of the contract broken, separate and inde-

pendent of any other former contract. *Addams v. Tutton*, 39 Pa. St. 447. See also, *Jones v. Morehead*, 3 B. Mon. (Ky.) 377.

⁸⁷ *McCollum v. Carlucci*, 206 Pa. 312, 55 Atl. 979, 98 Am. St. 780. See also, *Corcoran v. Sumption*, 79 Minn. 108, 81 N. W. 761, 79 Am. St. 428; *Van Ness v. Fisher*, 5 Lans. (N. Y.) 236.

⁸⁸ *Bagley v. Smith*, 10 N. Y. 489, 19 How. Pr. (N. Y.) 1, Seld. Notes (N. Y.) 109, 61 Am. Dec. 756.

condition and situation of the business and assets of the firm, together with proof as to the actual results accomplished in the business before the breach.⁸⁹

§ 2205. Breach of contract to pay firm debts.—The damages recoverable for a breach of contract by which one partner agreed to pay certain debts of the firm on a dissolution would be the amount of the debts provided for in the contract.⁹⁰ These damages are recoverable on the failure of the partner to pay the debts as agreed, and this, though the other partner has paid nothing on the debts. “Where there is an affirmative contract to do or to perform a certain act, or pay a certain sum of money, or a certain indebtedness, an action may be maintained, although the plaintiff has performed no act, or paid no part of the indebtedness, or sustained no actual damage, and the measure of his recovery is the value of the act to be done or the payment to be made.”⁹¹

§ 2206. Damages for breach of contract not to engage in business by retiring partner.—On the breach of a contract by a retiring partner not to again engage in the same business in the same locality, it has been held that the remaining partner may recover in one action all damages sustained by him, and this will include the damages past, present and future.⁹²

§ 2207. Damages for failure to pay money.—Damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such

⁸⁹ *Reiter v. Morton*, 96 Pa. St. 229.

⁹⁰ *Gillen v. Peters*, 39 Kans. 489, 18 Pac. 613.

⁹¹ *Gage v. Lewis*, 68 Ill. 604; *Smith v. Riddell*, 87 Ill. 165; *Bacon v. Marshall*, 37 Iowa 581; *Stout v. Folger*, 34 Iowa 71, 11 Am. Rep.

138; *Gillen v. Peters*, 39 Kans. 489, 18 Pac. 613; *Crofoot v. Moore*, 4 Vt. 204. See also, *Lathrop v. Atwood*, 21 Conn. 117.

⁹² *Downs v. Woodson*, 25 Ky. L. 566, 76 S. W. 152. See also, *Davis v. Brown*, 98 Ky. 475, 17 Ky. L. 1428, 32 S. W. 614, 36 S. W. 534.

damages and the rate of such interest is that allowed by law,⁹³ and fixed by the contract.⁹⁴

§ 2208. Breach of contract to pay debt of third person.—For breach of contract to pay the debt of another, the measure of damages is the amount of the debt with interest.⁹⁵ The measure of damages for breach of a contract to pay the note of a third person in consideration of an extension of time is the amount that could have been recovered in a direct action on the note.⁹⁶ In one case where a partner after dissolution of the firm organized a firm with other parties and this firm contracted with the former partner in the dissolved firm to pay the debts of the old firm and to save such partner harmless from any cost, trouble or liability on account of the debts of the old firm, it was held that such partner on failure of the new firm to pay the debts within a reasonable time could recover the amount of the debts unpaid at the commencement of the action with interest.⁹⁷

§ 2209. Breach of contract to loan money.—On breach of a contract to loan money the injured party may recover such damages as were caused by the breach and which might be supposed to have entered into the contemplation of the parties.⁹⁸ Where the only effect of the breach of

⁹³ *Guy v. Franklin*, 5 Cal. 416; *Beckwith v. Hartford &c. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Chicago v. Duffy*, 117 Ill. App. 261; *Hoblit v. Bloomington*, 71 Ill. App. 204; *Brown v. Maulsby*, 17 Ind. 10; *Thayer v. Hedges*, 23 Ind. 141; *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *White v. Green*, 3 T. B. Mon. (Ky.) 155; *Stockton v. Scobie*, 24 Ky. 6; *Griffin v. His Creditors*, 6 Rob. (La.) 216; *Mason v. Callender*, 2 Gil. (Minn.) 302, 72 Am. Dec. 102; *Gatewood v. Moses*, 5 Rich. L. (S. Car.) 244; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476; *Close v. Fields*, 13 Tex. 623; *Loudon v. Taxing District*, 104 U. S. 771, 26 L. ed. 923; *Ferris v. Barlow*, 2 Aik. (Vt.) 106; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063.

⁹⁴ *Beckwith v. Hartford &c. R. Co.*, 29 Conn. 268, 76 Am. Dec. 599.

⁹⁵ *Lathrop v. Atwood*, 21 Conn. 117; *Nelson v. Ravens*, 3 Ill. App. 565; *Weddle v. Stone*, 12 Ind. 625; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Pratt v. Bates*, 40 Mich. 37; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Sturgess v. Crum*, 29 Mo. App. 644; *Richards v. Whittle*, 16 N. H. 259; *Wright v. Chapin*, 87 Hun (N. Y.) 144, 67 N. Y. St. 771, 33 N. Y. S. 1068.

⁹⁶ *Kester v. Hulman*, 65 Ind. 100.

⁹⁷ *Lathrop v. Atwood*, 21 Conn. 117. See also, *Nelson v. Ravens*, 3 Ill. App. 565; *Weddle v. Stone*, 12 Ind. 625.

⁹⁸ *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S. W. 887; *Holt v. United Security Life Ins. Co.*, 76

such a contract is to compel the borrower to pay more interest, then his recovery is the amount of excess interest he is required to pay.⁹⁹ Remote, indirect or speculative damages can not be recovered.¹ Accordingly, on breach of an agreement to advance money to buy goods, the profits which might have been made on their resale are too remote and speculative to constitute an element of damages, especially where it is not shown that the goods had been purchased at less than their market-price or that they were at any time worth more than the price agreed upon.²

§ 2210. Breach of contract to advance money to pay liens.—The measure of damages for the breach of an agreement to advance money to pay liens is ordinarily the same as for a breach of a contract to loan the money direct.³

§ 2211. Damages for breach of duty in collection of paper by bank.—The measure of damages for failure to collect paper sent to a bank for collection where the collection is defeated by negligence of the bank is *prima facie* the amount of the paper with interest.⁴ But this is not always the case, for it is plain that the sender of the paper may otherwise secure all or part of the debt represented by the paper and this fact is to be considered in any award of damages.⁵ Says the Supreme Court of Alabama: "The

N. J. L. 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691n; *Equitable Mort. Co. v. Thorn* (Tex. Civ. App.), 26 S. W. 276.

⁹⁹ *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 52 So. 843, 29 L. R. A. (N. S.) 194n, 140 Am. St. 47; *New York Life Ins. Co. v. Pope*, 24 Ky. L. 485, 68 S. W. 851; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571.

¹ *Levinski v. Middlesex Banking Co.*, 92 Fed. 449, 34 C. C. A. 452; *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S. W. 887; *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571.

² *Carsey v. Farmer*, 117 Ky. 826, 25 Ky. L. 1965, 79 S. W. 245.

³ *Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233. According to a New York decision the measure of damages for breach of a contract to pay off liens is the difference between value of the property and the amount of the liens which have been foreclosed as a result of the breach. *Doushness v. Burger Brewing Co.*, 20 App. Div. (N. Y.) 375, 47 N. Y. S. 312.

⁴ *Commercial Bank v. Red River Val. Nat. Bank*, 8 N. Dak. 382, 79 N. W. 859.

⁵ *Jefferson County Saving Bank v. Hendrix*, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246. See also, *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412.

damages recoverable are by no means necessarily the amount of the check. It by no means follows from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the paper, whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even any part of it. To the contrary, it is frequently, if not generally, true that the owner of the paper secures some part or all of the debt for which it was given in some other way, as by subsequent voluntary payment by or suit against the drawee bank when it is solvent, or by dividends upon its being wound up as an insolvent concern.”⁶

§ 2212. Damages for breach of duty of bank in protest of paper.—The measure of damages against a bank through whose negligence an indorser is discharged from liability is, *prima facie*, the face of the note which may be mitigated by proof of the solvency of the maker, insolvency of the indorser, that it was otherwise secured, or any fact tending to lessen the actual loss.⁷ But the bank is not liable to the owner for the costs of an unsuccessful suit against such indorsers unless it induced the bringing of the suit by false representations that the necessary steps to charge them had been taken.⁸ Where the damages are for failure to fix the liability of the drawer of a draft, the question whether the bank is liable for the full amount of the draft is a question of fact and depends upon the probability of the collection if due diligence had been exercised.⁹

⁶ *Jefferson County Sav. Bank v. Hendrix*, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246.

⁷ *Pritchard v. Louisiana State Bank*, 2 La. 415; *Borup v. Nininger*, 5 Gil. (Minn.) 417; *West v. St. Paul National Bank*, 54 Minn. 466, 56 N. W. 54; *Ft. Dearborn Nat. Bank v. Security Bank*, 87 Minn. 81, 91 N. W. 257; *Steele v. Russell*, 5 Nebr. 211; *Mott v. Havana Nat. Bank*, 22 Hun (N. Y.) 354;

Hitchcock v. Bank of Suspension Bridge, 57 App. Div. (N. Y.) 458, 68 N. Y. S. 234.

⁸ *Ayrault v. Pacific Bank*, 1 Abb. Pr. (N. S.) 381.

⁹ *Selz v. Collins*, 55 Mo. App. 55; *Lienau v. Dinsmore*, 10 Abb. Pr. (N. S.) (N. Y.) 209, 3 Daly (N. Y.) 365, 41 How. Pr. (N. Y.) 97; *Stowe v. Bank of Cape Fear*, 14 N. Car. 408.

§ 2213. **Damages for dishonor of check.**—Ordinarily, substantial damages may be recovered for the dishonor of a check.¹⁰ In Georgia these damages are termed “temperate damages,” by which is meant reasonable damages as distinguished from nominal or excessive damages.¹¹ Where the fact of dishonor occasioned no provable inconvenience and is the mere result of an error of bookkeeping, the recovery is usually limited to nominal damages.¹² Exemplary damages are not generally allowed¹³ except in cases where the dishonor is accompanied by circumstances showing malice or wilfulness.¹⁴

¹⁰ *Rolin v. Steward*, 14 C. B. 595; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224n; *Metropolitan Supply Co. v. Garden City Banking & C. Co.*, 114 Ill. App. 318; *Schaffner v. Ehrman*, 139 Ill. 109, 38 N. E. 917, 15 L. R. A. 134n, 32 Am. St. 192; *National Bank of Lebanon v. Boles*, 12 Ky. L. (abstract) 422; *American National Bank v. Morey*, 113 Ky. 857, 24 Ky. L. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. 379; *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655; *Svensen v. State Bank*, 64 Minn. 40, 65 N. W. 1086, 31 L. R. A. 552, 58 Am. St. 522; *First Nat. Bank v. Railsback*, 58 Nebr. 248, 78 N. W. 512; *Bank of Commerce v. Goos*, 39 Nebr. 437, 58 N. W. 84, 23 L. R. A. 190; *Birchall v. Third National Bank*, 15 Wkly. Notes Cas. (Pa.) 174; *Patterson v. Marine National Bank*, 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. 778; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. 857n.

¹¹ *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. 139; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224n.

¹² *First Nat. Bank v. Kansas Grain Co.*, 60 Kans. 30, 55 Pac. 277; *T. B. Clark Co. v. Mt. Morris Bank*, 85 App. Div. (N. Y.) 362, 83 N. Y. S. 447, affd. 181 N. Y. 533, 73 N. E. 1133; *Burroughs v. Tradesmen's National Bank*, 87 Hun (N. Y.) 6, 67 N. Y. St. 481,

33 N. Y. S. 864, 156 N. Y. 663, 50 N. E. 1115.

¹³ *American National Bank v. Morey*, 113 Ky. 857, 24 Ky. L. 658, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. 379; *Bank of Commerce v. Goos*, 39 Nebr. 437, 58 N. W. 84, 23 L. R. A. 190.

¹⁴ *American National Bank v. Morey*, 25 Ky. L. 2151, 80 S. W. 157; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. 857n. See also, *Birchall v. Third National Bank*, 15 Wkly. Notes Cas. (Pa.) 174. “A bank is an institution of a quasi public character. It is chartered by the government for the purpose, inter alia, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositors’ checks upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time the business of the community would be at the mercy of banks if they could at their pleasure refuse to honor their depositors’ checks and then claim that such action was the mere breach of an ordinary contract for which only nominal damages could be recovered unless special damages were proved. There is something more than a breach of contract in such cases. There is a question of public policy involved, as was said in *Bank v. Mason*, 95 Pa. St. 113, and a breach of the implied contract between the bank

§ 2214. Damages for breach of lumber contract.—The measure of damages for failure to drive logs according to the contract in the proper manner is loss which accrues to the owner from the negligence of the driver.¹⁵ The damages for negligent delay in rafting and delivering logs is the difference between their real market value at the time when delivered and that at the time when they should have been delivered.¹⁶ And the words “market value” are not limited to the price which the logs might realize at a forced sale, but mean the fair value of the logs as between one who desires to buy and one who desires to sell and it is not what could be obtained for the logs under peculiar circumstances, where by reason of the necessities of another, more than a fair price could be realized.¹⁷ Where prospective profits may be awarded for breach of a contract to furnish a millowner with logs to be sawed, it has been held that these profits must be calculated with reference to depreciation and deterioration in the mill property from wear and tear and the earnings of the millowner from other sources during the time.¹⁸

§ 2215. Damages for breach of timber cutting contract.—Where a party was prevented from cutting and removing the timber from a portion of the land covered by his contract because of its sale by the owner, the measure of damages has been held to be the difference between the cost of cutting and the removing the timber from the entire lands and the contract-price.¹⁹ The measure of damages for a failure to cut, remove and pay for all the timber on certain land within a specified time is the difference be-

and its depositor entitles the latter to recover substantial damages.” *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 18 Atl. 632, 17 Am. St. 778.

¹⁵ *Parks v. Libby*, 92 Maine 133, 42 Atl. 318. See also, *Parks v. Libby*, 90 Maine 56, 37 Atl. 357.

¹⁶ *Palmer v. Penobscot Lumber-*

ing Assn., 90 Maine 193, 38 Atl. 108.

¹⁷ *Palmer v. Penobscot Lumbering Assn.*, 90 Maine 193, 38 Atl. 108.

¹⁸ *Snell v. Remington Paper Co.*, 102 App. Div. (N. Y.) 138, 92 N. Y. S. 343.

¹⁹ *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477.

tween the market value of the timber left standing on the land and the contract-price at the time of the breach.²⁰

§ 2216. Damages for breach of contract of corporation to issue stock.—The measure of damages for the wrongful refusal of a corporation to issue stock to subscribers is the value of the shares at the time of the demand,²¹ together with accrued dividends,²² less any amount due on the stock.²³ These damages may be alleged in a gross sum and proved as the value of the stock at the time of its conversion.²⁴ Where the breach consists in the failure to deliver stock in payment for work as required by the contract, the measure of damages is the marketable value of the stock and not its par value.²⁵

§ 2217. Damages for failure to deliver corporate stock.—The measure of damages for the breach of a contract to deliver shares of stock on demand is the value of the stock when demanded, less the price to be paid therefor.²⁶ Where there is a failure to return borrowed stock, the rule is the same and the owner may recover the market value of the stock on the day of demand with interest.²⁷ Some of the authorities make the measure of damages the highest mar-

²⁰ *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432, 84 S. W. 483, 108 Am. St. 42.

²¹ *Birmingham National Bank v. Roden*, 97 Ala. 404, 11 So. 883; *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 168; *Eastern R. Co. v. Benedict*, 10 Gray (Mass.) 212; *Perkins v. Union Button-Hole & Mach. Co.*, 12 Allen (Mass.) 273; *State v. Carpenter*, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. 556.

²² *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

²³ *Blaisdell v. Bohr*, 68 Ga. 56; *Van Allen v. Illinois Central R. Co.*, 7 Bosw. (N. Y.) 515, affd. 41 N. Y. [2 Keyes] 673, 4 Abb. Dec. (N. Y.) 443.

²⁴ *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171.

²⁵ *Porter v. Buckfield Branch R. Co.*, 32 Maine 539; *Doak v. Snapp's Exrs.*, 1 Cold. (Tenn.) 180.

²⁶ *Eastern R. Co. v. Benedict*, 10 Gray (Mass.) 212; *Bowker v.*

Goodwin, 7 Nev. 135; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Huntingdon & B. T. M. R. & Coal Co. v. English*, 86 Pa. St. 247; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. Civ. App. 178, 23 S. W. 282; *Humaston v. American Tel. Co.*, 20 Wall. (U. S.) 20, 22 L. ed. 279; *Tayloe v. Turner*, 2 Cranch. (U. S.) 203; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225; *Enders v. Board of Public Works*, 1 Grat. (Va.) 364; *Bull v. Douglas*, 4 Munf. (Va.) 303, 6 Am. Dec. 518; *Orange & A. R. Co. v. Fulvey*, 17 Grat. (Va.) 366; *Noonan v. Ilsley*, 17 Wis. 314, 84 Am. Dec. 742.

²⁷ *McKenney v. Haines*, 63 Maine 74; *Day v. Perkins*, 2 Sandf. Ch. (N. Y.) 359; *Fosdick v. Greene*, 27 Ohio St. 484, 22 Am. Rep. 328; *Musgrave v. Beckendorff*, 53 Pa. St. 310 (highest price between breach and trial).

ket value of the stock between the breach and the trial, together with dividends declared in the interval, less the par value.²⁸

§ 2218. Breach of broker's contract to deliver stock.—Where the breach of contract is that of a broker in refusing to deliver shares of stock on demand of a customer for whom he had bought the same on a margin, the damages recoverable are determined according to the highest intermediate value of the stocks between the default and a time after the customer has notice thereof reasonably sufficient to enable him to replace the stocks.²⁹

§ 2219. Damages for refusal to execute contract.—The refusal of one to execute a contract which he has agreed to execute would seem to render him liable for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing.³⁰ And where the breach is of an agreement to execute a promissory note payable in the future, damages may be recovered presently and the amount for which the note was to have been given will *prima facie* be the measure of damages.³¹

²⁸ *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131. See also, *San Antonio & A. P. R. Co. v. Busch* (Tex. Civ. App.), 23 S. W. 308.

²⁹ *In re Swift*, 114 Fed. 947. See also, *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. 335.

³⁰ *Pratt v. Hudson River R. Co.*, 21 N. Y. 305. In this case it was observed: "A contract to make and execute a certain written agreement, the terms of which are specific, and mutually understood, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear, from the evidence, that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract, were, in all

respects, definitely understood and agreed upon, and that a part of the mutual understanding, was, that a written contract, embodying those terms, should be drawn and executed by the respective parties, this is an obligatory contract which neither party is at liberty to refuse to perform. Such a case can not be distinguished from that of an agreement to execute a lease. If two parties negotiate for a lease of certain premises, and they agree upon the terms and conditions of the lease, and that a written lease shall be drawn and executed, embracing those terms, this is not a lease, but it is a contract, which, whenever the statute of frauds does not interfere to prevent, can be enforced; and which the courts will compel the parties specifically to perform."

³¹ *American Mfg. Co. v. Klarquist*, 47 Minn. 344, 50 N. W. 243.

§ 2220. **Damages for breach of contract to devise property.**—On the breach of a valid contract to devise certain property the promisee may maintain an action at law against the estate of the deceased promisor.³² The promisee may either sue on the contract, in which case his measure of damages will be the value of the property which was to have been devised,³³ or he may treat the contract as rescinded and sue on quantum meruit for the reasonable value of the services performed by him.³⁴ The latter form of action will be that pursued in cases where the contract is made by parol and falls within the terms of the statute of frauds.³⁵ The measure of damages in such a case is ordinarily the value of the original consideration for the contract to devise.³⁶ Where there has been a partial performance of the contract the promisee may accept such partial performance and sue the estate for the balance.³⁷ Generally speaking, the measure of damages for breach of the contract to devise does not differ from the measure of such damages in cases where a contract to convey is breached.³⁸

§ 2221. **Damages for breach of contract to procure deed or title to land.**—In a case where a party who agreed to procure a good title to certain lots owned by a third party was unable to do so without fault or fraud on his part, the

³² *Purviance v. Shultz*, 16 Ind. App. 94, 44 N. E. 766; *Lisle v. Tribble*, 92 Ky. 304, 13 Ky. L. 595, 17 S. W. 742; *Clark v. Cordry*, 69 Mo. App. 6; *Logan v. McGinnis*, 12 Pa. St. 27.

³³ *Benge v. Hiatt's Admr.*, 82 Ky. 666, 6 Ky. L. 714, 56 Am. Rep. 912; *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122; *Graham v. Graham's Exrs.*, 34 Pa. St. 475.

³⁴ *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. 270; *Purviance v. Shultz*, 16 Ind. App. 94, 44 N. E. 766; *Nimmo v. Walker*, 14 La. Ann. 581; *Laird v. Lard*, 115 Mich. 352, 73 N. W. 382; *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; *Green v. Orgain* (Tenn.), 46 S. W. 477; *Murtha v. Donohoo*, 149 Wis. 481, 136 N. W. 158; *Taylor v. Wood*, 72 Tenn. 504.

³⁵ *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. 270; *Jack v. McKee*, 9 Pa. St. 235. See also, *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

³⁶ *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Succession of McNamara*, 48 La. Ann. 45, 18 So. 908; *Ham v. Goodrich*, 37 N. H. 185; *Erben v. Lorillard*, 19 N. Y. 299; *Hertzog v. Hertzog's Admr.*, 34 Pa. St. 418. But see, *Hopkins v. Lee*, 6 Wheat. (U. S.) 109, 5 L. ed. 218; *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. 20; *MacDowell v. Oyer*, 21 Pa. St. 417.

³⁷ *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122.

³⁸ *Burgess v. Burgess*, 109 Pa. St. 312, 1 Atl. 167.

measure of damages was held to be the consideration paid with interest thereon from date of payment.³⁹ In another case where no specified time was fixed for performance of such a contract and there was a failure to perform by reason of a refusal to sell, the measure of damages was held to be the value of the land at the time when the promisee was informed that the deed could not be obtained.⁴⁰ In another case where land was sold subject to a mortgage and the vendor agreed as part of the consideration that he would secure an extension of time on the mortgage, the measure of damages for breach of the agreement to obtain the extension was held to be the expense incident to obtaining another loan to pay the mortgage which would include the expense for examination of title, drawing the bond and mortgage and satisfaction, and recording the instruments incident to the the transaction.⁴¹

§ 2222. Damages for breach of contract to exchange property.—The measure of damages for the breach of a contract to exchange one article for another is ordinarily the difference in value between the two articles.⁴² In a case of the exchange of certain wheat for seed wheat where there was a breach of the contract, it was held that the measure of damages was the difference between the value of the seed wheat when and where it was to be delivered and the market value of the other wheat at the time of the breach of the contract.⁴³

§ 2223. Damages for breach of contract of warehouseman.—The measure of damages for injury to property deposited with a warehouseman is generally held to be according to the market value of the goods when taken from the warehouse, less the charges for storage.⁴⁴ The measure of

³⁹ *Sawyer v. Warner*, 36 Iowa 333.

⁴⁰ *Gale v. Dean*, 20 Ill. 320. See also, *Howard v. Person's Heirs*, 3 N. Car. 336.

⁴¹ *Hoch v. Braxmar*, 95 N. Y. S. 647.

⁴² *Montelius v. Atherton*, 6 Colo.

224; *Smith & Nixon Co. v. Curry* (Ky.), 146 S. W. 434; *Bicknell v. Waterman*, 5 R. I. 43.

⁴³ *Talbot v. Boyd*, 11 N. Dak. 81, 88 N. W. 1026.

⁴⁴ *Western Union Cold Storage Co. v. Ermeling*, 73 Ill. App. 394; *Holt Ice &c. Co. v. Arthur Jordan*

damages for the conversion of the goods stored with a warehouseman is the value of the property converted, and this is generally held to be the value at the date of the demand.⁴⁵ And where the owner of goods stored in an elevator is unable by reason of damage to the goods through the negligence of the elevator company to remove them at the end of the time for which they are stored and is required to pay storage for the additional time, he may recover back excess storage as part of his damages.⁴⁶ In the case of the fraudulent issue of a warehouse receipt to a bona fide holder for value, his recovery is limited to the amount paid for the receipt.⁴⁷

§ 2224. Damages for delay in delivering machinery.—The measure of damages for delay in delivering machinery under a contract fixing a time for its delivery is ordinarily the rental of the machine during the time of delay and not the profits from the operation of the machine during such period.⁴⁸ And this is the rule where the delay is in the delivery of an essential part of a machine. The rental is the rental of the machine rendered useless by lack of the part.⁴⁹ Where the machine is operated during a short season only, then the damages estimated by rental may cover the time until the next season opens, where the delay prevents any operation during the current season.⁵⁰

Co., 25 Ind. App. 314, 57 N. E. 575; *Adams v. Sullivan*, 100 Ind. 8; *Laurence L. Prince & Co. v. St. Louis Cotton Compress Co.*, 112 Mo. App. 49, 86 S. W. 873; *Hattiesburg Compress Co. v. Johnson*, 81 Miss. 731, 33 So. 654; *Motley v. Southern Finishing & Warehouse Co.*, 122 N. Car. 347, 30 S. E. 3.

⁴⁵ *Reebie v. Brackett*, 109 Ill. App. 631; *State v. Sullivan*, 99 Mo. App. 616, 74 S. W. 417. See also, *Dolliff v. Robins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. 466.

⁴⁶ *Arbuckle v. Everybody's &c. Mill. Co. (Tex. Civ. App.)*, 148 S. W. 1136.

⁴⁷ *Fletcher v. Great Western*

Elevator Co., 12 S. Dak. 643, 82 N. W. 184.

⁴⁸ *Washington & G. R. Co. v. American Car. Co.*, 5 App. D. C. 524; *Singer v. Farnsworth*, 2 Ind. 597; *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.*, 77 Md. 202, 26 Atl. 493; *Maryland Ice Co. v. Arctic Ice-Machine Mfg. Co.*, 79 Md. 103, 29 Atl. 69, affd. 30 Atl. 633; *Brown v. Foster*, 51 Pa. St. 165; *Logemann v. Pauly*, 100 Wis. 671, 76 N. W. 604.

⁴⁹ *Champion Ice Mfg. &c. Co. v. Pennsylvania Iron Works Co.*, 68 Ohio St. 229, 67 N. E. 486.

⁵⁰ *Wood v. Joliet Gaslight Co.*, 111 Fed. 463, 49 C. C. A. 427.

§ 2225. **Damages for delay in delivering vessels.**—In case of delay in the construction and delivery of a vessel, the damages are generally held to be the ordinary hire of the vessel during the period of delay, excluding the profits from the running of the vessel as being speculative and uncertain.⁵¹ In a case where the parties for whom vessels were built were in some measure responsible for the delay and in fact delayed the acceptance of the vessels after their completion, it was held that the builder was liable only to the amount of the interest on the payments made prior to the delivery of the vessels for the time of the delay.⁵²

§ 2226. **Damages for breach of municipal improvement contracts.**—Where a contractor is prevented by a city from carrying out his contract, the measure of damages is ordinarily the difference between the contract-price and what it would actually have cost to construct the improvement in question.⁵³ This will allow a recovery of profits prevented, but will exclude the profits of collateral enterprises.⁵⁴ In New York the contractor who establishes his right to recover is entitled to interest on his claim.⁵⁵ A recent Iowa case holds a city liable to a local improvement contractor for his loss of interest on assessments, where this is due to the unreasonable and negligent delay of the city in levying the assessments.⁵⁶ Where the contractor for a public improvement abandons the same without sufficient reason, the city is entitled to the reasonable expenses necessarily incurred by it in completing the work.⁵⁷

⁵¹ *Cable v. Leeds*, 6 La. Ann. 293; *Taylor v. Maguire*, 13 Mo. 517; *Rogers v. Beard*, 36 Barb. (N. Y.) 31; *Brown v. Foster*, 51 Pa. St. 165.

⁵² *Deford v. Maryland Steel Co.*, 113 Fed. 72, 51 C. C. A. 59.

⁵³ *Brady v. St. Joseph*, 84 Mo. App. 399; *St. George Contracting Co. v. New York*, 98 N. E. 387; *Long Island Contracting &c. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483; *Toledo v. Libbie*, 8 Ohio C. D. 589, 19 Ohio C. C. 704. See also, *McManus v. Philadelphia*, 195 Pa. St. 304, 45 Atl. 1053.

⁵⁴ *Long Island Contracting &c. Co. v. New York*, 204 N. Y. 73, 97 N. E. 483. See also, *Jones v. New York*, 47 App. Div. (N. Y.) 39, 62 N. Y. S. 284.

⁵⁵ *R. G. Packard Co. v. New York*, 137 N. Y. S. 9.

⁵⁶ *J. W. Turner Imp. Co. v. Des Moines (Iowa)*, 136 N. W. 656. See *Greencastle v. Allen*, 43 Ind. 347.

⁵⁷ *Winona v. Jackson*, 92 Minn. 453, 100 N. W. 368; *Sherman v. Connor (Tex. Civ. App.)*, 72 S. W. 238.

§ 2227. **Damages on enforcement of mechanics' liens—Rights of subcontractors.**—The failure of the principal contractor does not, as a general rule, defeat in toto the claim of the subcontractor.⁵⁸ But the subcontractor will be entitled to so much as his materials are reasonably worth, according to the contract-price, first deducting all payments rightfully made and damages attaching, which are occasioned by the nonperformance of the principal contractor.⁵⁹ In case of nonperformance by the principal contractor the amount covered is the amount fixed by the contract, less damages sustained by nonperformance.⁶⁰ If the damage exceeds the entire amount due on the principal contract, the claim of the subcontractor will fail,⁶¹ and this rule will apply even where the damages are liquidated.⁶² The cases generally allow damages for default in performance of the contract to be pleaded as a defense in a suit to enforce mechanics' liens.⁶³

§ 2228. **Damages for breach of charter party.**—Here, as elsewhere, the damages for breach of a charter party must be confined to those damages which naturally and directly result from such breach, or may be fairly presumed to have been within the contemplation of the parties when the contract was made.⁶⁴ As a general rule, the measure of dam-

⁵⁸ *Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583.

⁵⁹ *Mehrle v. Dunne*, 75 Ill. 239; *Morehouse v. Moulding*, 74 Ill. 322; *Kotcher v. Perrin*, 149 Mich. 690, 113 N. W. 284; *Lake v. Brannin*, 90 Miss. 737, 44 So. 65; *Van Clief v. Van Vechten*, 48 Hun (N. Y.) 304, 15 N. Y. St. 896, 1 N. Y. S. 99, affd. 62 Hun (N. Y.) 619, 43 N. Y. St. 20, 16 N. Y. S. 818; *Wright v. Pohls*, 83 Wis. 560, 53 N. W. 848. But see *Taylor v. Murphy*, 148 Pa. 337, 23 Atl. 1134, 33 Am. St. 825.

⁶⁰ *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Waterbury Lumber & Co. v. Coogan*, 73 Conn. 519, 48 Atl. 204.

⁶¹ *Parrish v. Christopher*, 8 Ky. L. 868, 3 S. W. 603.

⁶² *McBean v. Kinnear*, 23 Ont.

313; *Wood v. Oakland & c. Rapid Transit Co.*, 107 Cal. 500, 40 Pac. 806; *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765; *Giant Powder Co. v. San Diego Flume Co.*, 97 Cal. 263, 32 Pac. 172; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588; *Stimson Mill Co. v. Riley*, 110 Cal. 18, 42 Pac. 1072; *Julin v. Ristow Poths Mfg. Co.*, 54 Ill. App. 460; *Morgan v. Stevens*, 6 Abb. N. C. (N. Y.) 356.

⁶³ *Heberlein v. Wendt*, 99 Ill. App. 506; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *Spalding v. Burke*, 33 Wash. 679, 74 Pac. 829; *Norton v. Sinkhorn*, 63 N. J. Eq. 313, 50 Atl. 506.

⁶⁴ *The Georg Dumois*, 115 Fed. 65, 52 C. C. A. 659.

ages against the charterer of a ship for the total breach of his contract is the net amount that would have been earned by the vessel under the charter sued on, less the net amount earned or which might with reasonable diligence have been earned by the vessel during the time required for the performance of the voyage named in such contract of charter.⁶⁵ Where the charter party obligates the vessel to receive a stated tonnage and the master refuses to accept this amount, the shippers are entitled to recover the extra expense to which they are put in shipping the balance of the cargo to its destination on another vessel.⁶⁶ The damages must be certain and not purely speculative. In one of the cases where the charterer of a vessel was to bring, from a foreign port, a cargo of fruit owned by another, but consigned to him for sale, it was held that he could not, in an action for a breach of the charter, which it was alleged caused delay and consequent injury to the fruit, recover for loss of commission which he would have made on the consignment. These losses were considered too remote and uncertain to furnish a measure of damages or to have been within the contemplation of the parties.⁶⁷ A charterer has also been denied the right to recover counsel fees paid out by a consignee to release the cargo from an unwarranted demand made by the master.^{67a}

§ 2229. Damages for breach of arbitration agreement.—

As a general rule, substantial damages can not be recovered for the breach of an agreement to arbitrate a dispute arising under a contract while such an agreement remains wholly executory, for the reason that there is nothing by which the damages can be measured.⁶⁸ "There are many cases in the books where, there having been an actual sub-

⁶⁵ *Smith v. McGuire*, 3 H. & N. 554; *Utter v. Chapman*, 38 Cal. 659; *Leblond v. McNear*, 104 Fed. 826, *affd.* 123 Fed. 384, 61 C. C. A. 564; *Dalbeattie Steamship Co. v. Card*, 59 Fed. 159; *Cornwall v. Moore*, 125 Fed. 646; *Dean v. Ritter*, 18 Mo. 182; *Ashburner v. Balchen*, 7 N. Y. 262.

⁶⁶ *Sewall v. Wood*, 135 Fed. 12, 67 C. C. A. 580.

⁶⁷ *The Habil*, 100 Fed. 120.

^{67a} *Sewall v. Wood*, 135 Fed. 12, 67 C. C. A. 580.

⁶⁸ *Munson v. Straits of Dover Steamship Co.*, 102 Fed. 926, 43 C. C. A. 57. See also, *Livingston v. Ralli*, 5 El. & Bl. 132.

mission, damages have been allowed for a subsequent revocation. In such cases the receding party has led the other into the expense of making a futile experiment, and the expenses incurred thereby result directly from his act, and can be definitely ascertained. But where nothing has been done in partial execution of the covenant, and the covenant does not fix anything by way of penalty or liquidated damages, the loss arising from a refusal to fulfill is usually wholly conjectural, because it is impossible to prove that the party would have profited by the arbitration."⁶⁹

§ 2230. Damages for breach of contract for board and lodging.—Where board and lodging are obtained for a fixed time at an agreed price, the damages recoverable by the landlord where the boarder leaves before the expiration of the time agreed upon are the pro rata amount of the board furnished, due and unpaid up to the time the boarder leaves, and compensation for the loss of the profits on the contract to the end of the term,⁷⁰ and this latter usually consists of the profits the landlord would have made had the contract not been broken.⁷¹ Where, however, the contract specially stipulates for "no deduction in case of absence," the landlord is entitled to the pay agreed upon until the place of the defaulting boarder is supplied by another paying the same or a higher price.⁷²

§ 2231. Damages for breach of advertising contracts.—The publisher of a newspaper is entitled to actual damages for the breach of an advertising contract,⁷³ and this will

⁶⁹ *Munson v. Straits of Dover Steamship Co.*, 102 Fed. 926, 43 C. C. A. 57.

⁷⁰ *Haggin's Admr. v. Price*, 8 Dana (Ky.) 48; *Wilson v. Martin*, 1 Denio (N. Y.) 602.

⁷¹ *Crane v. Powell*, 46 N. Y. St. 668, 19 N. Y. S. 220, affd. 139 N. Y. 379, 34 N. E. 911; *Lydecker v. Valentine*, 71 Hun (N. Y.) 194, 54 N. Y. St. 73, 24 N. Y. S. 567; *Strakosch v. Wray*, 6 Misc. (N. Y.) 207, 26 N. Y. S. 537; *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501;

Wetmore v. Jaffray, 9 Hun (N. Y.) 140; *Dock v. Pratt*, 30 Pa. Super. Ct. 598. In other words, it would seem to be the price of the board less the cost of furnishing it.

⁷² *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501.

⁷³ *Haynes v. Nye*, 185 Mass. 507, 70 N. E. 932; *May v. Poluhoff*, 65 Misc. (N. Y.) 546, 120 N. Y. S. 827; *Mendell v. Willyoung*, 42 Misc. (N. Y.) 210, 85 N. Y. S. 647; *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388.

usually be the contract-price, less the amount for which the space could have been rented to other parties.⁷⁴ Where the breach of contract is by the publisher, the advertiser on his part may recover only the damages he can prove and he may not have uncertain and speculative damages.⁷⁵ The measure of damages for breach of a contract to furnish advertising matter and other aid in making sales is held to be the amount of loss suffered by reason of such default.⁷⁶ The measure of damages for breach of contract to insert an advertisement where another medium of like character is readily obtainable in the market is held to be the difference between the contract-price and the market-price at the time of the breach.⁷⁷ Where the breach consists in the refusal to display an advertising scheme in a hotel, the damages are the amounts the promoter would have received from advertisers for such advertising.⁷⁸

§ 2232. Damages for breach of lease agreement by lessor.—When an owner of premises refuses to carry out his agreement to grant a leasehold estate and the other contracting party resorts to an action to recover compensation for the loss entailed by this breach of contract, the measure of damages is the value of the contemplated leasehold estate in the open market, minus the rent reserved.⁷⁹ The measure of damages is the loss of the bargain, viz.: the difference between the rent agreed upon in the accepted propo-

⁷⁴ Haynes v. Nye, 185 Mass. 507, 70 N. E. 932; Peck v. Kansas City Metal Roofing &c. Co., 96 Mo. App. 212, 70 S. W. 169; Railway Advertising Co. v. Standard Rock Candy Co., 83 App. Div. (N. Y.) 191, 83 N. Y. S. 338; Mendell v. Willyoung, 42 Misc. (N. Y.) 210, 85 N. Y. S. 647; Butler v. Mail &c. Pub. Co., 54 App. Div. (N. Y.) 382, 66 N. Y. S. 788, revd. 171 N. Y. 208, 63 N. E. 951. For breach of contract for publication of advertisement by refusal of advertiser to carry it out, the measure of damages is prima facie the agreed compensation for the full term and the advertiser has the burden

to prove facts in mitigation. McDermott v. De Meridor, 80 N. J. L. 67, 76 Atl. 331.

⁷⁵ Kenworthy v. Stevens, 132 Mass. 123; Holloway v. Stephens, 2 Thomp. & C. (N. Y.) 658; Eisenlohr v. Swain, 35 Pa. St. 107, 78 Am. Dec. 328.

⁷⁶ Simpson v. Crane, 149 Mich. 352, 110 N. W. 1081.

⁷⁷ Tribune Co. v. Bradshaw, 20 Ill. App. 17. See also, Kenworthy v. Stevens, 132 Mass. 123.

⁷⁸ Mudge v. Adams, 37 Tex. Civ. App. 186, 83 S. W. 722.

⁷⁹ North Chicago St. R. Co. v. LeGrand Co., 95 Ill. App. 435.

sition and the actual market value of the premises at the time the agreement was made.⁸⁰ If the leasehold estate has no general market value, its value should be ascertained from witnesses, whose skill and experience enable them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.⁸¹ The same damages can be recovered for breach of a covenant for quiet enjoyment by the lessor.⁸² For a breach of an agreement to make or assign a lease, the intending lessee may recover as damages sums expended by him in examining the title and in drawing papers.⁸³ It amounts to the same thing to charge that the plaintiff is entitled to be put in the same position, pecuniarily, as if the bargain had been kept.⁸⁴ A different rule has been applied where the party contracting to grant a leasehold estate is unable to do so because of an unforeseen event for which he is not to blame, as where a life interest comes to an end. The damages would be the same as in the case of a breach of a contract to sell land, made without fraud or misrepresentation and which the vendor is unable to carry out because he can not make a good title.⁸⁵ In such case the vendee can not recover for the fancied goodness of the bargain.⁸⁶ In one case there was no evidence of any pecuniary loss from the breach, or of any precise loss which could be ascertained in money, but the complaint was that the plaintiff was disappointed and put to trouble and in-

⁸⁰ Robinson v. Harman, 1 Exch. 850; Worthington v. Warrington, 8 C. B. 134; Hall v. Horton, 79 Iowa 352, 44 N. W. 569; Alexander v. Bishop, 59 Iowa 572, 13 N. W. 714; Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Taylor v. Bradley, 4 Abb. App. Dec. (N. Y.) 363; Garsed v. Turner, 71 Pa. St. 56; Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797.

⁸¹ Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Giles v. O'Toole, 4 Barb. (N. Y.) 261; Rhodes v. Baird, 16 Ohio St. 573; Newbrough v. Walker, 8 Grat. (Va.) 16, 56 Am. Dec. 127.

⁸² Buck v. Morrow, 2 Tex. Civ. App. 361, 21 S. W. 398.

⁸³ Hanslip v. Padwick, 5 Exch. 615.

⁸⁴ Garsed v. Turner, 71 Pa. St. 56.

⁸⁵ McCowry v. Croghan's Admr., 1 Grant Cas. (Pa.) 307.

⁸⁶ Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 B. & C. 416; Baldwin v. Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; Peters v. McKeon, 4 Denio (N. Y.) 546.

convenience in procuring another house. It was held that a verdict giving actual damages could not be sustained.⁸⁷

§ 2233. Damages for breach of lease agreement by lessee.—Where the owner of premises brings an action at law against an intended lessee for failure to carry out his agreement to lease premises, the measure of the damages sustained by the plaintiff is the difference between the contract-price of the leased premises as agreed upon and the amount that the plaintiff was able to realize out of the property after he had been notified that the defendant did not intend to take it.⁸⁸ However, the lessor will not be allowed to recover except for such loss as he could not, by the use of reasonable effort and care and at a moderate expense, have prevented. If by ordinary effort and care, and at a moderate expense, he could have cultivated the land, or could have rented it, it was his duty to do so.⁸⁹ In determining the difference between the market value of the lease and the agreed rent, instalments of rent not due at the time of the suit must be discounted at the legal rate.⁹⁰

§ 2234. Damages for breach of lease agreement—Letting on shares.—In a case where there was a letting on the shares and the owner of the premises refused to let the other party into possession, the latter was allowed to recover the value of his contract, that is to say, what he could reasonably have made out of it, as his damages. To say that the plaintiff's damages should be measured by what he could have made on the farm is but another mode of saying he was entitled to the value of the bargain.⁹¹

§ 2235. Damages for failure to repair leased premises.—The general rule for the measure of damages for failure to make repairs is the difference in the rental value of the

⁸⁷ Hunt v. D'Orval, Dud. (S. Car.) 180.

⁸⁸ Post v. Davis, 7 Kans. App. 217, 52 Pac. 903; Bacon v. Combes, 32 Misc. (N. Y.) 704, 65 N. Y. S. 510; Cleveland v. Bryant, 16 S. Car. 634.

⁸⁹ Stoker v. Wilson, 3 Willson Civ. Cas. Ct. App. (Tex.) § 10.

⁹⁰ Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797.

⁹¹ Hoy v. Grenoble, 34 Pa. St. 9, 75 Am. Dec. 628; Wolf v. Studebaker, 65 Pa. St. 459.

premises with the repairs and the rental value without them.⁹² In an action by a lessee for breach of covenant to repair resulting in damages to furniture and rendering the premises unfit for use as a boarding house, the damages recoverable were held to be such as would compensate for the damages to the furniture, and the difference between the rental value of the building as it actually was and what it would have been worth if the contemplated repairs had been made.⁹³ Consequential damages may sometimes be recovered, but such recovery is confined to the proximate and unavoidable consequences of the breach of the covenant to repair. The lessee, it is true, can not wait till the demised premises fall to pieces about his head, and then abandon the premises and sue on his covenant to repair.⁹⁴ But he is not deprived of his right to recover any actual damage he may have sustained by the dilapidation of the leased building merely because he did not himself repair as soon as the decay or dilapidation became dangerous. The damages must not be remote or speculative.⁹⁵ Hence, it has been held that indirect and consequential damages flowing from some failure to repair, such as the destruction of crops by the trespass of cattle, can not be recovered from the lessor.⁹⁶ The correct rule in most cases would be that if a lessee took possession with a fence down, it was his right and duty to rebuild the fence and that the full extent of his damages could not exceed the necessary cost of rebuilding. Yet this would not apply where the lessor refused to rebuild a fence or to allow the lessee to rebuild it. A man can not forbid the doing of a thing and then insist that his rights are to be predicated upon the result of a disregard

⁹² *Taylor v. Lehman*, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230; *Thomson-Houston & Co. v. Durant & Co.*, 144 N. Y. 34, 39 N. E. 7. In *Vivian v. Champion*, 2 Ld. Raym. 1125, it was said that the proper measure of damages in a breach of such covenants was what it would cost to put the premises in repair. This rule appears to have been modified in some modern cases on covenants for re-

pairs. *Fisher v. Goebel*, 40 Mo. 475.

⁹³ *Kohne v. White*, 12 Wash. 199, 40 Pac. 794.

⁹⁴ *Thompson v. Shattuck*, 2 Metc. (Mass.) 615; *Fisher v. Goebel*, 40 Mo. 475.

⁹⁵ *Loker v. Damon*, 17 Pick. (Mass.) 284; *Green v. Bell*, 3 Mo. App. 291.

⁹⁶ *Varner v. Rice*, 39 Ark. 344.

of his instruction.⁹⁷ So, generally, a tenant will not be permitted to recover damages for loss of trade resulting from a breach of a lessor's covenant to repair.⁹⁸ In assessing damages, certainty as far as the nature of the case will admit is required; mere speculative injuries, depending on uncertain future contingencies, afford no ground for damages.⁹⁹ But in an action during the term by a tenant against his landlord for breach of covenant to repair, the tenant may recover damages for the whole leasehold estate.¹ So, where an action brought during the term was tried after the lease expired, it was held that the jury could consider all the consequences of the refusal to repair, those subsequent as well as those prior to the institution of the suit, thus settling all questions of damages arising from the breach of the covenant assigned in the declaration.²

§ 2236. Damages for breach of lease agreement—Loss of profits.—Prospective profits from the lessee's use of the premises to be demised are too speculative to be recoverable.³ Loss of profit is too remote a subject of damage to be allowed at all under any circumstances in such cases as these.⁴ It has been held, however, that other damages than the loss of the bargain, which were the direct and natural consequences of the breach of contract complained of, could be recovered.⁵ Thus, in an action for breach of contract to lease a hotel, the plaintiffs were held to be entitled to recover for their loss of time in waiting, and for their expenses in coming from a distant state, and for money paid under contract to a clerk whom they had employed and brought with them to aid in operating the hotel.

⁹⁷ *Park v. Ensign*, 10 Kans. App. 173, 63 Pac. 280.

⁹⁸ *Middlekauff v. Smith*, 1 Md. 329.

⁹⁹ *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

¹ *Cohen v. Habenicht*, 14 Rich. Eq. (S. Car.) 31.

² *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

³ *Rhodes v. Baird*, 16 Ohio St. 573.

⁴ *Hanslip v. Padwick*, 5 Exch. 615.

⁵ *Adair v. Bogle*, 20 Iowa 238.

⁶ *Hall v. Horton*, 79 Iowa 352, 44 N. W. 569. To a similar effect is *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283.

§ 2237. **Measure of damages for failure to insure leased premises.**—The prevailing rule as to the measure of damages for the breach by a tenant of a contract to insure is the loss sustained by the landlord, not exceeding the amount of the policy which the tenant covenanted to obtain.⁷ The same doctrine as to damages is applied in the case of an agent or factor who fails to insure goods of his principal,⁸ and in other cases where a person is responsible for a loss of insurance.⁹ In New York a different rule of damages is adopted as between landlord and tenant, and the landlord can only recover the amount which would have paid the premiums for the required insurance. The result of this practice is that the lessor must place insurance in case the lessee fails to fulfill his covenant to do so. According to this view, damages resulting from the burning of the building would not be the direct and natural consequence of the breach of the contract to insure. The natural consequence of the failure would be that the lessor would procure another policy.¹⁰ It seems clear that the

⁷ *Douglass v. Murphy*, 16 U. C. Q. B. 113. Where a tenant obligates himself, by a valid contract, to keep the leased premises insured in a certain sum during the term of the lease, and without sufficient excuse fails to do so, and the building was worth the sum mentioned and was wholly destroyed by fire, the extent of the tenant's liability was the amount of the lessor's damages, that is, the amount for which insurance was taken out. *Jacksonville, M., P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. 379.

⁸ *Smith v. Price*, 2 F. & F. 748; *Ela v. French*, 11 N. H. 356; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Miner v. Taggart*, 3 Bin. (Pa.) 204; *Morris v. Summerl*, 2 Wash. (U. S.) 203, Fed. Cas. No. 9837; *De Taslet v. Crousellat*, 1 Wash. C. C. 504, Fed. Cas. No. 3827. See also, *Bateman, Ex parte*, 8 De Gex M. & G. 263.

⁹ *Hawkins v. Coulthurst*, 5 B. & S. 343; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Soule v. Union*

Bank, 45 Barb. (N. Y.) 111, 30 How. Pr. 105; *Ainsworth v. Backus*, 5 Hun (N. Y.) 414.

¹⁰ *National Mahaiwe Bank v. Hand*, 80 Hun (N. Y.) 584, 62 N. Y. St. 384, 30 N. Y. S. 508, 89 Hun (N. Y.) 329, 69 N. Y. St. 858, 35 N. Y. S. 449. The New York court went on the authority of *Dodd v. Jones*, 137 Mass. 322, where a contract for the sale of a house and lot contained a promise that a grantor would assign a policy of insurance. The policy was not assigned, the premises burned, but the grantor was only held liable for the amount of the premiums. The court said: "The agreement was not a contract of insurance, but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she can not elect to go without insurance, and hold the defendant

lessor may, if he choose, proceed to insure the premises on the default and recover the amount paid in premiums from the lessee or from his surety. But when the parties agreed that the lessor should attend to the taking out of the insurance for the lessee, that would be more like a voluntary loan from the lessor of the amount of the premiums, and the surety would not be liable to repay such amount.¹¹ In a case where the lessee collected the insurance after a loss and failed to covenant to rebuild with the proceeds, the lessor was allowed to recover the amount of the policy from him.¹²

§ 2238. Damages for breach of contract of lessee to pay taxes.—The amount of damages which a lessor can recover from his lessee for breach of a covenant to pay taxes is the amount paid by the lessor as taxes, with interest from the date of the payment, not including costs. The costs incurred by reason of any delay in the payment to the city must be considered as the result of the lessor's own fault or negligence and are not to be included in the amount he may recover.¹³

§ 2239. Damages for eviction of tenant.—Where the lessee has actually been deprived of the possession or use of demised premises, damages resolve themselves into three elements: first, the loss of the bargain; second, expense and loss incident to removal; and third, the loss of profits which the lessee could have made if he had been allowed to continue in possession. In regard to the first element of damages, the rule originally laid down was that the lessee who had been evicted could not recover as part of his damages

as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff

would procure another policy of insurance, and she can not charge the defendant with the consequences of her neglect to do that."

¹¹ Woodbridge v. Richardson, 2 Thomp. & C. (N. Y.) 418.

¹² Hayes v. Ferguson, 15 Lea (Tenn.) 1, 54 Am. Rep. 398.

¹³ Sargent v. Pray, 117 Mass. 267.

the value of the term.¹⁴ On analogy to cases where sales of real estate fell through and the vendees could only recover, beyond deposits made and expenses incident to examination of title, nominal damages, the recovery of the lessee was limited in like manner. At an early day certain cases were said to be exceptions to this rule; as where the vendor is guilty of fraud, or can convey but will not, or if he has covenanted to convey when he knew he had no authority to do so, or where it is in his power to remedy a defect in his title and he refuses to do so. In all these cases the vendor or lessor was liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property.¹⁵ In England the original rule, as applicable to an evicted lessee, has been repudiated in two well considered cases.¹⁶ In each of these cases the court held, after elaborate argument, that a lessee, upon a covenant for quiet enjoyment, was entitled to recover the value of the term lost, as well as for mesne profits paid to the owner of the paramount title. The same principle has been applied by courts in the United States so that the present doctrine as to this element of damage is that the lessee is entitled to recover the value of the leasehold estate minus the rent reserved.¹⁷ "Rental value" and "value

¹⁴ Kelly v. Dutch Church, 2 Hill (N. Y.) 105; Moak v. Johnson, 1 Hill (N. Y.) 99; Baldwin v. Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627.

¹⁵ Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343; Trull v. Granger, 8 N. Y. 115; Driggs v. Dwight, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; Brinckerhoff v. Phelps, 24 Barb. (N. Y.) 100; Tracy v. Albany Exchange Co., 7 N. Y. 472, 57 Am. Dec. 538; Chatterton v. Fox, 12 N. Y. Super. Ct. 64; Dean v. Roesler, 1 Hilt. (N. Y.) 420; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Conger v. Weaver, 20 N. Y. 140. See also, Lock v. Furze, L. R. 1 C. P. 441; Engel v. Fitch, L. R. 3 Q B. 314.

¹⁶ Williams v. Burrell, 1 M. G. & S. 402, 50 E. C. L. 402; Lock v. Furze, 19 C. B. (N. S.) 96.

¹⁷ Tyson v. Chestnut, 118 Ala. 387, 24 So. 73; Hodges v. Fries, 34 Fla. 63, 15 So. 682; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Adair v. Bogle, 20 Iowa 238; Leick v. Tritz, 94 Iowa 322, 62 N. W. 855; Taylor v. Cooper, 104 Mich. 72, 62 N. W. 157; Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Jefcoat v. Gunter, 73 Miss. 539, 19 So. 94; Cannon v. Wilbur, 30 Nebr. 777, 47 N. W. 85; Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Trull v. Granger, 8 N. Y. 115; Myers v. Burns, 35 N. Y. 269; Jonas v. Noel, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862; Newbrough v. Walker, 8 Grat. (Va.) 16, 56 Am. Dec. 127; Engstrom v. Merriam, 25 Wash. 73, 64 Pac. 914; Serfling v. Andrews, 106 Wis. 78, 81 N. W. 991. This rule as to the deduction of rent payable from the amount of

of the use" of premises mean substantially the same thing; the term "rental value," as used to measure damages, has been deemed to be the equivalent of actual damages in its legal signification. It is the commercial value of the use of a thing and the fact is ascertainable by direct proof of what it would rent for, or by the proof of facts from which a fair rental value may be known. The one is as direct and certain as the other. It may be assumed in judicial proceedings that the results of profits, if they are reasonable, definite and certain, arising from the use of real estate, afford a proper basis for fixing a rental value.¹⁸ Where a lessee for a crop rent brought an action against his lessor for failure to let him into possession, evidence of the average yield, of the cost of production and putting on the market, together with the market value of the crops, was held competent to show the measure of damages.¹⁹ Where rent has been paid in advance,²⁰ or where a lessee has been excluded from possession and has nevertheless been compelled to pay rent during the period of such exclusion, the amount so paid is to be added in computing damages; otherwise the lessee's actual loss, by reason of the breach of the implied covenant, will not be made good.²¹ It follows from this rule for estimating them that no damages

damages has been applied where a crop rent was reserved. *Jefcoat v. Gunter*, 73 Miss. 539, 19 So. 94. See also, *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448; *Dobbins v. Duguid*, 65 Ill. 464; *Adair v. Bogle*, 20 Iowa 238; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157.

¹⁸ *Leick v. Tritz*, 94 Iowa 322, 62 N. W. 855; *Alexander v. Bishop*, 59 Iowa 572, 13 N. W. 714; *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862. Yet it has been held that the use of the term "market value" to characterize the value of the leasehold interest is improper where a leasehold can not be said to have a market value. In determining the value of the leasehold it has been declared that its worth is not the amount it

would bring if offered for sale in open market, but the value to the lessee. In other words, it is the sum which he would be obliged to pay for a term of equal duration in premises equally desirable for his business or for the use he intended to make of it.

¹⁹ *Chew v. Lucas*, 15 Ind. App. 595, 43 N. E. 235.

²⁰ *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Leick v. Tritz*, 94 Iowa 322, 62 N. W. 855.

²¹ *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491. Thus, where a lessee was to clear land in payment for the use of it, and, after clearing the land, was evicted, the value of his labor in making the clearing was added to the lessee's damages. *Carter v. Lacy*, 3 Ind. App. 54, 29 N. E. 168.

can be recovered if the rent reserved for the unexpired term exceed any possible profit which the lessee could hope to make out of the use of the premises.²² In a Delaware case it has been stated that if an unlawful eviction is attended by circumstances of aggravation the jury may award exemplary damages.²³

§ 2240. Damages for eviction of tenant—Proximate consequences of breach.—In regard to the second element of damage, the rule for the measure of damages is that the tenant is entitled to recover for such loss as results directly and necessarily from the breach of the contract and is capable of being accurately estimated.²⁴ It seems that mesne profits which the lessee had been compelled to pay over to the holder of a paramount title would be included under this head. For refusing to allow the lessee to occupy according to agreement, the lessor renders himself liable in damages, the general rule for the measure of damages in such cases being the difference between the rent reserved and the value of the premises for the term. If the rent reserved is the full value of the premises, the lessee can recover only nominal damages, even though the refusal of the landlord is without just cause. But if the tenant has sustained in addition a particular loss which is the direct and necessary or natural consequence of the breach of contract by the landlord, he may recover therefor.²⁵ An evicted lessee may also recover damages for the interruption of an established business. The measure of such damages is what gain he can show with reasonable certainty that he would have made, that being what he is entitled to recover for. The profits actually realized in the preceding years under the lease may be shown as tending to prove the

²² *Leick v. Tritz*, 94 Iowa 322, 62 N. W. 855; *O'Connor v. Memphis*, 7 Lea (Tenn.) 219.

²³ *Bonsall v. McKay*, 1 Houst. (Del.) 520.

²⁴ *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Hodges v. Fries*, 34 Fla. 63, 15 So. 682;

Adair v. Bogle, 20 Iowa 238; *Kelly v. Davis*, 9 Ky. L. 647; *Chatterton v. Fox*, 12 N. Y. Super. Ct. 64; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858.

²⁵ *Adair v. Bogle*, 20 Iowa 238.

value of the premises to him.²⁶ But profits resulting from a criminal violation of the Sunday laws can form no legal basis for the estimation of damages for the eviction of a lessee,²⁷ and the recovery is limited to such loss as could not reasonably be avoided.²⁸ Where a covenantee is evicted by a stranger holding a paramount title by judgment of law, the measure of damages includes the expenses of the covenantee in defending the suit, including fees paid to counsel.²⁹

§ 2241. Damages for eviction of tenant—Loss of prospective profit.—Loss of prospective profits, the third element of damage, seems not to be properly recoverable in the case of eviction. Taking the rule that damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties, at the time of the making of such contract, as the probable result of a breach of it,³⁰ it follows that expected profits from the use of the demised premises are too remote, ordinarily, at least, to be recovered and can not be used as a basis for estimating damages.³¹ In order that the lessee may recover for loss of prospective profits or for expenditures for attempting to move in, knowledge of the situation must be brought home to the lessor at the time the lease was made. Without such knowledge, it can not be said that loss of profits could have been within the contemplation of the parties when the lease was entered into.³² However, it has been held that where a tenant was evicted by some act that amounted to a trespass on the part of the landlord, prospective profits

²⁶ *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. 157.

²⁷ *Raynor v. Valentine Blatz Brewing Co.*, 100 Wis. 414, 76 N. W. 343.

²⁸ *Dobbins v. Duquid*, 65 Ill. 464.

²⁹ *Levitzky v. Canning*, 33 Cal. 299; *Swett v. Patrick*, 12 Maine 9; *Pitkin v. Leavitt*, 13 Vt. 379.

³⁰ *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. 119, 53 Am. St. 909; *Bradley v. Chicago M. & St. P. R. Co.*, 94 Wis. 44, 68 N. W. 410.

³¹ *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Cleveland, C. C. & St. L. R. Co. v. Mitchell*, 84 Ill. App. 206; *Smith v. Phillips*, 16 Ky. L. 615, 29 S. W. 358; *Kelly v. Davis*, 9 Ky. L. 647; *Throop v. Broadus*, 15 Ky. L. 812; *Denny v. Marksburg*, 15 Ky. L. (abstract) 400; *Newbrough v. Walker*, 8 Grat. (Va.) 16, 56 Am. Dec. 127.

³² *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991.

in the plaintiff's business during the balance of the term could be made an item of recovery.³³ This ruling was based on the doctrine that anticipated profits could be recovered as damages in an action of trespass.³⁴ Where a new lessee seeks to recover possession and damages from a former lessee, who previously had a term in the premises, the amount of his recovery is not limited to the rent reserved in the new lease during the period which the former tenant occupies, but he may recover the reasonable value of the premises to him during that period.³⁵

§ 2242. Damages for failure of lessor to put lessee in possession.—In case the lessor fails to put the lessee into possession according to the terms of the contract, the proper measure of damages seems to be that the lessee is entitled to recover rent paid in advance, the difference between the rent agreed to be paid and the value of the term, and such special damages as would arise naturally and generally from such a breach of contract. If special circumstances under which the contract was made were stated at the time and known to both parties, then the amount of damages which would ordinarily follow from a breach of the contract under those special circumstances could be recovered.³⁶

§ 2243. Damages for partial disturbance of lessee's possession.—In a case of partial disturbance and interruption, the law fixes no precise rule of damages; but the lessee's recovery is not limited to the amount of rent reserved, for that may be nominal only and not express the real consideration for the lease.³⁷

§ 2244. Damages for breach of covenants against incumbrance.—Where the incumbrance is such as to wholly defeat the estate conveyed, the measure of damages is the

³³ *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059.

³⁴ *Schile v. Brokhahus*, 80 N. Y. 614.

³⁵ *Baldwin v. Skeels*, 51 Vt. 121.

³⁶ *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572.

³⁷ *Dexter v. Manley*, 4 Cush. (Mass.) 14.

consideration—money and interest thereon.³⁸ If the incumbrance is less in amount than the consideration paid for the land, and the grantee pays it to relieve his property, he is entitled to recover the amount paid with interest.³⁹ In a case where one conveyed land, with a covenant to save the grantee harmless against a mortgage upon that and other land given by a former owner, and the mortgage was afterward foreclosed upon all the mortgaged land, and the land was bought by the grantee, it was held, in an action by him on the covenant, that the measure of damages was the price paid by him to his grantors, and that the fact that the land other than that conveyed by his grantor was worth more than the amount paid for the purchase under the mortgage could not be taken into account to reduce the damages.⁴⁰ If the incumbrance is of a kind which interferes with the purchaser's enjoyment of the property, he is entitled to substantial damages, the measure of which is a just compensation for the injury resulting from the incumbrance.⁴¹ The damages must be proximate and not remote. Thus, where one who was the actual owner of a farm and in possession of it sold it with covenants of warranty subject to a mortgage, but, by reason of the loss of a deed in the grantor's chain of title before it was recorded, the

³⁸ *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Alexander v. Bridgford*, 59 Ark. 195, 27 S. W. 69; *Pearson v. Ford*, 1 Kans. App. 580, 42 Pac. 257; *Chapel v. Bull*, 17 Mass. 213; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Blanchard v. Ellis*, 1 Gray (Mass.) 195, 61 Am. Dec. 417; *Dana v. Goodfellow*, 51 Minn. 375, 53 N. W. 656; *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. 105; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Hunt v. Raplee*, 44 Hun (N. Y.) 149, 7 N. Y. St. 783; *Adams v. Conover*, 22 Hun (N. Y.) 424, affd. 87 N. Y. 422, 41 Am. Rep. 381; *Foote v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Nichol v. Alexander*, 28 Wis. 118.

³⁹ *Pitcher v. Livingston*, 4 Johns.

(N. Y.) 1, 4 Am. Dec. 229; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142.

⁴⁰ *Dana v. Goodfellow*, 51 Minn. 375, 53 N. W. 656.

⁴¹ *Hubbard v. Norton*, 10 Conn. 422; *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. 47; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Williamson v. Hall*, 62 Mo. 405; *Kellogg v. Malin*, 62 Mo. 429; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Brown v. Allen*, 73 Hun (N. Y.) 291, 57 N. Y. St. 281, 26 N. Y. S. 299; *Funk v. Voneida*, 11 Serg. & R. 109, 14 Am. Dec. 617; *Walker v. Wilson*, 13 Wis. 522.

grantee was unable to obtain a loan upon the farm, and in consequence the mortgage was foreclosed and the grantee evicted, the defect in the title not having been made good in season to prevent the eviction, though it was afterwards remedied, it was held that the grantee could not recover damages for the loss of the farm.⁴² Interest can not be recovered on damages arising from the breach of a covenant against incumbrances when the incumbrance is permanent in its nature; for in such case the measure of the damages is the difference between the value of the premises with and without the incumbrance, and they are necessarily unliquidated.⁴³

§ 2245. Damages for breach of covenants against incumbrance—Recovery of amount paid to remove.—In cases where the plaintiff has paid off the incumbrance at any time before the trial, he may recover what he has fairly and reasonably paid for that purpose, not exceeding the value of the estate.⁴⁴

⁴² *Lamb v. Buker*, 34 Nebr. 485, 52 N. W. 285.

⁴³ *Doctor v. Darling*, 68 Hun (N. Y.) 70, 52 N. Y. St. 221, 22 N. Y. S. 594.

⁴⁴ *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. 401, 3 Am. St. 57; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Davis v. Lyman*, 6 Conn. 249; *Amos v. Cosby*, 74 Ga. 793; *Wadhams v. Swan*, 109 Ill. 46; *Cheney v. City Nat. Bank*, 77 Ill. 562; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Willets v. Burgess*, 34 Ill. 494; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260; *Burk v. Clements*, 16 Ind. 132; *Snyder v. Lane*, 10 Ind. 424; *Rardin v. Walpole*, 38 Ind. 146; *Harwood v. Lee*, 85 Iowa 622, 52 N. W. 521; *Guthrie v. Russell*, 46 Iowa 269, 26 Am. Rep. 135; *Baker v. Corbett*, 28 Iowa 317; *Runnells v. Webber*, 59 Maine 488; *Reed v. Pierce*, 36 Maine 455, 58 Am. Dec. 761; *Spring v. Chase*, 22 Maine 505, 39 Am. Dec. 595; *Stoddard v. Gage*,

41 Maine 287; *Herrick v. Moore*, 19 Maine 313; *Bradshaw v. Crosby*, 151 Mass. 237, 24 N. E. 47; *Coburn v. Litchfield*, 132 Mass. 449; *Smith v. Carney*, 127 Mass. 179; *Johnson v. Collins*, 116 Mass. 392; *Harrington v. Murphy*, 109 Mass. 299; *Farnum v. Peterson*, 111 Mass. 148; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Comings v. Little*, 24 Pick. (Mass.) 266; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Lefingwell v. Elliott*, 10 Pick. (Mass.) 204; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Brooks v. Moody*, 20 Pick. (Mass.) 474; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Chapel v. Bull*, 17 Mass. 213; *Edington v. Nix*, 49 Mo. 134; *St. Louis v. Bissell*, 46 Mo. 157; *Henderson v. Henderson's Exrs.*, 13 Mo. 151; *Ward v. Ashbrook*, 78 Mo. 515; *Williamson v. Hall*, 62 Mo. 405; *Morgan v. Hannibal & C. R. Co.*, 63 Mo. 129; *Walker's Admr. v. Deaver*, 79 Mo. 664; *Barnhart v. Hughes*, 46 Mo. App. 318; *Mills v. Saunders*, 4 Nebr. 190; *Smith v. Jeffs*, 44 N. H. 482; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Morrison v. Un-*

§ 2246. **Damages for breach of covenants against incumbrance—Inextinguishable incumbrance.**—If the incumbrance is practically inextinguishable, as in case of a permanent easement, the measure of damages is the difference in the value of the land without and with the incumbrance.⁴⁶ A restriction as to building lines, or as to the character or cost of the building, to be erected upon the land, is for all practical purposes inextinguishable, for the purchaser can not compel a release of it in any form, and therefore the measure of damages is the injury arising from the continuance of the incumbrance. A similar rule of damages applies in case of a breach of a covenant to allow another to exercise a certain easement, as where a deed of a right of way to a railroad company provided for a private way on the grantor's farm under the railroad, and the company having violated the covenant, evidence of what his land was worth without the crossings, and what it would have been worth with them, was held admissible.⁴⁷

derwood, 20 N. H. 369; Osgood v. Osgood, 39 N. H. 209; Fagan v. Cadmus, 46 N. J. L. 441; Hartshorn v. Cleveland, 52 N. J. L. 473, 19 Atl. 974; Stewart v. Drake, 9 N. J. L. 139; Garrison v. Sandford, 12 N. J. L. 261; Braman v. Bingham, 26 N. Y. 483; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Standard v. Eldridge, 16 Johns. (N. Y.) 105; Lane v. Richardson, 104 N. Car. 642, 10 S. E. 189; Stambaugh v. Smith, 23 Ohio St. 584; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Corbett v. Wrenn, 25 Ore. 305, 35 Pac. 658; Funk v. Voneida, 11 Serg. & R. 109, 14 Am. Dec. 617; Richardson v. Dorr, 5 Vt. 9; Eaton v. Tallmadge, 22 Wis. 526; Pillsbury v. Mitchell, 5 Wis. 17; Eaton v. Lyman, 30 Wis. 41.

⁴⁶ Copeland v. McAdory, 100 Ala. 553, 13 So. 545; Clark v. Zeigler, 79 Ala. 346; Hubbard v. Norton, 10 Conn. 422; Mitchell v. Stanley, 44 Conn. 312; Richmond v. Ames,

164 Mass. 467, 41 N. E. 671; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Wetherbee v. Bennett, 2 Allen (Mass.) 428; Harlow v. Thomas, 15 Pick (Mass.) 66; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Streeper v. Abeln, 59 Mo. App. 485; Kellogg v. Malin, 62 Mo. 429; Walker's Admr. v. Deaver, 79 Mo. 664; Henderson v. Henderson's Exrs., 13 Mo. 151; Fagan v. Cadmus, 46 N. J. L. 441; Hymes v. Esty, 133 N. Y. 342, 31 N. E. 105; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. 432; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Porter v. Bradley, 7 R. I. 538.

⁴⁷ Lake Erie & W. R. Co. v. Lee, 14 Ind. App. 328, 41 N. E. 1058; Louisville, N. A. & C. R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546; Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719.

§ 2247. **Damages for breach of covenants against incumbrance — Encroachment of buildings.** — Where the breach consists of an alleged encroachment of the buildings on the adjoining land of another, evidence that the covenantee had made a contract to sell the premises, and that the purchaser refused to accept on account of such encroachment, is not admissible, as his damages, if anything, are the difference in value between the building with and without the encroachment.⁴⁸

§ 2248. **Damages for breach of covenants against incumbrance—Unexpired lease.**—The measure of damages for the incumbrance of an unexpired term of lease is the fair rental value of the property to the expiration of the term. "The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use."⁴⁹ The purchaser may, if he prefers, recognize the lease to the tenant and accept the unpaid rent; and in that case he could not recover damages for the incumbrance. But he is not obliged to recognize the lease, and he is not obliged to receive the unpaid rent in satisfaction of his damages for the incumbrance. He is entitled to the immediate possession of the land, and, being deprived of such possession by reason of the existence of the lease, he is entitled to all his damages for the injury.⁵⁰ If the breach of the covenant consists in the possession of the land by a tenant of the grantor, who offers to attorn to the purchaser, and not being recognized by the purchaser, pays the rent to the grantor, the purchaser is entitled to damages to the full rental value for the time he is kept out of possession,

⁴⁸ *Stearn v. Hesdorfer*, 9 Misc. (N. Y.) 134, 59 N. Y. St. 713, 29 N. Y. S. 281.

⁴⁹ *Clark v. Fisher*, 54 Kans. 403, 38 Pac. 493; *Fritz v. Pusey*, 31

Minn. 368, 18 N. W. 94; *Porter v. Bradley*, 7 R. I. 538.

⁵⁰ *Clark v. Fisher*, 54 Kans. 403, 38 Pac. 493; *Smith v. Leighton*, 38 Kans. 544, 17 Pac. 52, 5 Am. St. 778.

without deduction of the rents turned over to the grantor.⁵¹ If there is a crop upon the leased land at the time of the delivery of the deed which the lessee is authorized to remove, the measure of damages may be increased to the extent of the value of the crop, less the expense of taking care of and harvesting the same.⁵² Where the incumbrance is a right granted to a stranger to cut timber on the land for a term of years, the measure of damages is the value of the timber to the purchaser of the land for the use of his farm estimated at the time of the conveyance to him, and not the value of the timber to the purchaser of that.⁵³ If the incumbrance is a lease of the coal in the granted land, but the coal remains in its natural state, and the covenantor tenders a release from the lessee, the damages are merely nominal.⁵⁴ Where the incumbrance consists of a right, under a lease which does not expire for some years, to procure ice from the premises, and a right of way across the land for such purpose, the plaintiff may, upon proper and sufficient proof, recover substantial damages, although he has paid nothing to extinguish the incumbrance, nor been disturbed in his possession.⁵⁵

§ 2249. Damages for breach of covenants against incumbrance—Nominal damages.—Only nominal damages, it has been held, can be recovered in case the incumbrance is an inchoate right of dower, for the contingent nature of this incumbrance is not susceptible of computation until the right becomes consummate.⁵⁶ If the dower right has become fixed, the measure of damages is determined according to the expectation of life of the tenant in dower, on the basis of the

⁵¹ *Edwards v. Clark*, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659.

⁵² *Chapman v. Veach*, 32 Kans. 167, 4 Pac. 100. "If the defendants had given to the plaintiff the immediate possession of the premises at the time of the delivery of the deed, as they covenanted therein, he would have had the exclusive possession thereof, with all the crops growing thereon." *Clark v. Fisher*, 54 Kans. 403, 38 Pac. 493;

Robinson v. Hall, 33 Kans. 139, 5 Pac. 763.

⁵³ *Clark v. Zeigler*, 85 Ala. 154, 4 So. 669; *Cathcart v. Bowman*, 5 Pa. St. 317.

⁵⁴ *Buren v. Hubbell*, 54 Mo. App. 617.

⁵⁵ *Smith v. Davis*, 44 Kans. 362, 24 Pac. 428.

⁵⁶ *Blevins v. Smith*, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441; *Walker's Admr. v. Deaver*, 79 Mo. 664.

consideration paid to the covenantor for the land.⁵⁷ To recover more than nominal damages, the burden is on the grantee to show the fair and reasonable value of the incumbrance paid by him. He is not entitled to recover in an action upon the covenant what he actually paid to extinguish the incumbrance, unless he shows that the sum so paid was the fair and reasonable value of the incumbrance.⁵⁸ Evidence given by the person who held the incumbrance, that the price paid to him to extinguish it was the least sum that he would take for his interest, is not sufficient without other evidence to establish the reasonableness of such payment.⁵⁹ One who buys land by a deed containing a covenant against incumbrances may discharge a mortgage which incumbered the land at the time of the purchase, and, though he knew of the mortgage, which was to a building association, and agreed to pay a certain sum toward the discharge of it, he may recover upon his covenant the sum paid for the discharge of it in excess of the sum he agreed to pay for that purpose. The grantor, for the purpose of mitigating the damages for breach of the covenant, may show that the purchaser agreed to pay a part of the incumbrance, but he can not negative the covenant by showing that, if the purchaser had waited till the maturity of the mortgage, the sum he agreed to pay upon it would have been sufficient to extinguish instead of a much larger sum required for its extinguishment at the time the purchaser discharged it.⁶⁰ Only nominal damages can be recovered for the existence of an incumbrance until it is paid, if there has been no attempt to enforce the incumbrance.⁶¹ The

⁵⁷ *Tierney v. Whiting*, 2 Colo. 620; *Western v. Short*, 12 B. Mon. (Ky.) 153; *Downie v. Ladd*, 22 Nebr. 531, 35 N. W. 388; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Terry's Exr. v. Drabensstadt*, 68 Pa. St. 400; *Mills v. Catlin*, 22 Vt. 98.

⁵⁸ *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Guthrie v. Russell*, 46 Iowa 269, 26 Am. Rep. 135.

⁵⁹ *Gilbert v. Rushmer*, 49 Kans. 632, 31 Pac. 123.

⁶⁰ *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. 658.

⁶¹ *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. 401, 3 Am. St. 57; *Briggs v. Morse*, 42 Conn. 258; *Davis v. Lyman*, 6 Conn. 249; *Cheney v. City Nat. Bank*, 77 Ill. 562; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Willets v. Burgess*, 34 Ill. 494; *Marsh v. Thompson*, 102

covenant against incumbrance is strictly one of indemnity, and if the grantee extinguishes the incumbrance he can recover only the sum he has paid to extinguish it.⁶² If the incumbrance is a mortgage or lien which can be discharged by the payment of money, and which does not interfere with the enjoyment of the property by the grantee, the law gives only nominal damages if the grantee has done nothing towards the removal of the incumbrance.⁶³ The reason for the rule is that the grantee may never be disturbed by

Ind. 272, 1 N. E. 630; Whisler v. Hicks, 7 Blackf. (Ind.) 100, 33 Am. Dec. 454; Black v. Coan, 48 Ind. 385; Yancey v. Tatlock, 93 Iowa 386, 61 N. W. 997; Funk v. Creswell, 5 Iowa 62; Brandt v. Foster, 5 Iowa 287; Royer v. Foster, 62 Iowa 321, 17 N. W. 516; Sac County Bank v. Hooper, 77 Iowa 435, 42 N. W. 363; Harwood v. Lee, 85 Iowa 622, 52 N. W. 521; Runnells v. Webber, 59 Maine 488; Reed v. Pierce, 36 Maine 455, 58 Am. Dec. 761; Clark v. Perry, 30 Maine 148; Herrick v. Moore, 19 Maine 313; Johnson v. Collins, 116 Mass. 392; Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Harrington v. Murphy, 109 Mass. 299; Harlow v. Thomas, 15 Pick. (Mass.) 66; Tufts v. Adams, 8 Pick. (Mass.) 547; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Clark v. Swift, 3 Metc. (Mass.) 390; Brooks v. Moody, 20 Pick. (Mass.) 474; Thayer v. Clemence, 22 Pick. (Mass.) 490; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; St. Louis v. Bissell, 46 Mo. 157; Edington v. Nix, 49 Mo. 134; Mills v. Saunders, 4 Nebr. 190; Smith v. Jeffs, 44 N. H. 482; Osgood v. Osgood, 39 N. H. 209; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Morrison v. Underwood, 20 N. H. 369; Garrison v. Sandford, 12 N. J. L. 261; Stewart v. Drake, 9 N. J. L. 139; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Kent v. Welch, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; Hall v. Dean, 13 Johns. (N. Y.) 105; DeForest v. Leete, 16 Johns. (N. Y.) 122; Stanard v. Eldridge, 16 Johns. (N. Y.) 254; Grant v. Tall-

man, 20 N. Y. 191, 75 Am. Dec. 384; Barlow v. St. Nicholas Nat. Bank, 63 N. Y. 399, 20 Am. Rep. 547; Soule v. Dixon, 49 Hun (N. Y.) 605, 17 N. Y. St. 360, 1 N. Y. S. 697; McGuckin v. Milbank, 83 Hun (N. Y.) 473, 65 N. Y. St. 79, 31 N. Y. S. 1049, affd. 152 N. Y. 297, 46 N. E. 490; Braman v. Bingham, 26 N. Y. 483; Stearn v. Hessedorfer, 9 Misc. (N. Y.) 134, 59 N. Y. St. 713, 29 N. Y. S. 281; Lane v. Richardson, 104 N. Car. 642, 10 S. E. 189; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Stambaugh v. Smith, 23 Ohio St. 584; Funk v. Voneida, 11 Serg. & R. (Pa.) 109, 14 Am. Dec. 617; Lessly v. Bowie, 27 S. Car. 193, 3 S. E. 199; McCrady's Exrs. v. Brisbane, 1 Nott & McC. (S. Car.) 104, 9 Am. Dec. 676; Richardson v. Dorr, 5 Vt. 9; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 Wis. 17.

⁶² Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169.

⁶³ Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Reed v. Pierce, 36 Maine 455, 58 Am. Dec. 761; Johnson v. Collins, 116 Mass. 392; Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Clark v. Swift, 3 Metc. (Mass.) 390; Harlow v. Thomas, 15 Pick. (Mass.) 66; Tufts v. Adams, 8 Pick. (Mass.) 547; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Lane v. Richardson, 104 N. Car. 642, 10 S. E. 189; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Lessly v. Bowie, 27 S. Car. 193, 3 S. E. 199; Eaton v. Lyman, 30 Wis. 41.

the incumbrance. The debtor whose debt the incumbrance is may pay it. If the grantee in the case of an outstanding mortgage could recover the amount of the mortgage from his grantor before paying it, the holder of the mortgage is not thereby paid, and he has no claim upon the grantee for the amount, but he may still resort to the grantor, if he is the mortgagor, and compel him to pay it again.⁶⁴

§ 2250. **Damages for breach of covenants against incumbrance—Burden of proof of payment.**—The burden is upon the plaintiff to show that the sum he has paid to extinguish an incumbrance was fairly and necessarily paid.⁶⁵ If the incumbrance is an assessment for a street improvement, which became an incumbrance from the time of the completion of the improvement, and the purchaser shows that the sum paid by him was reasonably necessary to discharge the incumbrance, it has been held that his recovery of such sum will not be affected by the fact that an assessment for the improvement, levied after the making of the covenant, and still existing at the time of payment, is invalid for non-compliance with the provisions in regard to levying such assessment. The right of the city to have the amount determined, and to collect it from the property, remained; and, whether the determination was finally made by the existing assessment or by another to be substituted for it, the lien would continue from the time of the completion of the improvement. The avoidance of the assessment would merely cast upon the plaintiff the burden of showing aliunde that the sum paid by him was reasonably necessary to discharge the property from its liability for a just and legal share of the expense of the improvement.⁶⁶

§ 2251. **Damages for breach of covenant of seizin.**—As a general rule, the measure of damages for a breach of the

⁶⁴ Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169.

⁶⁵ Anderson v. Knox, 20 Ala. 156; Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114; Guthrie v. Russell, 46 Iowa 269, 26 Am. Rep. 135; Gilbert v. Rushmer, 49 Kans. 632, 31

Pac. 123; Lawless v. Collier, 19 Mo. 480; Walker's Admr. v. Deaver, 5 Mo. App. 139, revd. 79 Mo. 664.

⁶⁶ Hartshorn v. Cleveland, 52 N. J. L. 473, 19 Atl. 974.

covenant of seizin, when no interest has passed, or even possession, is the consideration paid with interest.⁶⁷ This, as between the parties, is the agreed value of the land, or, in other words, the consideration of the conveyance. The rule is based upon the supposition that the grantee took nothing by the conveyance, for the reason that the grantor had no interest to convey. The rule is, therefore, limited to cases where there has been a total breach of the covenant, and no interest has passed to the grantee by the conveyance. It is limited to cases where no semblance of title or benefit whatever has passed; where the grantee has derived no advantage whatever from it, and can derive none

⁶⁷ *Bibb v. Freeman*, 59 Ala. 612; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Hartford &c. Ore. Co. v. Miller*, 41 Conn. 112; *Sterling v. Peet*, 14 Conn. 245; *Horne v. Walton*, 117 Ill. 130, 7 N. E. 100; *King v. Gilson's Admr.*, 32 Ill. 348, 83 Am. Dec. 269; *Weber v. Anderson*, 73 Ill. 439; *Rhea v. Swain*, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; *Wilson v. Peelle*, 78 Ind. 384; *Wright v. Nipple*, 92 Ind. 310; *Zent v. Picken*, 54 Iowa 535, 6 N. W. 750; *Brandt v. Foster*, 5 Iowa 287; *Norman v. Winch*, 65 Iowa 263, 21 N. W. 598; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 15 Ky. L. 70, 22 S. W. 314; *Cosby v. West*, 2 Bibb (Ky.) 568; *Thompson v. Heffner's Exrs.*, 11 Bush (Ky.), 353; *Robertson v. Lemon*, 2 Bush (Ky.) 301; *Baxter v. Bradbury*, 20 Maine 260, 37 Am. Dec. 49; *Montgomery v. Reed*, 69 Maine 510; *Stubbs v. Page*, 2 Greenl. (Maine) 378; *Bickford v. Page*, 2 Mass. 455, 462n; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Harris v. Newell*, 8 Mass. 262; *Marston v. Hobbs*, 2 Mass. 433, 43 Am. Dec. 611; *Chapel v. Bull*, 17 Mass. 213; *Smith v. Strong*, 14 Pick. (Mass.) 128; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Hodges v. Thayer*, 110 Mass. 286; *Kimball v. Bryant*, 25 Minn. 496; *Herndon v. Harrison*, 34 Miss. 486, 69 Am. Dec. 399;

Phipps v. Tarpley, 31 Miss. 433; *Murphy v. Price*, 48 Mo. 247; *Lawless v. Collier's Exrs.*, 19 Mo. 480; *Martin v. Long*, 3 Mo. 391; *St. Louis v. Bissell*, 46 Mo. 157; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Nutting v. Herbert*, 35 N. H. 120; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck's Exrs.*, 3 Cains (N. Y.) 111, 2 Am. Dec. 254; *Caulkins v. Harris*, 9 Johns. (N. Y.) 324; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Price v. Deal*, 90 N. Car. 290; *Wilson v. Forbes*, 2 Dev. (N. Car.) 30; *Farmers' Bank v. Glenn*, 68 N. Car. 35; *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. 336; *Clark v. Parr*, 14 Ohio 118, 45 Am. Dec. 529; *Backus' Admrs. v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Stark v. Olney*, 3 Ore. 88; *Cox's Admrs. v. Henry*, 32 Pa. St. 18; *Weiting v. Nissley*, 13 Pa. St. 650; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119; *Park v. Cheek*, 4 Cold. (Tenn.) 20; *Blake v. Burnham*, 29 Vt. 437; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Daggett v. Reas*, 79 Wis. 60, 48 N. W. 127; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6; *Conrad v. Grand Grove &c. Order of Druids*, 64 Wis. 258, 25 N. W. 24; *Semple v. Wharton*, 68 Wis. 626, 32 N. W. 690; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405.

without a wrongful entry upon the estate of another. When, therefore, the grantee has recovered damages for a complete breach of the covenant, and this fact appears of record in the suit, the grantor is entitled to re-enter, and the grantee can not set up the conveyance by way of estoppel. Full damages, measured by the consideration paid and interest, can not be recovered, in case the grantee has entered into and holds possession, until there has been an eviction by title paramount, either actual or constructive.⁶⁸ The price of the land recoverable for a breach of this covenant is the price the grantor received. Therefore, in case the person to whom he has contracted to sell, instead of receiving a conveyance, contracts to sell to a third person, and the grantor at the request of his vendee conveys directly to such third person by deed with general covenant of seizin, the amount of recovery against the grantor for breach of such covenant is limited to the consideration received by him, with interest thereon.⁶⁹ Where land is conveyed to a trustee, who pays nothing for it, and he afterward in execution of his trust conveys, with covenants of warranty, to a third person, to whom his grantor has sold it, he thereby executes his grantor's contract, and the consideration which fixes the limit of his liability on his covenant is the price paid by the third person to his grantor.⁷⁰

§ 2252. Breach of covenant of seizin—Failure of title to part of tract conveyed.—For a breach of any covenant, by reason of a failure of the title to a part of the land conveyed, the measure of damages, when determined by the consideration paid, is such fractional part of the whole consideration as the value, at the time of the purchase, of the part to which the title failed bears to the whole, and interest thereon during the time the grantee has been de-

⁶⁸ *Small v. Reeves*, 14 Ind. 163; *Hill v. Butler*, 6 Ohio St. 207; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Horton v. Arnold*, 18 Wis. 212; *Taft v. Kessel*, 16 Wis. 273.

⁶⁹ *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Byrnes v. Rich*, 5 Gray (Mass.) 518; *Bowne v. Wolcott*, 1 N. Dak. 497, 48 N. W. 426.

⁷⁰ *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464.

prived of the use of the part to which the title failed, but not exceeding six years in most jurisdictions.⁷¹ The rule is the same whether the covenant be for seizin, against incumbrance, or for warranty, except in a state in which the rule prevails that in actions for a breach of the covenant of warranty the measure of damages is the value of the land at the time of eviction. If the land is all of the same general character and quality, and there is failure of title to part, presumably, in the absence of proof to the contrary, the value of each acre is its pro rata part of the entire contract-price.⁷² If separate prices were agreed upon for sev-

- ⁷¹ *Major v. Dunnivant*, 25 Ill. 262; *Clapp v. Herdman*, 25 Ill. App. 509; *Tone v. Wilson*, 81 Ill. 529; *Weber v. Anderson*, 73 Ill. 439; *Wadhams v. Innes*, 4 Ill. App. 642; *Scheible v. Slagle*, 89 Ind. 323; *Hoot v. Spade*, 20 Ind. 326; *Wright v. Nipple*, 92 Ind. 310; *Mischke v. Baughn*, 52 Iowa 528, 3 N. W. 543; *Kostendader v. Pierce*, 37 Iowa 645; *McDunn v. Des Moines*, 39 Iowa 286; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 15 Ky. L. 70, 22 S. W. 314; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; *Blanchard v. Blanchard*, 48 Maine 174; *Blanchard v. Hoxie*, 34 Maine 376; *Boyle v. Edwards*, 114 Mass. 373; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Lucas v. Wilcox*, 135 Mass. 77; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Byrnes v. Rich*, 5 Gray (Mass.) 518; *Long v. Sinclair*, 40 Mich. 569; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Partridge v. Hatch*, 18 N. H. 494; *Parker v. Brown*, 15 N. H. 176; *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. 105; *Hymes v. Van Cleef*, 61 Hun (N. Y.) 618, 39 N. Y. St. 810, 15 N. Y. S. 341, revd. 133 N. Y. 342, 31 N. E. 105; *Hunt v. Raples*, 44 Hun (N. Y.) 149, 7 N. Y. St. 783; *Staats v. Ten Eyck's Axxrs.*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Furniss v. Ferguson*, 15 N. Y. 437; *Price v. Deal*, 90 N. Car. 290; *Nyce v. Obertz*, 17 Ohio 71; *Stark v. Olney*, 3 Ore. 88; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115; *Porter v. Bradley*, 7 R. I. 538; *Aiken v. McDonald*, 43 S. Car. 29, 20 S. E. 796, 49 Am. St. 817; *Hunt v. Nolen*, 46 S. Car. 356, 24 S. E. 310; *Earle v. Middleton*, *Cheves* (S. Car.) 127; *Wallace's Admrs. v. Talbot*, 1 McCord (S. Car.) 466; *Crawford's Exrs. v. Crawford*, 1 Bailey (S. Car.) 128; *Lewis v. Lewis*, 5 Rich. L. (S. Car.) 12; *Whitzman v. Hirsh*, 87 Tenn. 513, 11 S. W. 421; *Mette v. Dow*, 9 Lea (Tenn.) 93; *Moses v. Wallace*, 7 Lea (Tenn.) 413; *Keesey v. Old*, 82 Tex. 22, 17 S. W. 938; *White v. Holley*, 3 Tex. Civ. App. 590, 24 S. W. 831; *Saunders v. Flanniken*, 77 Tex. 662, 14 S. W. 236; *Weeks v. Barton* (Tex. Civ. App.), 31 S. W. 1071; *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. 502; *Griffin v. Reynolds*, 17 How. (U. S.) 609, 15 L. ed. 229; *Downer's Admrs. v. Smith*, 38 Vt. 464; *Conrad v. Effinger*, 87 Va. 59, 12 S. E. 2, 24 Am. St. 646; *Clarke v. Hardgrove*, 7 Grat. (Va.) 399; *Click v. Green*, 77 Va. 827; *Threlkeld's Admr. v. Fitzhugh's Exrs.*, 2 Leigh (Va.) 451; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6; *Temple v. Wharton*, 68 Wis. 626, 32 N. W. 690; *Larson v. Cook*, 85 Wis. 564, 55 N. W. 703.
- ⁷² *Gass v. Sanger* (Tex. Civ. App.), 30 S. W. 502.

eral tracts conveyed, on breach of the covenant of seizin as to one tract, the rule of damages is the sum paid for that tract.⁷³ If a distinct parcel of land was inserted with others by mistake, and nothing was paid for this parcel, and it was not considered by either party as included in the purchase, the damages for a breach of the covenant of seizin as to this parcel should be nominal only.⁷⁴

§ 2253. Breach of covenant of seizin—Failure of title as to one of several parcels.—Where there is a failure of title as to one of several parcels of land of different values sold and conveyed by one deed, the values of the different parcels not having been determined by the parties, the measure of damages is the value of such parcel, to be ascertained by the relation of its value to the remainder of the land at the time of sale, assuming the price agreed upon by the parties as the value of the whole, with interest for such time as the purchaser has been deprived of, or is accountable for, the mesne profits.⁷⁵

§ 2254. Breach of covenant of seizin—Where consideration not all paid to grantor.—The rule that the measure of damages is the consideration paid applies, though the grantor did not receive the entire consideration. Thus, where the owner of land placed it with an agent for sale, with the agreement that the agent might retain as his commission whatever should be received for the land over a certain amount, and to facilitate the sale the owner conveyed the land to a trustee to convey to such persons as

⁷³ Harlow v. Thomas, 15 Pick. (Mass.) 66; Grant v. Hill (Tex. Civ. App.), 30 S. W. 952.

⁷⁴ Leland v. Stone, 10 Mass. 459; Barns v. Learned, 5 N. H. 264.

⁷⁵ Cornell v. Jackson, 3 Cush. (Mass.) 506; Winnipiseogee Paper Co. v. Eaton, 65 N. H. 13, 18 Atl. 171; Patridge v. Hatch, 18 N. H. 494; Furniss v. Ferguson, 15 N. Y. 437; Morris v. Phelps, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; Hymes v. Van Cleef, 61 Hun (N. Y.) 618, 39 N. Y. St. 810, 15 N. Y. S. 341,

revd. 133 N. Y. 342, 31 N. E. 105; Beaupland v. McKeen, 28 Pa. St. 124, 70 Am. Dec. 115; Grant v. Hill (Tex. Civ. App.), 30 S. W. 952; Raines v. Calloway, 27 Tex. 678; Weeks v. Barton (Tex. Civ. App.), 31 S. W. 1071; White v. Holley, 3 Tex. Civ. App. 590, 24 S. W. 831; Gass v. Sanger (Tex. Civ. App.), 30 S. W. 502; Mann v. Mathews, 82 Tex. 98, 17 S. W. 927; Griffin v. Reynolds, 17 How. (U. S.) 609, 15 L. ed. 229.

the agent might sell to, the deed containing a covenant of warranty, it was held that the warranty inured to the benefit of a purchaser, and the measure of damages was the amount paid and interest, notwithstanding a large part of this amount was retained by the agent as his commission.⁷⁶ Such would be the amount of damages, although no part of the money reached the hands of the warrantor.⁷⁷ Though the covenant of quiet enjoyment and the other usual covenants be joined with the covenant of seizin, the extent of the grantor's liability is the purchase-money, with interest.⁷⁸ These covenants should be taken in connection to ascertain their import.⁷⁹

§ 2255. Damages for breach of covenant of seizin—Nominal damages.—Generally, where the breach of the covenant is technical merely, the grantee can recover nominal damages only.⁸⁰ If the covenantee has entered into possession, and he has never been disturbed in his possession, he can recover only nominal damages, although the title to the whole or some part of the land be in another.⁸¹ The grantee may buy in the outstanding title, and in that case he is entitled to recover the amount he has reasonably paid for such title; but until he proves what he paid for such title he can recover only nominal damages.⁸² A grantee who has parted with his entire interest in the land can recover only nominal damages for a technical breach of the

⁷⁶ *Rash v. Jenne*, 26 Ore. 169, 37 Pac. 538.

⁷⁷ *Bloom v. Wolfe*, 50 Iowa 286.
⁷⁸ *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320.

⁷⁹ *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229.

⁸⁰ *O'Meara v. McDaniel*, 49 Kans. 685, 31 Pac. 303; *Bowne v. Wolcott*, 1 N. Dak. 415, 48 N. W. 336; *Lessly v. Bowie*, 27 S. Car. 193, 3 S. E. 199; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68.

⁸¹ *Axtel v. Chase*, 77 Ind. 74; *Norman v. Winch*, 65 Iowa 263, 21 N. W. 598; *Wilson v. Irish*, 62 Iowa

260, 17 N. W. 511; *Boon v. McHenry*, 55 Iowa 202, 7 N. W. 503; *Sable v. Brockmeier*, 45 Minn. 248, 47 N. W. 794; *Ogden v. Ball*, 38 Minn. 237, 36 N. W. 344; *Cockrell v. Proctor*, 65 Mo. 41; *Cowan v. Silliman*, 4 Dev. (N. Car.) 46; *Willson v. Forbes*, 13 N. Car. 30. See also, note in 17 L. R. A. (N. S.) 1178, also showing that in some states there is no breach of the covenant of seizin where the grantee gets possession.

⁸² *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Snell v. Iowa Homestead Co.*, 59 Iowa 701, 13 N. W. 848. But see in equity, *Boice v. Coffeen* (Iowa), 138 N. W. 857.

covenants of seizin and of right to convey. Stated more fully and completely, the rule is that when personal covenants are connected with the sweeping covenant of warranty, and the covenant of seizin is broken, but the grantee has parted with the property, and has never been disturbed in his ownership, nor paid anything in purchasing in the paramount title, nor become liable to pay anything, he can at most recover only nominal damages from the grantor for the breach of the covenant of seizin.⁸³

§ 2256. Breach of covenant of seizin—Parol evidence as to mistake.—Parol evidence is not admissible to show a mistake in the conveyance, and the knowledge of the purchaser that such parcel belonged to another and was not intended or understood to be included in the conveyance, for such evidence can not be received to vary or contradict a deed; but such evidence is admissible, on the question of damages, to show the consideration paid for the parcel for which a breach of the covenant of seizin is claimed, or to show that there was no consideration for such parcel.⁸⁴

§ 2257. Breach of covenant of seizin—Parol evidence as to consideration.—Parol evidence is admissible to show that no consideration was paid for a part of the land conveyed, to which there was no title, it having been included in the description by mistake.⁸⁵ Such evidence is admissible only on the question of damages. It could not be received to contradict or vary the deed by showing that such land was not intended or understood to be included in the conveyance,

⁸³ King v. Gilson's Admx., 32 Ill. 348, 83 Am. Dec. 269; Brandt v. Foster, 5 Iowa 287; Boon v. McHenry, 55 Iowa 202, 7 N. W. 503; Hammerslough v. Hackett, 48 Kans. 700, 29 Pac. 1079; Baxter v. Bradbury, 20 Maine 260, 37 Am. Dec. 49; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Kimball v. Bryant, 25 Minn. 496; Burke v. Beveridge, 15 Gil. (Minn.) 160; Reese v. Smith, 12 Mo. 344; Morrison v. Underwood, 20 N. H. 369; McCarty v. Leggett, 3 Hill (N.

Y.) 134; Colby v. Osgood, 29 Barb. (N. Y.) 339; Wilson v. Forbes, 13 N. Car. 30; Middlebury College v. Cheney, 1 Vt. 336; Garfield v. Williams, 2 Vt. 327.

⁸⁴ Nutting v. Herbert, 35 N. H. 120.

⁸⁵ Leland v. Stone, 10 Mass. 459; Stewart v. Hadley, 55 Mo. 235; Nutting v. Herbert, 35 N. H. 120; Barns v. Learned, 5 N. H. 264; Weeks v. Barton (Tex. Civ. App.), 31 S. W. 1071.

for the purpose and with the result of negating any breach of the covenant. Evidence that no consideration was paid for a part of the land, that such part, though included in the deed, had already been conveyed to another, and that the parties knew and understood that such part was not to pass by the conveyance, is admissible on the question of damages, and on that question only.⁸⁶ For the purpose of ascertaining the damages, the true consideration may be shown by parol evidence in contradiction of the statement of the consideration contained in the deed.⁸⁷ Such evidence may have the effect of increasing the damages by showing that the actual consideration was greater than that expressed in the deed, or may have the effect of diminishing the damages by showing that the actual consideration was less than expressed. The recital of the consideration paid is at most only *prima facie* evidence of the amount; it is open to explanation and contradiction, not to defeat the deed, but for the purpose of showing the true consideration. As to third persons, such recital is not even *prima facie*

⁸⁶ *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. 391; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. 861; *Nutting v. Herbert*, 35 N. H. 120.

⁸⁷ *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Martin v. Gordon*, 24 Ga. 533; *Fields v. Wilingham*, 49 Ga. 344; *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863; *Gavin v. Buckles*, 41 Ind. 528; *Wachendorf v. Lancaster*, 66 Iowa 458, 23 N. W. 922; *Williamson v. Test*, 24 Iowa 138; *Hallam v. Todhunter*, 24 Iowa 166; *Bloom v. Wolfe*, 50 Iowa 286; *Blood v. Wilkins*, 43 Iowa 565; *Engleman v. Craig*, 2 Bush (Ky.) 424; *Louisville, St. L. & T. R. Co. v. Neafus*, 93 Ky. 53, 13 Ky. L. 951, 18 S. W. 1030; *Goodspeed v. Fuller*, 46 Maine 141, 71 Am. Dec. 572; *Cushing v. Rice*, 46 Maine 303, 71 Am. Dec. 579; *Hodges v. Thayer*, 110 Mass. 286; *Byrnes v. Rich*, 5 Gray (Mass.) 518; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Estabrook v.*

Smith, 6 Gray (Mass.) 570, 66 Am. Dec. 443; *Dexter v. Manley*, 4 Cush. (Mass.) 14; *Smith v. Strong*, 14 Pick. (Mass.) 128; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692; *Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Moore v. McKie*, 5 Sm. & M. (Miss.) 238; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Bobb v. Bobb*, 89 Mo. 411, 4 S. W. 511; *Henderson v. Henderson's Exrs.*, 13 Mo. 151; *Bircher v. Watkins*, 13 Mo. 521; *Guinotte v. Chouteau*, 34 Mo. 154; *Nutting v. Herbert*, 35 N. H. 120; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Bingham v. Weiderwax*, 1 N. Y. 509; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Stark v. Olney*, 3 Ore. 88; *Cox's Admrs. v. Henry*, 32 Pa. St. 18; *Garrett v. Stuart*, 1 McCord (S. Car.) 514; *Calcote v. Elkin* (Tenn.), 15 S. W. 85; *Perry v. Central So. R. Co.*, 5 Coldu. (Tenn.) 138; *Partrick v. Leach*, 1 McCrary (U. S.) 250, 2 Fed. 120; *Semple v. Wharton*, 68 Wis. 626, 32 N. W. 690.

evidence of the consideration actually paid.⁸⁸ If no consideration was actually paid by the grantee to the grantor, the measure of damages has been held to be the value of the land, with interest from the date of the deed.⁸⁹

§ 2258. Damages for breach of covenant of warranty of title to land.—The measure of damages generally adopted for a breach of the covenants of quiet enjoyment and warranty, in a suit by the grantee against the grantor, is the value of the land at the time of the conveyance, which is the consideration agreed upon by the parties, with interest,⁹⁰

⁸⁸ *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142.

⁸⁹ *Staples v. Dean*, 114 Mass. 125; *Hodges v. Thayer*, 110 Mass. 286; *Byrnes v. Rich*, 5 Gray (Mass.) 518; *Smith v. Strong*, 14 Pick. (Mass.) 128.

⁹⁰ *Kingsbury v. Milner*, 69 Ala. 502; *Allinder v. Bessemer Coal, Iron & Land Co.*, 164 Ala. 275, 51 So. 234; *Barnett v. Hughey*, 54 Ark. 195, 15 S. W. 464; *Carvill v. Jacks*, 43 Ark. 439; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. 963; *Davis v. Smith*, 5 Ga. 274, 47 Am. Dec. 279; *Martin v. Gordon*, 24 Ga. 533; *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Harding v. Larkin*, 41 Ill. 413; *Mauzy v. Flint*, 42 Ind. App. 386, 83 N. E. 757; *McClure v. McClure*, 65 Ind. 482; *Rhea v. Swain*, 122 Ind. 272, 22 N. E. 1000, 23 N. E. 776; *Reese v. McQuilkin*, 7 Ind. 450; *Thomas v. Hamilton*, 71 Ind. 277; *Wood v. Bibbins*, 58 Ind. 392; *Phillips v. Reichert*, 17 Ind. 120; *Burton v. Reeds*, 20 Ind. 87; *Bellows v. Litchfield*, 83 Iowa 36, 48 N. W. 1062; *Wilhelm v. Fimple*, 31 Iowa 131, 7 Am. Rep. 117; *Fawcett v. Woods*, 5 Iowa 400; *Williamson v. Test*, 24 Iowa 138; *Herrington v. Clark*, 60 Kans. 855, 55 Pac. 462; *Stebbins v. Wolf*, 33 Kans. 765, 7 Pac. 542; *Hanson v. Buckner's Exr.*, 4 Dana (Ky.) 251, 29 Am. Dec. 401; *Helton v. Asher*, 135 Ky. 751, 123 S. W. 285; *Graham v. Dyer*, 16 Ky. L. 541, 29 S. W. 346; *Pence's Heirs*

v. Duvall's Heirs, 9 B. Mon. (Ky.) 48; *Cox's Exrs. v. Strode*, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; *Robertson v. Lemon*, 2 Bush (Ky.) 301; *Boyer v. Amet*, 41 La. Ann. 721, 6 So. 734; *Coleman v. Ballard's Heirs*, 13 La. Ann. 512; *Hale v. New Orleans*, 13 La. Ann. 499; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692; *Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Moore v. Frankenfield*, 25 Minn. 540; *Yazoo R. Co. v. Barrow*, 89 Miss. 808, 42 So. 345; *Phipps v. Tarpley*, 31 Miss. 433; *Brooks v. Black*, 68 Miss. 161, 8 So. 332, 11 L. R. A. 176, 24 Am. St. 259; *White v. Presly*, 54 Miss. 313; *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014; *Dickson v. Desire's Admr.*, 23 Mo. 151, 66 Am. Dec. 661; *Reese v. Smith*, 12 Mo. 344; *Hutchins v. Roundtree*, 77 Mo. 500; *Dryden v. Kellogg*, 2 Mo. App. 87; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Murphy v. Price*, 48 Mo. 247; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Taylor v. Holter*, 1 Mont. 688; *Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. 703; *Dalton v. Bowker*, 8 Nev. 190; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Foster v. Thompson*, 41 N. H. 373; *Nutting v. Herbert*, 35 N. H. 120; *Moody v. Leavitt*, 2 N. H. 171; *Bedel v. Loomis*, 11 N. H. 9; *Morris v. Rowan*, 17 N. J. L. 304; *Stew-*

and expenses of litigation.⁹¹ If the covenant is a mortgage, upon a total breach of these covenants, the amount of the mortgage debt is the measure of damages.⁹² In England,⁹³ the New England states,⁹⁴ and Michigan, however,

- art v. Drake, 9 N. J. L. 139; Holmes' Exrs. v. Sinnickson's Devises, 15 N. J. L. 313; Wheeler v. State, 190 N. Y. 406, 83 N. E. 54, 123 Am. St. 555; Grist v. Hodges, 14 N. Car. 198; Folk v. Graham, 82 S. Car. 66, 62 S. E. 1106; Elliott v. Thompson, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630; Kempner v. Beaumont Lumber Co., 20 Tex. Civ. App. 307, 49 S. W. 412; Mayer v. Wooten, 46 Tex. Civ. App. 327, 102 S. W. 423; Young v. Moore (Tex. Civ. App.), 110 S. W. 548; Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. ed. 218; Patrick v. Leach, 1 McCrary (U. S.) 250, 2 Fed. 120; West Coast Mfg. & Co. v. West Coast Imp. Co., 31 Wash. 610, 72 Pac. 455; Fernander v. Dunn, 19 Ga. 497, 65 Am. Dec. 607; Staats v. Ten Eyck's Exrs., 3 Caines (N. Y.) 111, 2 Am. Dec. 254; Pitcher v. Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; Bennet v. Jenkins, 13 Johns. (N. Y.) 50; Jenks v. Quinn, 137 N. Y. 223, 33 N. E. 376; Petrie v. Folz, 10 N. Y. St. 451, 54 N. Y. Super. Ct. 223; Peters v. McKeon, 4 Denio (N. Y.) 546; Kelly v. Dutch Church, 2 Hill (N. Y.) 105; West v. West, 76 N. Car. 45; Ramsey v. Wallace, 100 N. Car. 75, 6 S. E. 638; Wade v. Comstock, 11 Ohio St. 71; Lloyd v. Quimby, 5 Ohio St. 262; Clark v. Parr, 14 Ohio 118, 45 Am. Dec. 529; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Dustin v. Newcomer, 8 Ohio 49; Rash v. Jenne, 26 Ore. 169, 37 Pac. 538; Stark v. Olney, 3 Ore. 88; Cox's Admrs. v. Henry, 32 Pa. St. 18; Hertzog v. Hertzog's Admr., 34 Pa. St. 418; McClure v. Gamble, 27 Pa. St. 288; Brown v. Dickerson, 12 Pa. St. 372; Cathcart v. Bowman, 5 Pa. St. 317; King v. Pyle, 8 Serg. & R. (Pa.) 166; McCafferty v. Griswold, 99 Pa. St. 270; Allison v. Montgomery, 107 Pa. St. 455; Lowrance v. Robertson, 10 S. Car. 8; Furman v. Elmore, 2 Nott & McC. (S. Car.) 189n; Bond v. Quattlebaum, 1 McCord (S. Car.) 584, 10 Am. Dec. 702; Aiken v. McDonald, 43 S. Car. 29, 20 S. E. 796, 49 Am. St. 817; Earle v. Middleton, Cheves (S. Car.) 127; Henning's Exrs. v. Withers, 3 Brev. (S. Car.) 458, 2 Tread. Const. (S. Car.) 584, 6 Am. Dec. 589; McGuffey v. Humes, 85 Tenn. 26, 1 S. W. 506; Shaw v. Wilkins' Admr., 8 Humph. (Tenn.) 647, 49 Am. Dec. 692; Mette v. Dow, 9 Lea (Tenn.) 93; Thiele v. Axell, 5 Tex. Civ. App. 548, 24 S. W. 552, 803; Rogers v. Golson (Tex. Civ. App.), 31 S. W. 200; Simpson v. Belvin, 37 Tex. 674; Glenn v. Mathews, 44 Tex. 400; Turner v. Miller, 42 Tex. 418, 19 Am. Rep. 47; Sheffey's Exr. v. Gardiner, 79 Va. 313; Moreland v. Metz, 24 Va. 119, 49 Am. Rep. 246; Click v. Green, 77 Va. 827; Haffey's Heirs v. Birchetts, 11 Leigh (Va.) 83; Threlkeld's Admr. v. Fitzhugh's Exrs., 2 Leigh (Va.) 451; Butcher v. Peterson, 26 W. Va. 447, 53 Am. Rep. 89; Conrad v. Grand Grove & Co. Order of Druids, 64 Wis. 258, 25 N. W. 24; Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6; McInnis v. Lyman, 62 Wis. 191, 22 N. W. 405; Lawton v. Howe, 14 Wis. 241; Hall v. Delaplaine, 5 Wis. 206, 68 Am. Dec. 57. See also, Williams v. Beeman, 2 Dev. (N. Car.) 483.
- ⁹¹ Kingsbury v. Milner, 69 Ala. 502; Harding v. Larkin, 41 Ill. 413; Cheney v. Straube, 35 Nebr. 521, 53 N. W. 479; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Morris v. Rowan, 17 N. J. L. 304.
- ⁹² Curtis v. Deering, 12 Maine 499; Wetmore v. Green, 11 Pick. (Mass.) 462.
- ⁹³ Jenkins v. Jones, 9 Q. B. Div. 128.
- ⁹⁴ Horsford v. Wright, Kirby (Conn.) 3, 1 Am. Dec. 8; Sterling v. Peet, 14 Conn. 245; Butler v. Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273; Beecher v. Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. 57; Williamson v. William-

the measure of damages for a breach of the covenant of warranty is the value of the land at the time of the eviction.⁹⁵ Under the general rule, the increased value of the land since the sale can not be considered in a suit for breach of the covenant of warranty.⁹⁶ Where the purchaser is not put to expense because of the breach he can recover nominal damages only.⁹⁷

§ 2259. Breach of covenant of warranty — Subsequent purchasers.—The damages a subsequent purchaser can recover are limited to his actual loss and to the amount of the covenantor's liability. When the suit is between the original parties, the damages are measured by the consideration they themselves have set upon the land in the consideration paid for the conveyance. But when the original grantee has sold the land to another, and the second or any subsequent purchaser has been evicted, and he brings his action against the original grantor who sold with warranty, his right to recovery is in the first place limited to his actual loss, and in the second place, this can not exceed the liability of the grantor who is sued, to his immediate grantee. In other words, the damages are usually measured by the amount of consideration paid by the plain-

son, 71 Maine 442; Ryerson v. Chapman, 66 Maine 557; Hardy v. Nelson, 27 Maine 525; Swett v. Patrick, 12 Maine 9; Elder v. True, 32 Maine 104; Cushman v. Blanchard, 2 Greenl. (Maine) 266, 11 Am. Dec. 76; Gore v. Brazier, 3 Mass. 523, 3 Am. Dec. 182; Caswell v. Wendell, 4 Mass. 108; Bigelow v. Jones, 4 Mass. 512; Donahoe v. Emery, 9 Metc. (Mass.) 63; Norton v. Babcock, 2 Metc. (Mass.) 510; White v. Whitney, 3 Metc. (Mass.) 81; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Boyle v. Edwards, 114 Mass. 373; Cecconi v. Rodden, 147 Mass. 164, 16 N. E. 749; Keeler v. Wood, 30 Vt. 242; Keith v. Day, 15 Vt. 660; Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; Drury v. Shumway, 1 D. Chip. (Vt.) 110, 1 Am. Dec. 704; Pitkin v. Leavitt, 13 Vt. 379.

⁹⁵ Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740.

⁹⁶ Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279; Cox's Heirs v. Strode, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Staats v. Ten Eyck's Exrs., 3 Caines (N. Y.) 111, 2 Am. Dec. 254; Hunt v. Raplee, 44 Hun (N. Y.) 149, 7 N. Y. St. 783; Phillips v. Smith, 4 N. Car. 87, 6 Am. Dec. 542; Backus' Admrs. v. McCoy, 3 Ohio 211, 17 Am. Dec. 585.

⁹⁷ Mauzy v. Flint, 42 Ind. App. 386, 83 N. E. 757; Small v. Reeves, 14 Ind. 163; Mason v. Cooksey, 51 Ind. 519; O'Meara v. McDaniel, 49 Kans. 685, 31 Pac. 303; Patrick v. Swinney, 5 Bush (Ky.) 421; Hill v. Butler, 6 Ohio St. 207; Noonan v. Hlsley, 22 Wis. 27.

tiff for the land, with interest, not exceeding the amount paid the original grantor for it.⁸⁸ Some courts hold, however, that the measure of recovery is the value of the land at the time of the conveyance by the original covenantor to the covenantee, and that that value is conclusively fixed by the consideration then paid. Under this rule, if a remote grantee should sue all the previous covenantors, his recovery would be as variable as the several amounts received by each covenantor; "and, in case the consideration paid by him to his immediate grantee is less than the consideration received by the original covenantor, his recovery would be less against such grantee than it would be in an action against the original covenantor; while, under the rule that the amount of his recovery is the amount of consideration actually paid by him for the land, not exceeding the original purchase-price, the recovery in both cases would be the same. The rule limiting the measure of damages in a case like this, where the remote grantee elects to sue the original covenantor, to the actual loss sustained by him, seems to us not only equitable, but is in principle analogous to the doctrine that applies in an action by the original covenantee. Compensation for his loss is all that any evicted grantee can reasonably ask."⁸⁹ A covenantee who has conveyed the land with covenants of warranty may maintain an action against an antecedent covenantor for a breach of the covenant which occurred after he had conveyed the land, if he has been obliged to make good his own covenant to his grantee. By satisfying the covenant, it is regarded as having been restored to him, and he has

⁸⁸ Taylor v. Wallace, 20 Colo. 211, 37 Pac. 963; Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480; Moore v. Frankenfield, 25 Minn. 540; Dickson v. Desire's Admr., 23 Mo. 151, 66 Am. Dec. 661; Jenks v. Quinn, 61 Hun (N. Y.) 427, 41 N. Y. St. 22, 16 N. Y. S. 240, affd. 137 N. Y. 223, 33 N. E. 376, Petrie v. Folz, 10 N. Y. St. 451, 54 N. Y. Super. Ct. 223; Greenvault v. Davis, 4 Hill (N. Y.) 643; Williams v. Beeman, 2 Dev. (N. Car.)

483; Mette v. Dow, 9 Lea (Tenn.) 93; Whitzman v. Hirsh, 87 Tenn. 513, 11 S. W. 421; Eaton v. Lyman, 26 Wis. 61.

⁸⁹ Taylor v. Wallace, 20 Colo. 211, 37 Pac. 963; Dougherty v. Duvall's Heirs, 9 B. Mon. (Ky.) 57; Hunt v. Orwig, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; Brooks v. Black, 68 Miss. 161, 8 So. 332, 11 L. R. A. 176, 24 Am. St. 259; Lowrance v. Robertson, 10 S. Car. 8.

his right of action against any antecedent covenantor.¹ If he has conveyed by quitclaim deed, so that he is not liable to his grantee, the latter, if any one, has a remedy against the antecedent grantor on the covenants in his deed.² A purchaser who has himself perfected the title may recover of his warrantor the amount he has reasonably paid, with interest, and not the whole purchase-price of the land.³

§ 2260. Breach of covenant of warranty—Partial failure of title.—Where the failure of title concerns only part of the land, the measure of damages is such proportional part of the consideration money as the value of the land to which

¹ *Wheeler v. Sohier*, 3 Cush. (Mass.) 219; *Baxter v. Ryeress*, 13 Barb. (N. Y.) 267; *Clement v. Bank of Rutland*, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425.

² *Hunt v. Middlesworth*, 44 Mich. 448, 7 N. W. 57.

³ *Anderson v. Knox*, 20 Ala. 156; *Lewis v. Harris*, 31 Ala. 689; *Dilahunt v. Little Rock & Ft. S. R. Co.*, 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Davis v. Lyman*, 6 Conn. 249; *Amos v. Cosby*, 74 Ga. 793; *Clapp v. Herdman*, 25 Ill. App. 509; *Claycomb v. Munger*, 51 Ill. 373; *Richards v. Iowa Homestead Co.*, 44 Iowa 304, 24 Am. Rep. 745; *Snell v. Iowa Homestead Co.*, 59 Iowa 701, 13 N. W. 848; *Fawcett v. Woods*, 5 Iowa 400; *Yokum v. Thomas*, 15 Iowa 67; *Royer v. Foster*, 62 Iowa 321, 17 N. W. 516; *Dale v. Shively*, 8 Kans. 276; *McKee v. Bain*, 11 Kans. 569; *Reed v. Pierce*, 36 Maine 455, 58 Am. Dec. 761; *Kelly v. Low*, 18 Maine 244; *Swett v. Patrick*, 12 Maine 9; *Smith v. Carney*, 127 Mass. 179; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Wyman v. Brigden*, 4 Mass. 150; *Comings v. Little*, 24 Pick. (Mass.) 266; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 445; *Thayer v. Clemence*, 22

Pick. (Mass.) 490; Harlow v. Thomas, 15 Pick. (Mass.) 66; *Long v. Sinclair*, 40 Mich. 569; *Kimball v. Bryant*, 25 Minn. 496; *Ward v. Ashbrook*, 78 Mo. 515; *Blondeau v. Sheridan*, 81 Mo. 545; *Dickson v. Desire's Admr.*, 23 Mo. 151, 66 Am. Dec. 661; *St. Louis v. Bissell*, 46 Mo. 157; *Cheney v. Straube*, 35 Nebr. 521, 53 N. W. 479; *Loomis v. Bedel*, 11 N. H. 74; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Hartshorn v. Cleveland*, 52 N. J. L. 473, 19 Atl. 974; *Stewart v. Drake*, 9 N. J. L. 139; *Delavergne v. Norris*, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; *Andrews v. Appel*, 22 Hun (N. Y.) 429; *Petrie v. Folz*, 10 N. Y. St. 451, 54 N. Y. Super. Ct. 223; *Price v. Deal*, 90 N. Car. 290; *Lane v. Fury*, 31 Ohio St. 574; *Arrigoni v. Johnson*, 6 Ore. 167; *Porter v. Bradley*, 7 R. I. 538; *McClelland v. Moore*, 48 Tex. 355; *Denson v. Love*, 58 Tex. 468; *James v. Lamb*, 2 Tex. Civ. App. 185, 21 S. W. 172, revd. 87 Tex. 485, 29 S. W. 647; *Cole v. Kimball*, 52 Vt. 639; *Turner v. Goodrich*, 26 Vt. 707; *Eaton v. Tallmadge*, 22 Wis. 526; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 Wis. 618. See also, *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488, where the measure of damages in an action against a remote grantor was held to be the amount the plaintiff was compelled to pay to protect his title.

the title fails bears to the whole tract, with interest on such sum.⁴

§ 2261. Breach of covenant of warranty—Eviction under paramount mortgage.—When the eviction is by reason of a mortgage or other paramount lien, and there is time for redemption, the measure of damages is the amount payable to effect a redemption,⁵ if that is less than the full value of the land. This is an exception to the general rule that where there has been no eviction, and the grantee's possession has not been interfered with, he can recover only nominal damages. This exception to the rule is not made in some decisions.⁶ It is held, however, in some cases that the grantee who has been evicted by a paramount mortgage is under no obligation to redeem, and, therefore, that he is entitled to recover the value of the land measured by the consideration paid and interest thereon.⁷ Although it is a rule that a party exposed to injury or damage shall make the loss as small as he reasonably can, a purchaser by warranty deed is not required to advance the money to pay a mortgage for the purpose of protecting himself or his land.⁸ The purchaser may recover upon his covenant, although he might have removed the incumbrance or defect of title.⁹

⁴ *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Weber v. Anderson*, 73 Ill. 439; *Major v. Dunnavant*, 25 Ill. 262; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *Wright v. Nipple*, 92 Ind. 310; *McNally v. White*, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214; *McDunn v. Des Moines*, 39 Iowa 286; *Sullivan v. Hill*, 33 Ky. L. 962, 112 S. W. 564; *DuBay v. Kelly*, 137 Mich. 345, 100 N. W. 677; *Dalton v. Bowker*, 8 Nev. 190; *Winnipeg Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Wacker v. Straub*, 88 Pa. St. 32; *Hunt v. Nolan*, 46 S. Car. 356, 24 S. E. 310; *Weeks v. Barton* (Tex. Civ. App.), 31 S. W. 1071; *Saunders v. Flanniken*, 77 Tex. 662, 14 S. W. 236; *Lumpkin v. Adams*, 74 Tex. 96, 11 S. W. 1070.

⁵ *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Donahoe v. Emery*, 9 Metc. (Mass.) 63; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *White v. Whitney*, 3 Metc. (Mass.) 81; *Tufts v. Adams*, 8 Pick. (Mass.) 547. See also, *Curtis v. Deering*, 12 Maine 499; *Winslow v. McCall*, 32 Barb. (N. Y.) 241; *Lloyd v. Quimby*, 5 Ohio St. 262. See also, *Tukey v. Foster* (Iowa), 138 N. W. 862.

⁶ *Bundy v. Ridenour*, 63 Ind. 406; *Randell v. Mallett*, 14 Maine 51.

⁷ *Elder v. True*, 32 Maine 104; *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Halsey*, 14 N. J. L. 48.

⁸ *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. 823.

⁹ *Elder v. True*, 32 Maine 104; *Blanchard v. Ellis*, 1 Gray (Mass.) 195, 61 Am. Dec. 417; *Miller v. Halsey*, 14 N. J. L. 48; *Wilcox v.*

When, however, a mortgage or other paramount lien has been foreclosed and all right of redemption is gone, the rule of damages is the value of the land at the time of the conveyance by the defendant, not exceeding the consideration received by him.¹⁰

§ 2262. Breach of covenant of warranty—Purchase of outstanding title.—Where the breach of the covenant compels the purchaser to lift an incumbrance or buy in an outstanding title, he is entitled to the amount he paid therefor, not exceeding the purchase-price, with interest.¹¹ But there can be no recovery of damages for the purchase of an outstanding title which has no validity.¹²

§ 2263. Breach of covenant of warranty—Exchange of property.—Where the consideration for the purchase of the land is an exchange for other property, the measure of damages on breach of warranty of title to the property exchanged is the agreed value of the land; if it has none, then the market value of the property given in exchange.¹³

§ 2264. Breach of covenant of warranty—Improvements.—The general rule of damages for a breach of the covenant of warranty in its terms excludes the value of improvements, for the measure is the value of the land as determined by the parties at the time of the conveyance. On the other hand, the measure of damages established in Eng-

Campbell, 106 N. Y. 325, 12 N. E. 823; Jenks v. Quinn, 61 Hun (N. Y.) 427, 41 N. Y. St. 22, 16 N. Y. S. 240, revd. 137 N. Y. 223, 33 N. E. 376.

¹⁰ Jenks v. Quinn, 61 Hun (N. Y.) 427, 41 N. Y. St. 22, 16 N. Y. S. 240, revd. 137 N. Y. 223, 33 N. E. 376.

¹¹ Weber v. Anderson, 73 Ill. 439; Claycomb v. Munger, 51 Ill. 373; Brady v. Spurck, 27 Ill. 478; Rinehart v. Rinehart, 91 Ind. 89; Fawcett v. Woods, 5 Iowa 400; Snell v. Iowa Homestead Co., 59 Iowa 701, 13 N. W. 848; Royer v. Foster, 62 Iowa 321, 17 N. W. 516; Nolan v. Feltman, 12 Bush (Ky.) 119;

Leet v. Gratz, 92 Mo. App. 422; Hall v. Bray, 51 Mo. 288; Arrigoni v. Johnson, 6 Ore. 167; Cox's Admrs. v. Henry, 32 Pa. St. 18; Bailey v. Scott, 13 Wis. 618.

¹² Nottinger v. Ware, 41 Ill. 245; Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 17 L. R. A. (N. S.) 1195, 124 Am. St. 629.

¹³ Lacey v. Marnan, 37 Ind. 168; Looney v. Reeves, 5 Kans. App. 279, 48 Pac. 606; Chenault v. Thomas, 119 Ky. 130, 26 Ky. L. 1029, 83 S. W. 109; Hodges v. Thayer, 110 Mass. 286; Burke v. Beveridge, 15 Gil. (Minn.) 160; Evans v. Fulton, 134 Mo. 653, 36 S. W. 230.

land and New England, being the value of the land at the time of eviction, necessarily includes the value of improvements made by the purchaser prior to that time, even though made after notice of the paramount claim. The improvements constitute a separate claim,¹⁴ and the value of improvements made under the contract for a deed can not usually be recovered in an action for breach of a covenant of warranty in the deed, for the contract of sale is merged in the deed.¹⁵

§ 2265. Breach of covenant of warranty—Liability for interest.—It is another well accepted rule in this connection that where the covenantee has had possession of the property and received benefits therefrom, the covenantor is liable for interest only for such period before eviction as that for which the covenantee is liable or has paid the true owner for mesne profits.¹⁶ Neither is the covenantor liable for interest for the time during which the covenantee occupied the premises without liability to the holder of the paramount title.¹⁷

¹⁴ *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Carvill v. Jacks*, 43 Ark. 439; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Cosby v. West*, 2 Bibb (Ky.) 568; *Babin v. Winchester*, 7 La. 460; *Elder v. True*, 32 Maine 104; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Taylor v. Holter*, 1 Mont. 688; *Coffman v. Huck*, 19 Mo. 435; *Cheney v. Straube*, 35 Nebr. 521, 53 N. W. 479; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Hulse v. White*, 1 N. J. L. 173; *Hunt v. Raplee*, 44 Hun (N. Y.) 149, 7 N. Y. St. 783; *Phillips v. Smith*, 4 N. Car. 87, 6 Am. Dec. 542; *Backus' Admrs. v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Bender v. Fromberger*, 4 Dall. (U. S.) 436, 1 L. ed. 898.

¹⁵ *West Coast Mfg. &c. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455.

¹⁶ *Logan v. Moulder*, 1 Ark. 313,

33 Am. Dec. 338; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Harding v. Larkin*, 41 Ill. 413; *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Lawless v. Collier's Exrs.*, 19 Mo. 480; *Hutchins v. Roundtree*, 77 Mo. 500; *Foster v. Thompson*, 41 N. H. 373; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Clark v. Parr*, 14 Ohio 118, 45 Am. Dec. 529; *Cox's Admrs. v. Henry*, 32 Pa. St. 18; *Conrad v. Grand Grove &c. Order of Druids*, 64 Wis. 258, 25 N. W. 24.

¹⁷ *Whitlock v. Crew*, 28 Ga. 289; *Danforth v. Smith*, 41 Kans. 146, 21 Pac. 168; *Thompson's Heirs v. Jones*, 11 B. Mon. (Ky.) 365; *White v. Tucker*, 52 Miss. 145; *King v. Kerr's Admrs.*, 5 Ohio 154, 22 Am. Dec. 777; *Mette v. Dow*, 9 Lea (Tenn.) 93; *Mann v. Mathews*, 82 Tex. 98, 17 S. W. 927; *Flint v. Steadman*, 36 Vt. 210.

§ 2266. **Set-off against note of damages arising ex contractu but under different contract.**—A defendant can not, in an action on a bill or note, set off unliquidated damages which arise ex contractu but under a contract other than that in which the instrument sued on was given.¹⁸ So, where an action was brought on a promissory note which was secured by a mortgage of land it was held that the defendant could not recoup damages which had been sustained by him as a result of the mortgagor's negligence in procuring insurance upon a house covered by the mortgage, under an agreement made subsequent to the mortgage.¹⁹ The court said that the agreement as to insurance was not "an agreement made at the time the note was given, and was not a part of the same transaction. It was a subsequent independent contract. The answer sets up, therefore, as a defense to the note, that the plaintiff has broken another contract which he entered into with the defendant, by which he has sustained damages. The defendant has no right to recoup such damages, but his remedy, if he has any, is by a cross-action."²⁰ And where an action was brought for a breach of a contract to deliver cans and the defendant set up as a counterclaim a note which it held against the plaintiff, it was decided that only so much of said note should be allowed as a counterclaim as represented the cost of cans which had been delivered under the contract out of which the suit arose, and which was the foundation of plaintiff's claim.²¹ It has, however, been decided that in equity a defendant who has acquired,

¹⁸ McCord v. Williams, 2 Ala. 71; Griffin v. Lawton, 54 Ga. 104; Kaskaskia Bridge Co. v. Shannon, 1 Gilm. (Ill.) 15; Clause v. Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201; West v. Hayes, 104 Ind. 251, 3 N. E. 932; Smith v. Smith, 1 Ind. 476, Smith 337; Loring v. Otis, 7 Gray (Mass.) 563; Pitts v. Holmes, 10 Cush. (Mass.) 92; Pratt v. Menkens, 18 Mo. 158; Mahan v. Ross, 18 Mo. 121; Phillips v. Lawrence, 6 Watts & S. (Pa.) 150; Bolinger v. Gordon, 11

Humph. (Tenn.) 61; Moore v. Weir, 3 Sneed (Tenn.) 46; Armstrong v. Brown, 1 Wash. C. C. (U. S.) 43, Fed. Cas. No. 542; Mc-Smithee's Admr. v. Feamster, 4 W. Va. 673.

¹⁹ Brighton Five Cents Sav. Bank v. Sawyer, 132 Mass. 185.

²⁰ Sawyer v. Wiswell, 9 Allen (Mass.) 39.

²¹ Californian Canneries Co. v. Pacific Sheet Metal Works, 144 Fed. 886, affd. 164 Fed. 980, 91 C. C. A. 108.

prior to notice of transfer, a claim for unliquidated damages which arose out of another contract may avail himself of the same by way of set-off.²²

§ 2267. Set-off against note of damages for breach of warranty or covenant.—In an action upon a promissory note given in payment for personal property the maker of such note may, ordinarily, introduce evidence of a breach of warranty in respect to such property and damages for such breach may be allowed by way of recoupment or set-off.²³ And though a person executes notes in payment for personal property with a knowledge of a breach of warranty in respect thereto, yet if they are executed in reliance upon assurances by the vendor that the defect will be remedied, the former may, in action on the notes, avail himself of the damages arising from such breach as a set-off, where the vendor has not fulfilled his promise to remedy the defect.²⁴ And it has been decided that in an action by a mortgagee against a mortgagor upon a note and mortgage given for the purchase-money of the premises, the mortgagor may, as a defense, set up a counterclaim for damages by reason of the fraud of the mortgagee, in concealing from him material facts as to the condition and extent of the premises.²⁵ But it is decided in another case

²² Wray's Admrs. v. Furniss, 27 Ala. 471.

²³ Weaver v. Shropshire, 42 Ala. 230; Wheelock v. Berkley, 138 Ill. 153, 27 N. E. 942; Mills v. Rosenbaum, 103 Ind. 152, 2 N. E. 313; Wentworth v. Dows, 117 Mass. 14; Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604; Loring v. Morrison, 15 App. Div. (N. Y.) 498, 44 N. Y. S. 526; Phoenix Iron Works Co. v. Rhea (Tenn. Ch. App.), 38 S. W. 1079, affd. 98 Tenn. 461, 40 S. W. 482. Compare Stockton Savings & Loan Soc. v. Giddings, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. 181.

²⁴ Aultman & Taylor Co. v. Hefner, 67 Tex. 54, 2 S. W. 861. The court said: "The title passed to him with a warranty for his protection, and, if there was a breach

of that warranty, he might have either of two remedies: (1) After seeing and accepting the machinery, he would be entitled to maintain an action for damages, in which he might recover, not only the sum equal to the difference between the value of the defective thing and one of its kind not defective, but in which he might also recover any such sum as under the rules of law he might be entitled to as consequential damages; (2) when sued for the purchase money, he may set up the defective quality of the thing warranted in diminution of the price."

²⁵ Pierce v. Tiersch, 40 Ohio St. 168, citing Baughman v. Gould, 45 Mich. 481, 8 N. W. 73; Allen v. Shackelton, 15 Ohio St. 145.

that in an action upon a note given for the price of land the defendant can not be allowed to prove, by way of recoupment in damages, that the plaintiff made false representations as to the quality and productiveness of the soil, and the number of acres contained within boundaries which were truly pointed out, by which the defendant was deceived and thereby induced to make the purchase.²⁶ The right to set off damages arising from a breach of warranty is held not to be one of which a guarantor or surety may avail himself.²⁷ In an action by a bona fide holder of a negotiable bill or note, the maker can not avail himself of a set-off of damages arising from a breach of warranty or covenant on the part of the payee.²⁸ It is, however, decided that where a note is not negotiable by the law merchant, there may, in an action against the maker, be a set-off of damages arising from a breach of warranty, even though the plaintiff is a bona fide holder or assignee of the instrument.²⁹

²⁶ *Gordon v. Parmalee*, 2 Allen (Mass.) 212. In an early case in Ohio it is decided that in that state the covenant against incumbrance is a real covenant running with the land and is not broken until eviction and that where promissory notes were given in part payment of real estate, conveyed by a deed containing the covenants of warranty and freedom from incumbrances, and at the time the land was mortgaged for more than its value, one to whom the notes were transferred before maturity for value, but with full notice of these facts, may recover against the maker of the notes, although, after the indorsement, an eviction

occurred by the sale of the land upon foreclosure under the prior incumbrance. *Stites v. Hobbs*, 2 Disn. (Ohio) 571.

²⁷ *Osborne v. Bryce*, 23 Fed. 171; *Mabie v. Johnson*, 8 Hun (N. Y.) 309; *Hiner v. Newton*, 30 Wis. 640. But see *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355, as against an insolvent principal.

²⁸ *Gridley v. Tucker*, Freem. Ch. (Miss.) 209; *Blair v. Reid*, 20 Tex. 310. Compare *Holman v. Creagmiles*, 14 Ind. 177.

²⁹ *National Bank of Commerce v. Feeney*, 12 So. Dak. 156, 80 N. W. 186, 46 L. R. A. 732, 76 Am. St. 594.

CHAPTER LI.

SPECIFIC PERFORMANCE.

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§ 2275. Definition, origin and purpose of remedy.—By specific performance is meant the fulfilment or completion of a contract in strict conformity with the terms thereof by a party bound to fulfill the same, or such substantial performance thereof as will accomplish equity between the parties under the circumstances of the particular case.¹ The term is also applied to a remedy in equity whereby a court, in its sound discretion, will compel a party making a breach of his contract obligations to perform the same in the terms agreed upon. This remedy is of a purely equitable nature, being a substitute for the legal remedy of compensation in damages when the latter is inadequate or impracticable, and lies within sound judicial discretion on consideration of all the circumstances surrounding the case.² Inasmuch as every suit for specific performance must necessarily be determined largely on its own special facts, the rules governing the case must be applied with more or less flexibility.³ But this does not mean that there

¹ "Specific performance" contemplates that the party at fault, has, by his contract and covenant, agreed to do certain specific acts which the court can order. *Morey v. Terre Haute Traction & Light Co.*, 47 Ind. App. 16, 93 N. E. 710.
² *Brown v. Boston, & M. R. Co.*, 106 Maine 248, 76 Atl. 692. See

also, *Black v. Miller* (Iowa), 138 N. W. 535; *Healy v. Hohn* (Iowa), 138 N. W. 551; *Buffalo Coal & Co. v. Vance* (W. Va.), 76 S. E. 177.

³ *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641; *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455.

are no settled rules to be applied; nor is the discretion of the chancellor to be arbitrarily applied. Indeed, his discretion is fettered and governed by rules that are well settled and almost as inflexible when they clearly apply as those that govern a court of law. In other words, the discretion meant, when it is said that specific performance is discretionary with the court, is a sound discretion, defined and governed by settled principles. In case damages would not be commensurate with the loss occasioned by a breach of contract, it usually becomes a matter of equitable jurisdiction.⁴ The remedy had its origin in the inability of the law courts to give any other remedy for breach of contracts than damages.⁵ It is an enabling remedy invented by the early English clerical chancellors to compel the party at fault to perform his undertaking specifically, and while it is of judicial origin, it has been held that a statutory provision authorizing a court to extend to a municipality a compulsory remedy by a suit in equity for specific performance is constitutional.⁶ By the exercise of the jurisdiction of courts of equity, the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach is prevented.

§ 2276. **Enforcing partial performance.** — Generally, a contract will not be specifically enforced, unless it can be done completely and so as to secure substantially all that the parties contracted for at the time of the agreement,⁷ enforcement by piecemeal not being considered sufficient;⁸ and equity will leave the parties to their remedies at law.⁹

⁴ *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

⁵ *Brady v. Yost*, 6 Idaho 273, 55 Pac. 542; *Peake v. Young*, 40 S. Car. 41, 18 S. E. 237.

⁶ *Metuchen v. Pennsylvania R. Co.*, 71 N. J. Eq. 404, 64 Atl. 484.

⁷ *Northern Texas Realty & Const. Co. v. Lary* (Tex. Civ. App.) 136 S. W. 843.

⁸ *Tombigbee Valley R. Co. v.*

Fairford Lumber Co., 155 Ala. 575, 47 So. 88.

⁹ *Bannerot v. Davidson*, 226 Pa. 287, 75 Atl. 417. In an agreement for a gross consideration to sell a certain tract of land together with the timber on another tract, the description of the timber being too uncertain to warrant specific performance of the part of the contract relating thereto, neither part

But where a contract relating to several tracts of real estate is severable, it may be specifically enforced as to some of the tracts, although it be unenforcible as to others.¹⁰ The vendee has a right to specific performance of a contract for the sale of land so far as the vendor can carry it out,¹¹ and have abatement in the purchase-price for the deficiency.¹² Where a vendor's wife refuses to join her husband in a conveyance in specific performance of a contract made by her husband alone, the vendee may usually elect to take a deed from the husband subject to the inchoate interest of the wife, with a deduction from the purchase-price of a sum equal to the gross value of such interest.¹³

§ 2277. Grounds of jurisdiction in general.—Since the power of a court of equity to compel specific performance is based upon the absence of an adequate remedy at law, it follows that where damages at law will put the plaintiff in as good a position as if the contract had been actually performed, equity will decline to interfere.¹⁴ Nor will a

of the contract can be specifically enforced, since the consideration can not be separated. *Fordyce Lumber Co. v. Wallace*, 85 Ark. 1, 107 S. W. 160.

¹⁰ *Engle v. White*, 104 Mich. 15, 62 N. W. 154; *Phillips v. Stanch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946; *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022, 135 Am. St. 531; *Farrell v. Bork*, 76 N. J. Eq. 615, 79 Atl. 897; *Lathrop v. Columbia Collieries Co. (W. Va.)*, 73 S. E. 299. But where a contract for the conveyance of several parcels of land stated "all said lands shall be in one body," and further described it as "containing about 114 acres," the vendee could not be compelled to perform in part, where the vendor was unable to convey the whole. *North Avenue Land Co. v. Baltimore*, 102 Md. 475, 63 Atl. 115.

¹¹ *Lockhart v. Ferrey*, 58 Ore. 179, 115 Pac. 431; *Whiteside v. Winans*, 29 Pa. Super. Ct. 244. A cotenant agreed to convey the whole of

property held jointly with others. It was held that specific performance could not be enforced against her cotenants, but could be decreed as to her interest in the joint property on payment of a proportionate part of the contract-price. *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826. See also, *Schaeffer v. Herman (Pa.)*, 85 Atl. 94.

¹² *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884; *Nelson v. Gibe*, 162 Mich. 410, 127 N. W. 304; *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946; *Lackawanna Coal & Iron Co. v. Long*, 231 Mo. 605, 133 S. W. 35; *Hazzard v. Morrison (Tex. Civ. App.)*, 130 S. W. 244; *Lathrop v. Columbia Collieries Co. (W. Va.)*, 73 S. E. 299.

¹³ *Bride v. Reeves*, 36 App. D. C. 476; *Maas v. Morgenthaler*, 136 App. Div. (N. Y.) 359, 120 N. Y. S. 1004. But see, *Leo v. Deitz (Ore.)*, 127 Pac. 550.

¹⁴ *American Box Mach. Co. v. Crosman*, 61 Fed. 888, 10 C. C. A. 146; *Bernier v. Griscover-Spencer Co.*, 161 Fed. 438; *Campbell v. Pot-*

court of equity compel specific performance where the party invoking its aid has not parted with any consideration, and no irreparable damage is suffered, and no fraud is inflicted, and he is in statu quo at the commencement of his suit.¹⁵ But where there is no adequate remedy at law, and the contract is valid and mutually enforceable with just results, the contract may be specifically enforced.¹⁶ Specific performance, it is said, is not favored in law,¹⁷ and in a suit therefor, the court will look into all the circumstances, and will not decree specific performance unless it appears from the whole record that justice and equity will be subserved thereby.¹⁸ It must appear that some injury will result from a refusal to perform the contract before equity is warranted in awarding a decree of performance.¹⁹

§ 2278. **Existence of other remedy.**—As a part of the appropriate and acknowledged jurisdiction of a court of equity, specific performance of a contract to convey land has been enforced from the earliest decisions of that court, although the vendor has, in most cases, another remedy, by an action at law upon the agreement to purchase.²⁰

ter, 147 Ill. 576, 35 N. E. 364; *Porter v. Frenchman's &c. Water Co.*, 84 Maine 195, 24 Atl. 814; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189, 133 Am. St. 283; *Haffner v. Dobrinski*, 215 U. S. 446, 54 L. ed. 277. In compelling specific performance, equity but carries out the principles of the common law, affording that remedy which the common-law courts would give, if their mode of administering justice were adapted to the particular case. *Alley v. Deschamps*, 13 Ves. 225.

¹⁵ *Howes v. Barmon*, 11 Idaho 64, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. 255.

¹⁶ *Nobles v. L'Engle*, 61 Fla. 696, 55 So. 839. The purchaser is entitled to specific performance of a contract for the conveyance of real estate where he has so far fulfilled his part of the contract that a failure to carry it out would operate as a fraud upon his rights. *Tidewater R. Co. v. Hurt*, 109 Va.

204, 63 S. E. 421. But improvements made by the purchaser under such contract afford no independent ground for specific performance, unless the improvements so made are valuable and permanent, and be warranted by the contract. *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381.

¹⁷ *Pratt v. McCoy*, 128 La. 570, 54 So. 1012.

¹⁸ *Heflin v. Heflin*, 63 W. Va. 29, 59 S. E. 745.

¹⁹ *Ames v. Ames*, 46 Ind. App. 597, 91 N. E. 509. A vendor will not be permitted to agree upon a method of performance, induce the purchaser to act accordingly, and then commit a gross fraud by repudiating his contract altogether. *Painter v. Fletcher*, 81 Kans. 195, 105 Pac. 500. See also, *Wiley v. Verhaest*, 52 Wash. 475, 100 Pac. 1008.

²⁰ *Abbott v. Moldestad*, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348;

And the right of the vendee to maintain specific performance has also been, for a long period of time, a well established right.²¹ And the decree will not be denied to the vendee because the vendor is possessed of sufficient property to respond in the event a judgment for damages should be recovered against him.²² So, in case of a breach of contract for the sale of real estate, the injured party is entitled, at his election, to bring suit for specific performance, and is not bound to bring an action at law for damages.²³ And the court's jurisdiction in such cases extends even to lands in another county and out of the jurisdiction of the court if the parties are within its jurisdiction.²⁴ The theory upon which a court of equity grants relief in such cases is that its powers are exercised in personam and not in rem.²⁵ Equity has jurisdiction of a suit to compel specific performance on the part of the purchaser of real estate, though the vendor has a remedy at law by action for the purchase-money.²⁶ If the parties in their contract for the conveyance of land provide for a penalty to be forfeited on a failure of either to perform, there seems to be no question that it will not operate to prevent the relief of specific performance.²⁷ But where the contract itself has assessed the

Brown v. Haff, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *Crary v. Smith*, 2 N. Y. 60.

²¹ *Stone v. Lord*, 80 N. Y. 60.

²² *Belanewsky v. Gallaher*, 55 Misc. (N. Y.) 150, 105 N. Y. S. 77; *Jones v. Barnes*, 105 App. Div. (N. Y.) 287, 94 N. Y. S. 695; *Schippicasse v. Pauline Church*, 29 Ohio C. C. 678.

²³ *Schroepel v. Hopper*, 40 Barb. (N. Y.) 425; *Baumann v. Pinckney*, 118 N. Y. 604, 23 N. E. 916; *Bryson v. Peak*, 43 N. Car. 310; *Ayres v. Robins*, 30 Grat. (Va.) 105.

²⁴ *Montgomery v. Ruppensburg*, 31 Ont. 433; *Loaiza v. Superior Ct.*, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. Rep. 197; *Western Union Tel. Co. v. Pittsburg & C. R. Co.*, 137 Fed. 435; *Poole v. Koons*, 252 Ill. 49, 96 N. E. 556; *Bethell v. Bethell*, 92 Ind. 318; *Rea v. Ferguson*, 126 Iowa 704, 102 N.

W. 778; *McQuerry v. Gilliland*, 89 Ky. 434, 11 Ky. L. 656, 12 S. W. 1037; *Brown v. Desmond*, 100 Mass. 267; *Olney v. Eaton*, 66 Mo. 563; *Silver Camp Min. Co. v. Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940; *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. 802; *Penn v. Hayward*, 14 Ohio St. 302.

²⁵ *Brown v. Desmond*, 100 Mass. 267; *O. W. Kerr Co. v. Mygren*, 114 Minn. 268, 130 N. W. 1112.

²⁶ *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305, 138 Am. St. 167; *Andrews v. Sullivan*, 2 Gilm. (Ill.) 327, 43 Am. Dec. 53; *Migatz v. Stieglitz*, 166 Ind. 361, 77 N. E. 400; *Munro v. Syracuse, L. S. & N. R. Co.*, 200 N. Y. 224, 93 N. E. 516.

²⁷ *Kettering v. Eastlack*, 130 Iowa 498, 107 N. W. 177; *Powell v. Dwyer*, 149 Mich. 141, 112 N. W. 499, 11 L. R. A. (N. S.) 978; *Buckhout v. Witwer*, 157 Mich. 406, 122

damages which the defaulting party has to pay equity will not interfere to enforce specific performance of the contract or prevent the recovery of damages.²⁸

§ 2279. Adequate remedy at law.—It must be borne in mind, as already stated, that the principle upon which equity jurisdiction is based is the absence of any adequate remedy at law,²⁹ and a suit will only lie where the loss can not be compensated in damages.³⁰ The right of a court of equity to decree specific performance does not ordinarily depend upon whether the contract relates to real or personal property, but depends rather on whether the breach can be adequately compensated in damages.³¹ In contracts pertaining to personal property the party seeking redress for a breach thereof is confined to an action for damages, unless he is entitled to the thing contracted for in specie, which to him has some special value, and which he can not readily obtain in the market, or in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy.³² Thus, a court of equity

N. W. 184, 23 L. R. A. (N. S.) 506n; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 Am. St. 586n; *Newton v. Dickson*, 53 Tex. Civ. App. 429, 116 S. W. 143.

²⁸ *Amanda Gold Min. & Mill. Co. v. People's Min. & Mill. Co.*, 28 Colo. 251, 64 Pac. 218; *Palmer v. Gould*, 63 Hun (N. Y.) 636, 44 N. Y. St. 802, 18 N. Y. S. 638, *affd.* 138 N. Y. 608, 34 N. E. 291, *revd.* 144 N. Y. 671, 39 N. E. 378; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749. Where the parties to a contract to convey have deposited mutual forfeits for failure of either to perform, the vendor can not maintain specific performance; his only remedy is an action for damages and the sum stipulated is the true measure of his damages for the breach. *Clark v. Asbury* (Tex. Civ. App.), 134 S. W. 286.

²⁹ *Morgan v. Morgan*, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829; *Jones v. Newhall*, 115

Mass. 244, 15 Am. Rep. 97; *Peters v. Phillips*, 19 Tex. 70, 70 Am. Dec. 319; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501.

³⁰ *American Box Mach. Co. v. Crosman*, 61 Fed. 888, 10 C. C. A. 146; *Campbell v. Potter*, 147 Ill. 576, 35 N. E. 364; *Gove v. Biddeford*, 85 Maine 393, 27 Atl. 264; *Porter v. Frenchman's Bay & C. Water Co.*, 84 Maine 195, 24 Atl. 814.

³¹ *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Wait v. Kern River & C. Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Edelen v. Samuels*, 31 Ky. L. 731, 103 S. W. 360; *Telegraphphone Corp. v. Canadian Telegraphphone Co.*, 103 Maine 444, 69 Atl. 767.

³² *De Mattos v. Gibson*, 4 De Gex & J. 276; *Johnson v. Rickett*, 5 Cal. 218; *Hapgood v. Rosenstock*, 23 Fed. 86, 23 Blatchf. (U. S.) 95; *Adams v. Messenger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. 679; *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002. Where specific per-

will not enforce specific performance of a contract of sale of an article of commerce which can be bought at all times in the market, and the remedy for breach thereof is at law.³³

§ 2280. Inadequate remedy at law.—The remedy at law must be fully efficient, else relief may be given by specific performance.³⁴ Thus, a recovery in damages is regarded as an inadequate remedy where they are estimable only by conjecture and not by an accurate standard.³⁵ An action for damages for breach of contract to convey real estate is not usually an adequate remedy, and equity has jurisdiction to decree a specific performance.³⁶ In order that the remedy at law be a bar to equitable relief it must be as practical and efficient to the ends of justice and its prompt administration as in equity.³⁷ The interposition of equity is not withheld except upon the ground that the complaining party has a speedy and adequate remedy at law, as its jurisdiction is as ample to decree specific performance of an agreement relative to personalty as it is to one relative to realty.³⁸ Where the subject-matter or thing contracted for has a special value to a purchaser, or is of such a character as is difficult to obtain in the open market or in the locality in which his business is conducted, an action at

formance of a contract will enable a railroad company to earn operating expenses, and, without the revenue secured by such performance, it would become financially embarrassed, specific performance will be decreed, though the company has an adequate remedy at law. *Lone Star Salt Co. v. Texas Short Line R. Co. (Tex.)*, 86 S. W. 355.

³³ *Block v. Shaw*, 78 Ark. 511, 95 S. W. 806. Whether specific performance will be decreed depends upon whether the thing contracted for can be purchased by plaintiff or whether damages are an adequate compensation for a breach. *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189, 133 Am. St. 283.

³⁴ *Eisenberger v. Eisenberger*, 38 Pa. Super. Ct. 569.

³⁵ *Shannon v. Cavanaugh*, 12 Cal. App. 434, 107 Pac. 574; *Cattle Creek Water Co. v. Aspen*, 146 Fed. 8, 76 C. C. A. 516; *Finley v. Aiken*, 1 Grant Cas. (Pa.) 83.

³⁶ *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635; *Foss v. Haynes*, 31 Maine 81.

³⁷ *Brett v. Warnick*, 44 Ore. 511, 75 Pac. 1061, 102 Am. St. 639; *South Portland Land Co. v. Munger*, 36 Ore. 457, 54 Pac. 815, 60 Pac. 5; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909.

³⁸ *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768; *Duff v. Fisher*, 15 Cal. 375; *Frue v. Houghton*, 6 Colo. 318; *Mason v. Patterson*, 74 Ill. 191; *Sullivan v. Tuck*, 1 Md. Ch. 59.

law for damages would be inadequate.³⁹ In case a public service corporation violate its contract with a municipality by failure to furnish service or maintain its system or works, an action at law would not afford complete relief to the citizens for whose benefit the contract was made, and specific performance is the proper remedy.⁴⁰

§ 2281. **Mutuality of obligation.**—One of the essential equitable rules, to which, however, there are exceptions, is that a contract to be specifically enforceable must be mutually binding upon the parties to it,⁴¹ or there must have been part performance,⁴² or an offer to perform by the party seeking to enforce specific performance.⁴³ The rule seems to be well established that performance by the party seeking specific performance may remove the objection of want of mutuality, although the party seeking the remedy was not originally bound.⁴⁴ The general rule requiring

³⁹ *Ridenbaugh v. Thayer*, 10 Idaho 662, 80 Pac. 229; *Fred Gorder & Son v. Pankonin*, 83 Nebr. 204, 119 N. W. 449, 131 Am. St. 629; *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837; *Strause v. Berger*, 220 Pa. 367, 69 Atl. 818; *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41.

⁴⁰ *Cumberland Telephone & Telegraph Co. v. Hickman*, 33 Ky. L. 730, 111 S. W. 311; *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497; *Bounds v. Hubbard*, 47 Tex. Civ. App. 233, 105 S. W. 56.

⁴¹ *Dimmick v. Stokes*, 151 Ala. 150, 43 So. 854; *Kerr v. Moore*, 6 Cal. App. 305, 92 Pac. 107; *Peacock v. Deweese*, 73 Ga. 570; *Stockton v. Herron*, 3 Idaho 581, 32 Pac. 257; *Tryce v. Dittus*, 199 Ill. 189, 62 N. E. 220; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619; *Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; *Baltimore Aged Women's & Aged Men's Homes v. Pierce*, 99 Md. 352, 58 Atl. 26; *Colt v. O'Connor*, 59 Misc. (N. Y.) 83, 109 N. Y. S. 689; *Knudtson v. Robinson*, 18 N. Dak. 12, 118 N. W. 1051. See also, note in 6 L. R. A. (N. S.) 391, and note in 38 L. R. A. (N. S.) 452; *Friendly v. Elwert*, 57 Ore. 509, 105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann.

Cas. 1913A, 357 and note. *Chambers v. Roseland*, 21 S. Dak. 298, 112 N. W. 148.

⁴² *Leuschner v. Duff*, 7 Cal. App. 721, 95 Pac. 914; *Schubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Zelleken v. Lynch*, 80 Kans. 746, 104 Pac. 563; *Peckham v. Lane*, 81 Kans. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. 667n; *Lawlor v. Densmore-Compton Bldg. Co.*, 63 Misc. (N. Y.) 458, 118 N. Y. S. 468; *Knudtson v. Robinson*, 18 N. Dak. 12, 118 N. W. 1051.

⁴³ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689; *Kerr v. Moore*, 6 Cal. App. 305, 92 Pac. 107; *Pacific Elec. R. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619; *Simon v. Schmitt*, 118 N. Y. S. 326.

⁴⁴ *Burnell v. Bradbury*, 67 Kans. 762, 74 Pac. 279; *Moayon v. Moayon*, 114 Ky. 855, 24 Ky. L. 1641, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. 303; *Walker v. Owen*, 79 Mo. 563; *Bigler v. Baker*, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255; *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

mutuality of obligation as a condition of specific performance does not apply to one against whom a contract within the statute of frauds could not have been enforced, because he did not sign the same, who is seeking specific performance against the party who did sign it.⁴⁵ Nor does the rule apply to option contracts, after the option has been exercised in accordance with its terms, notwithstanding that it could not originally have been specifically enforced against the party seeking the relief.⁴⁶

§ 2282. Mutuality of remedy.—As a general rule, a contract will not be specifically enforced, unless it can be done mutually. In other words, mutuality of remedy as well as mutuality of obligation is often, though not always, essential.⁴⁷ Thus, a contract to render personal services, not being enforceable against the promisor, will not be enforced against the promisee.⁴⁸ But the rule stated does not necessarily require in every case that each party must have the same remedy against the other.⁴⁹ And it is held that the

⁴⁵ *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. 137; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. 145; *Peevey v. Haughton*, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. 592; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. 669.

⁴⁶ *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. 47; *Stanton v. Singleton (Cal.)*, 54 Pac. 587; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Thomas v. Gottlieb*, B. S. Brewing Co., 102 Md. 417, 62 Atl. 633; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 12 Ann. Cas. 88, 118 Am. St. 586; *Madison Athletic Assn. v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652; *In re Newell's Appeal*, 100 Pa. St. 513; *Hoogendorn v. Daniels*, 178 Fed. 765, 102 C. C. A. 213.

⁴⁷ *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619; *Carney v. Pendleton*, 139 App. Div. (N. Y.) 152, 123 N.

Y. S. 738; *Northern Texas Realty & Const. Co. v. Lary (Tex. Civ. App.)* 136 S. W. 843; *Shubert v. Woodward*, 167 Fed. 47. Since a contract to construct and operate a railroad can not be specifically enforced, a contract to convey a right of way in consideration of such construction and operation can not be specifically enforced, there being no mutuality of remedy. *Pacific Elec. R. Co. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623.

⁴⁸ *Joliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Taussig v. Corbin*, 142 Fed. 660, 73 C. C. A. 656; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428. See *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803, holding that unless equity can decree specific performance of the entire contract, it will not interfere to enforce any part of it, and specific performance will not be enforced unless the remedy is mutual.

⁴⁹ *Montgomery Light & Power*

rule applies only to cases in which there is no mutuality of remedy at the time the contract is made, and not to cases in which the mutuality of remedy is taken away by a subsequent contingent event.⁵⁰ Likewise, where a contract, at the time of its execution, is not specifically enforceable against one of the parties, he can not by subsequent performance of the conditions that could not be specifically enforced put himself in a position to demand specific performance against the other party.⁵¹ The rule as originally stated, and often repeated by modern courts, seems to be that to decree specific performance there must be mutuality both of obligation and of remedy, as long as the contract is executory on both sides.⁵² The obligation may be mutual, and yet specific performance be denied on the ground that the remedy of specific performance is not mutually available. Thus, where a railway company agreed with a construction company that it would deliver certain stock certificates to the construction company in consideration of the latter's agreement to build a line of railway for the former, it was held that as specific performance against the construction company would be impracticable, such company could not have specific performance against the railway company.⁵³ In case one of the parties to a contract is not bound, or is not able to perform his part of the contract, he can not call upon a court of equity to compel specific performance by the opposite party.⁵⁴ Where the

Co. v. Montgomery Traction Co., 191 Fed. 657.

⁵⁰ Ochs v. Kramer, 32 Ky. L. 762, 107 S. W. 260; Moore's Admrs. v. Randolph, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

⁵¹ Pantages v. Grauman, 191 Fed. 317, 112 C. C. A. 61.

⁵² Chadwick v. Chadwick, 121 Ala. 580, 25 So. 631; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; Kansas Construction Co. v. Topeka, S. & W. R. Co., 135 Mass. 34, 46 Am. Rep. 439; Smith v. McVeigh, 11 N. J. Eq. 239; Ballou v. March, 133 Pa. St. 64, 19 Atl. 304. The rule does not apply where the provisions which could not be specifically per-

formed have been fully performed, the defendant's grantor having agreed to devise property to complainant in consideration of personal care. Complainant having fully rendered such services under the agreement, the fact that specific performance of complainant's agreement to render such services could not have been enforced will not prevent specific performance of the rest of the agreement. Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619.

⁵³ Kansas Construction Co. v. Topeka, S. & W. R. Co., 135 Mass. 34, 46 Am. Rep. 439.

⁵⁴ Beard v. Linthicum, 1 Md. Ch. 345; Woodruff v. Woodruff, 44 N.

vendor of real estate is unable to make a good title as agreed, he can not compel the purchaser to perform.⁵⁵ Nor can the purchaser, after refusal to accept such title as the vendor is able to make, maintain an action for specific performance.⁵⁶ When the contract, in its nature and character and according to the intention of the parties, involves and imposes a reciprocity of obligation and duty, there is no authority for enforcing specific performance of it in favor of a party who, on his part, has not performed, can not be compelled to perform, and is not capable of performing.⁵⁷

§ 2283. When mutuality of remedy not necessary.—In a suit for specific performance of a contract, want of mutuality is no defense where the party not bound thereby has performed all of the conditions of the contract on his part to be performed, and has brought himself clearly within the terms thereof.⁵⁸ The fact that specific performance can not be enforced against a party seeking specific performance does not of itself necessarily prevent him from obtaining it,⁵⁹ and the principle that contracts must be mutual and must bind both parties or neither does not mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, where only assumpsit can be maintained against the other.⁶⁰ According to the principle just stated, one party may be pre-

J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955.

⁵⁵ McKinnon v. Johnson, 54 Fla. 538, 45 So. 451.

⁵⁶ Riley v. Allen, 71 Kans. 625, 81 Pac. 186; Friendly v. Elwert, 57 Ore. 599, 105 Pac. 404, Ann. Cas. 1913A, 357.

⁵⁷ Tombigbee Valley R. Co. v. Fairford Lumber Co., 155 Ala. 575, 47 So. 88; Electric Lighting Co. v. Mobile & S. H. R. Co., 109 Ala. 190, 19 So. 721, 55 Am. St. 927; Cooper v. Pena, 21 Cal. 403.

⁵⁸ Johnston v. Trippe, 33 Fed. 530; Bigler v. Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255; Vandoren v. Robinson, 16 N. J.

Eq. 256; Reynolds v. O'Neil, 26 N. J. Eq. 223; Schields v. Horbach, 30 Nebr. 536, 46 N. W. 629.

⁵⁹ Hickey v. Dole, 66 N. H. 336, 29 Atl. 792, 49 Am. St. 614; Lamprey v. St. Paul & C. R. Co., 89 Minn. 187, 94 N. W. 555; Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. 653; Northern Central R. Co. v. Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683.

⁶⁰ Hickey v. Dole, 66 N. H. 336, 29 Atl. 792, 49 Am. St. 614; Northern Central R. Co. v. Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683; Jennings v. McComb, 112 Pa. St. 518, 4 Atl. 812; Grove v. Hodges, 55 Pa. St. 504.

vented from receiving specific performance, even though his adversary may be entitled to such remedy.⁶¹ Thus, a contract to sell A shares of stock in B's company, to be paid for out of A's share of earnings of the company, could be specifically enforced, though A's agreement to give B preference on resale might not be capable of specific enforcement.⁶² And specific performance may be granted upon the suit of a party not signing the contract, although under the statute of frauds he would not have been bound thereby.⁶³ So, the rule refusing specific performance of contracts, executory on both sides, because of lack of mutuality of remedy, has no application to contracts in which the provisions which could not be enforced specifically have been fully performed.⁶⁴

§ 2284. Discretion of court.—The remedy by specific performance is not in all respects a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, upon full consideration of the rights and equities of the parties, to require.⁶⁵ But the court has

⁶¹ Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. 404.

⁶² Johnson v. Stearns, 160 Mich. 247, 125 N. W. 29.

⁶³ Flegel v. Dowling, 54 Ore. 40, 102 Pac. 178, 135 Am. St. 812.

⁶⁴ Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Topeka Water Supply Co. v. Root, 56 Kans. 187, 42 Pac. 715; Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609; Dickson v. Stewart, 71 Nebr. 424, 98 N. W. 1085.

⁶⁵ Elliott v. Elliott, 3 Alaska 352; Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657; Mensch v. Gail (Del. Ch.), 74 Atl. 832; Marthinson v. King, 150 Fed. 48; Jones v. Byrne, 149 Fed. 457; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Nobles v. L'Engle, 61 Fla. 696, 55 So. 839; Pensacola Gas Co. v. Provisional Municipality of Pensacola, 33 Fla. 322, 14 So. 826; McCrillis v. Copp, 31 Fla. 100, 12 So. 643; Baltimore & O. S. W. R.

Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; Sutton v. Miller, 219 Ill. 462, 76 N. E. 838; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696; Ames v. R. A. (N. S.) 232n, 104 Am. St. 491; Richardson Shoe Machinery Co. v. Essex Mach. Co., 207 Mass. 219, 93 N. E. 650; Banaghan v. Maloney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. 378n; Chicago, K. & S. R. Co. v. Lane, 150 Mich. 162, 113 N. W. 22; Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; Gottfried v. Bray, 208 Mo. 652, 106 S. W. 639; Furse v. Lambert, 85 Nebr. 739, 124 N. W. 146; Ten Eyck v. Manning, 52 N. J. Eq. 47, 27 Atl. 900; Davidson v. Canabiss Mfg. Co., 113 App. Div. (N. Y.) 664, 99 N. Y. S. 1018; Shakespeare v. Caldwell Land & Lumber Ames, 46 Ind. App. 597, 91 N. E. 509; New York Brokerage Co. v. Wharton, 143 Iowa 61, 119 N. W. 969; Shoop v. Burnside, 78 Kans. 871, 98 Pac. 202; Pratt v. McCoy, 128 La. 570, 54 So. 1012; Lanahan

no arbitrary discretion to deny relief.⁶⁶ The discretion to be exercised is a sound discretion, defined and governed by settled principles, or, in other words, in accordance with the principles of equity and with reference to the particular facts and circumstances of the case.⁶⁷ With this explanation, it may be stated that suits for specific performance of contracts for the sale of land are addressed to the sound legal discretion of the court, and may be granted or withheld according to all the circumstances surrounding the case,⁶⁸ but equity often refuses specific performance of even valid contracts to convey real estate, leaving plaintiff to his legal remedy for damages, for breach of the contract.⁶⁹ In a suit for specific performance of a unilateral contract, the court will exercise its discretion with great care.⁷⁰ So, also, where the enforcement of a contract will inconvenience the public, equity may refuse to enforce it in the exercise of its discretionary power.⁷¹ Where a contract for the conveyance of land provides that the sale should be completed at the purchaser's option, as soon as the title

v. Cockey, 108 Md. 620, 71 Atl. 314; McLaughlin v. Leonhardt, 113 Md. 261, 77 Atl. 647; Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. Co., 144 N. Car. 516, 57 S. E. 213; Jones v. Jones, 148 N. Car. 358, 62 S. E. 417; Ball v. Milliken, 31 R. I. 36, 76 Atl. 789; Marthinson v. McCutchen, 84 S. Car. 256, 66 S. E. 120; Roberts v. Braffett, 33 Utah 51, 92 Pac. 789; Givens v. Clem, 107 Va. 435, 59 S. E. 413; Heflin v. Heflin, 63 W. Va. 29, 59 S. E. 745.

⁶⁶ Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608; Ullsperger v. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221; Anderson v. Anderson, 251 Ill. 415, 96 N. E. 265; Posey v. Kimsey, 146 Ky. 205, 142 S. W. 703; Edelen v. Samuels, 31 Ky. L. 731, 103 S. W. 360; Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651.

⁶⁷ Atkinson v. Jackson, 8 Ind. 31; Cincinnati, B. & C. R. Co. v. Wall (Ind. App.), 96 N. E. 389; Seymour v. Delaney, 6 Johns. Ch. (N. Y.) 222, revd. 3 Cow. 445, 15 Am.

Dec. 270; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501; Hennessey v. Woolworth, 128 U. S. 438, 32 L. ed. 500, 9 Sup. Ct. 109. See also, 4 Pom. Eq. Jur. (3d ed.) § 1404.

⁶⁸ Nobles v. L'Engle, 61 Fla. 696, 55 So. 839; Malloy v. Foley (Iowa), 133 N. W. 778; Somerville v. Coppage, 101 Md. 519, 61 Atl. 318; Jones v. Barnes, 105 App. Div. (N. Y.) 287, 94 N. Y. S. 695. As to whether a parol contract to convey real estate in consideration of personal services shall be specifically enforced is addressed to the conscience of the chancellor. Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657.

⁶⁹ Burge v. Gough (Iowa), 133 N. W. 340.

⁷⁰ Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874.

⁷¹ Ford v. Oregon Electric R. Co., 60 Ore. 278, 117 Pac. 809, being a suit on a contract by a railroad company to stop its trains at certain places.

was perfected, the purchaser may waive the condition and have specific performance of the contract.⁷² He may also elect to accept such title as the vendor has and enforce a conveyance thereof.⁷³ A vendor can not enforce specific performance by the vendee as to a part of the real estate described and retain a part, since a contract for the sale of land must be enforced in its entirety, if, as executed, it was an entirety.⁷⁴

§ 2285. Impossible performance.—Where the performance of a contract is in fact impossible and a decree for specific performance can not be enforced, the court will deny the remedy. Thus, if the property contracted for was never owned by the vendor,⁷⁵ or is not in existence at the time of the contract,⁷⁶ or where vendor has no title, though his inability to convey was caused by his own act.⁷⁷ So, also, a court of equity will not order a party to do that which legally he is not entitled to do.⁷⁸ To justify specific performance of a contract of sale of realty, ownership of the land by the vendor at the time the suit is brought is generally necessary.⁷⁹ But it has been held no defense that after commencement of the action defendant conveyed the same land to another.⁸⁰ And if the vendor agrees to convey

⁷² *West v. Washington &c. R. Co.*, 49 Ore. 436, 90 Pac. 666.

⁷³ *McDuffee v. Hestonville &c. R. Co.*, 158 Fed. 827, revd. 162 Fed. 36, 89 C. C. A. 76; *Newell v. Lamping*, 45 Wash. 304, 88 Pac. 195.

⁷⁴ *Kenner v. Bitely*, 45 Fed. 133; *Baldwin v. Fletcher*, 48 Mich. 604, 12 N. W. 873; *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223. A city accepted an option to purchase several tracts of land as a whole, forming one body, and the owner of one of the tracts comprising the whole had knowledge that his tract was not to be purchased unless the entire property was conveyed. It was held that he was not entitled to specific performance as to his land alone. *Vickers v. Baltimore*, 102 Md. 487, 63 Atl. 120.

⁷⁵ *Hildreth v. Thibodeau*, 117

Fed. 146, affd. 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; *Laubengayer v. Rohde*, 167 Mich. 605, 133 N. W. 535; *Public Service Corp. of New Jersey v. Hackenack Meadows Co.*, 72 N. J. Eq. 285, 64 Atl. 976; *Du Bois v. Bormann*, 65 N. J. Eq. 207, 55 Atl. 634; *Morrissey v. Strom*, 57 Wash. 487, 107 Pac. 191.

⁷⁶ *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184; *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576, 9 Sup. Ct. 202.

⁷⁷ *Enslen v. Allen*, 160 Ala. 529, 49 So. 430.

⁷⁸ *Walshe v. Endom*, 124 La. 697, 50 So. 656.

⁷⁹ *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120.

⁸⁰ *Kitchener v. Jehlik*, 85 Kans. 684, 118 Pac. 1058. Nor is it any defense to an action for specific

realty which he does not own at the time the agreement is made, but which he afterwards acquires, specific performance may be decreed,⁸¹ but he can not be compelled to buy the land and convey it to complainant.⁸² If the vendor has sold corporate stock to a bona fide purchaser against whom such decree can not be enforced, equity will not decree specific performance in a suit against the original vendor of such stock.⁸³

§ 2286. Enforcement involving hardship.—In case specific performance would operate as a hardship to the party against whom such relief is sought, it may be denied, even if the other circumstances are such that it would ordinarily be granted.⁸⁴ Such relief will be refused where the giving thereof would violate familiar principles of equity jurisprudence,⁸⁵ or where it would operate in a harsh, inequitable and unjust manner.⁸⁶ But the mere fact that the subject-matter of the contract subsequently increased in value would be no defense to a suit for specific performance.⁸⁷

performance that the vendor, who had only a contract for title, caused the deed to be executed to a volunteer, and not to himself, as the volunteer under such circumstances could be required to execute the deed to plaintiff. *Pearson v. Courson*, 129 Ga. 656, 59 S. E. 907.

⁸¹ *Coleridge Creamery Co. v. Jenkins*, 66 Nebr. 129, 92 N. W. 123.

⁸² *Laubengayer v. Rohde*, 167 Mich. 605, 133 N. W. 535.

⁸³ *Birmingham Nat. Bank v. Roden*, 97 Ala. 404, 11 So. 883; *Summerlin v. Fronterezza Milling Co.*, 41 Fed. 249; *Wonson v. Fenno*, 129 Mass. 405; *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 16 N. E. 34.

⁸⁴ *Ellis v. Burden*, 1 Ala. 458; *Federal Oil Co. v. Oil Co.*, 121 Fed. 674, 57 C. C. A. 428; *Hopwood v. McCausland*, 120 Iowa 218, 94 N. W. 469; *Maryland Tel. & C. Co. v. Chas. Simons Sons Co.*, 103 Md. 136, 63 Atl. 314, 115 Am. St. 346; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Cameron Coal Co. v. Emanuel*, 49 N. Y. Super. Ct. 77; *Cannaday v. Shepard*, 55

N. Car. 224; *Huntington v. Rogers*, 9 Ohio St. 511; *McCarty v. Kyle*, 4 Cold. (Tenn.) 348.

⁸⁵ *Rawlings v. Collins*, 36 App. D. C. 72; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Eiseman v. Josephthal*, 71 Misc. (N. Y.) 288, 128 N. Y. S. 699; *Caldwell v. Virginia Fire & Marine Ins. Co. (Tenn.)*, 139 S. W. 698.

⁸⁶ *Tombigbee Valley R. Co. v. Fairford Lumber Co.*, 155 Ala. 575, 47 So. 88; *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Murphy v. Fox*, 128 App. Div. (N. Y.) 534, 112 N. Y. S. 819; *Triplett v. Williams*, 149 N. Car. 394, 63 S. E. 79; *Phelan v. Neary*, 22 S. Dak. 265, 117 N. W. 142.

⁸⁷ *Burge v. Gough (Iowa)*, 133 N. W. 340. See also, *Meehan v. Nelson*, 137 Fed. 731, 70 C. C. A. 165; *Rausch v. Hanson*, 26 S. Dak. 273, 128 N. W. 611. A foreign executor acting under testamentary power can not resist specific performance of a contract to convey because the land has greatly increased in value since the con-

Where greater wrong is likely to result on account of the granting of specific performance than the moving party will suffer, in case it is withheld, equity will deny it.⁸⁸ Specific performance will be denied where to do so would be unconscionable,⁸⁹ unjust or inequitable,⁹⁰ and against good conscience.⁹¹ Nor will such relief be decreed in case of fraud, mistake or of hard and unconscionable bargains,⁹² nor when the rights of innocent third parties intervened, so that the enforcement of the contract would be harsh, oppressive or unjust to them.⁹³

§ 2287. **Persons entitled to specific performance.**—The equitable remedy of specific performance is open alike to both vendor and vendee in a contract for the sale of real estate.⁹⁴ By such contract it has been said the vendee is considered in equity as the owner, and the vendor retains the title as security, and either party may have specific performance.⁹⁵ A suit for specific performance may be maintained by the assignee of a vendee.⁹⁶ And it is held that one who

tract was made. But compare, *Buffalo Coal &c. Co. v. Vance* (W. Va.), 76 S. E. 177; *Groesbeck v. Morgan* (N. Y.), 99 N. E. 1046, as to delay and change in circumstances.

⁸⁸ *Herzog v. Atchison, T. & S. F. R. Co.*, 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913n, 123 Am. St. 990.

⁸⁹ *Latta v. Hax*, 219 Pa. 483, 68 Atl. 1016.

⁹⁰ *Elliott v. Elliott*, 3 Alaska 352.

⁹¹ *Berry v. Frisbie*, 27 Ky. L. 724, 86 S. W. 558; *Superior &c. Oil Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545, 138 Am. St. 942.

⁹² *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480; *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. 990.

⁹³ *Bernard v. Benson*, 58 Wash. 191, 108 Pac. 439, 137 Am. St. 1051. See also, *Stanton v. Singleton*, 126

Cal. 657, 59 Pac. 146, 47 L. R. A. 334.

⁹⁴ *Boehly v. Mansing*, 52 Misc. (N. Y.) 382, 102 N. Y. S. 171.

⁹⁵ *Council v. Bailey*, 154 N. Car. 54, 69 S. E. 760. The fact that the plaintiff purchased for another does not concern the vendor in the transaction, as the right of action for specific performance follows the legal title. *Girault v. Feucht*, 120 La. 1070, 46 So. 26.

⁹⁶ *Lenman v. Jones*, 33 App. D. C. 7; *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14; *Bateman v. Riley*, 72 N. Y. Eq. 316, 73 Atl. 1006; *Tucker v. Atlantic Coast Lumber Co.*, 78 S. Car. 134, 59 S. E. 859; *Cheney v. Bilby*, 74 Fed. 52, 20 C. C. A. 291. The vendor of a business establishment covenanted in his contract of sale not to re-engage in the same business for a certain length of time. It was held that the assignee of the purchaser could enforce the agreement, though the word "assignee" was not used in such agreement. *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973. Where the contract of

furnishes part of the consideration for an option contract to purchase land is in effect an assignee of a part of the option, and entitled to the same right to enforce specific performance against the vendor as the holder of the option.⁹⁷ But it has been held that unless the assignee assumes some personal liability for the performance of the contract he can not maintain an action for specific performance.⁹⁸ It may be stated as a general rule that wherever the covenants in a contract respecting real estate could have been specifically enforced against either of the parties thereto, it may be so enforced by persons claiming under them in privity of estate, representation or title.⁹⁹ Thus, the rights of the heirs of a party who has made an agreement concerning land have been held to be the same as his rights would be, if living, in a suit to specifically enforce the agreement.¹

§ 2288. Persons against whom specific performance may be had.—The remedy of specific performance will be given in a proper case against the promisor in a contract, or, to the extent of their interest in the property contracted for, against those claiming under him, such as heirs,² or the widow of the promisor,³ or against the estate of the deceased promisor.⁴ A married woman, not a party to an

sale provides that no assignment thereof shall be made without the written consent of the vendor, it has been held that the assignee under an assignment without such written consent can not compel specific performance of the original contract. *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463, 35 L. R. A. (N. S.) 1064n, Ann. Cas. 1913A 228. But in the note to this case as last reported it is said to be contrary to the weight of author-

⁹⁷ *Naylor v. Parker* (Tex. Civ. App.), 139 S. W. 93.

⁹⁸ *Wheeling Creek Gas, Coal & Coke Co. v. Elder*, 170 Fed. 215; *Genevitz v. Feiering*, 136 App. Div. (N. Y.) 736, 121 N. Y. S. 392.

⁹⁹ *Griffith v. Stewart*, 31 App. D. C. 29; *Hollander v. Central Metal*

& Supply Co., 109 Md. 131, 71 Atl. 442; *Worthington v. Lee*, 61 Md. 530.

¹ *Nash v. Milford*, 33 App. D. C. 142.

² *Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Anderson v. Anderson*, 75 Kans. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229; *Evans v. Morris*, 234 Mo. 177, 136 S. W. 408; *Brandon v. West*, 28 Nev. 500, 83 Pac. 327; *Milton v. Kite* (Va.), 76 S. E. 313 (equity will compel heirs to convey and charge property with trust); *Mueller v. Northmann*, 116 Wis. 468, 93 N. W. 538, 96 Am. St. 997.

³ *Burdine v. Burdine's Exr.*, 98 Va. 515, 36 S. E. 992, 81 Am. St. 741.

⁴ *Pemberton v. Pemberton's Heirs*, 76 Nebr. 669, 107 N. W.

agreement executed by her husband for the conveyance of real estate, can not be compelled to join her husband in the conveyance,⁵ but it may be specifically enforced as to the husband.⁶ Specific performance can not be given against bona fide purchasers of the property without notice of contract,⁷ and it matters not whether they acquire their interests by a contract prior to or subsequent to the contract sought to be specifically enforced.⁸ But equity will enforce the specific performance of a contract to convey real estate against a grantee who took with notice of plaintiff's equitable right to a conveyance of such real estate to him.⁹

§ 2289. What contracts enforceable.—As a basis for the equitable remedy of specific performance, there must be a valid and binding contract.¹⁰ As a general rule, a court of equity will refuse to specifically enforce a contract which it would also refuse to cancel, and leave the parties to

996; *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474; *Cooper v. Cooper*, 65 W. Va. 712, 64 S. E. 927. In case an executor has an implied power of sale of real estate under a will, and he contracts to convey the same, equity will compel him to perform his contract. *Leeds v. Sparks*, 8 Del. Ch. 280, 68 Atl. 239.

⁵*Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709, 118 Am. St. 291; *Maas v. Morgenthaler*, 136 App. Div. (N. Y.) 359, 120 N. Y. S. 1004; *Schwoerdfeger v. Kelly*, 223 Pa. 631, 72 Atl. 1056.

⁶*Stromme v. Rieck*, 107 Minn. 177, 119 N. W. 948, 131 Am. St. 452.

⁷*Charlton v. Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. 444, revd. 67 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, 110 Am. St. 495.

⁸*Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Flackhamer v. Himes*, 24 R. I. 306, 53 Atl. 46. A grantee of real estate, with knowledge of a prior contract giving a third person the right to purchase, occupies the same position as the grantor as to such third person, who may

compel specific performance against the grantee, where he could have done so against the grantor, had he retained the legal title. *Vermont Marble Co. v. Mead* (Vt.), 80 Atl. 852.

⁹*Peasley v. Hart*, 65 Cal. 522, 4 Pac. 537; *Bryant v. Booze*, 55 Ga. 438; *Walker v. Cox*, 25 Ind. 271; *Wilson v. Emig*, 44 Kans. 125, 24 Pac. 80; *White v. Mooers*, 86 Maine 62, 29 Atl. 936; *Smoot v. Rea*, 19 Md. 398; *Stone v. Buckner*, 12 Sm. & M. (Miss.) 73; *Thompson v. Henry*, 85 Mo. 451; *Laverty v. Moore*, 33 N. Y. 658; *Jones v. Lewis*, 8 Ohio Dec. 368; *Scarborough v. Arrant*, 25 Tex. 129.

¹⁰*Maloy v. Boyett*, 53 Fla. 956, 43 So. 243; *Doyle v. Birdsell*, 21 S. Dak. 353, 112 N. W. 855; *Lawson v. King*, 56 Wash. 15, 104 Pac. 1118. An unsigned written agreement can not be the basis of a suit for specific performance. *Sarkisian v. Teele*, 201 Mass. 596, 88 N. E. 333. A valid bid at an auction sale is such a contract as may be enforced against the bidder by a suit in equity.

their remedy at law,¹¹ and it is only when the contract is fair, just, certain and founded on an adequate consideration that it will be enforced.¹² In other words, the contract sought to be enforced must, as a general rule, possess at least all the elements that make a contract enforceable at law.¹³ Where either party to the contract may abandon it at will, a court of equity will not decree specific performance for or against either party.¹⁴ It must be free from fraud, circumvention or surprise;¹⁵ it must be free from doubt or suspicion;¹⁶ and it must not be automatic, renewing and perpetual.¹⁷ So, to warrant a decree for specific performance the contract sought to be enforced must be clearly and unequivocally proved, and its terms, as to subject-matter, consideration and all other essentials, must be sufficiently specific or certain and unambiguous.¹⁸

§ 2290. Certainty of contracts in general.—Specific performance will be refused where the contract sought to be enforced is ambiguous, uncertain or doubtful, and the party seeking relief will be left to his remedy at law.¹⁹ The con-

¹¹ *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222, revd. 3 Cow. 445, 15 Am. Dec. 270; *Barksdale v. Payne, Riley Eq. (S. Car.)* 174; *Jackson v. Ashton*, 11 Pet. (U. S.) 229, 9 L. ed. 698. A contract will not be specifically enforced unless certain, fair and just in all its parts, though the contract, had it been executed, might have offered no sufficient ground for cancellation. *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545, 138 Am. St. 942.

¹² *Alabama Cent. R. Co. v. Long*, 158 Ala. 301, 48 So. 363; *Thomas v. Gottlieb Bauernschmidt Strauss Brewing Co.*, 102 Md. 417, 62 Atl. 633; *Tousey v. Hastings*, 127 App. Div. (N. Y.) 94, 111 N. Y. S. 344; *Lloyd v. Wheatley*, 55 N. Car. 267; *Miller v. Tjexhus*, 20 S. Dak. 12, 104 N. W. 519; *Roundtree v. McLain, Hempst. (U. S.)* 245, Fed. Cas. No. 12,084a; *Colonna Dry Dock Co. v. Colonna*, 108 Va. 230, 61 S. E. 770; *Smith v. Wood*, 12 Wis. 382.

¹³ *Rushton v. Thompson*, 35 Fed. 635; *Suydam v. Columbus Ins. Co.*, 18 Ohio 459; *Rose v. Oliver*, 32 Ore. 447, 52 Pac. 176.

¹⁴ *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, rehearing denied 89 N. E. 319.

¹⁵ *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 119 N. W. 969; *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647.

¹⁶ *Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709, 118 Am. St. 291.

¹⁷ *Marks v. Gates*, 2 Alaska 519.

¹⁸ *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172.

¹⁹ *Bowman v. Cunningham*, 78 Ill. 48; *McDaniels v. Whitney*, 38 Iowa 60; *Higgins v. Butler*, 78 Maine 520, 7 Atl. 276; *Shriver v. Seiss*, 49 Md. 384; *Daniel v. Frazer*, 40 Miss. 507; *Sprague v. Jessup*, 48 Ore. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410. See also, *Powell v. Huey*, 145 Ill. App. 477, *affd. Huey v. Powell*, 241 Ill. 132,

tract must be concluded and certain in all its parts, or it will not be specifically enforced.²⁰ Thus, a bond for title which does not set forth the purchase-price, nor the terms of payment, nor indicate what the purchaser is to perform, can not be specifically enforced.²¹ Also a contract for the sale of real estate which is not clear, certain, definite and unequivocal will not be specifically enforced at the suit of the vendor.²² A contract so uncertain that it can not be determined what the parties agreed to, as, for instance, a contract for the sale of planks of certain dimensions at the market-price when planks of such dimensions have no market-price, can not be enforced.²³ Equity will not compel specific performance of a contract that is indefinite and uncertain in its terms,²⁴ and a greater degree of certainty is required in such a proceeding than where the contract is made the basis of an action at law.²⁵

§ 2291. Certainty of contracts relating to realty.—A contract for the sale of real estate which is not definite, certain and clear will not be specifically enforced in equity.²⁶ Thus, a contract which does not describe the land so it can be located definitely,²⁷ or which conveys a certain number of acres in any one of certain specified counties,²⁸ or a deed

89 N. E. 299; Gaslight & Coke Co. v. New Albany, 139 Ind. 665, 39 N. E. 462; Oliver v. Johnson, 238 Mo. 359, 142 S. W. 274; McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249n; McCarty v. Kyle, 4 Cold. (Tenn.) 348; Pigg v. Corder, 12 Leigh (Va.) 69; Auer v. Mathews, 129 Wis. 143, 108 N. W. 45; Smith v. Wood, 12 Wis. 382.

²⁰ Lanahan v. Cockey, 108 Md. 620, 71 Atl. 314; Ward v. Newbold, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A 919; McKibbin v. Brown, 14 N. J. Eq. 13; Hammer v. McEl-downey, 46 Pa. St. 334.

²¹ La Belle Coke Co. v. Smith, 221 Pa. 642, 70 Atl. 894.

²² Kingsbury v. Cornelison, 122 Ill. App. 495.

²³ New England Box Co. v. Prentiss, 75 N. H. 246, 72 Atl. 826.

²⁴ Elliott v. Elliott, 3 Alaska 352;

Edwards v. Rothkranz, 3 Alaska 380; Maloy v. Boyett, 53 Fla. 956, 43 So. 243; Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232n, 124 Am. St. 491; Racich Asbestos Mfg. Co. v. Brooks, 146 App. Div. (N. Y.) 14, 130 N. Y. S. 382.

²⁵ Marsh v. Lott, 8 Cal. App. 384, 97 Pac. 163.

²⁶ Ehrenstrom v. Phillips (Del. Ch.), 77 Atl. 81; Gladville v. McDole, 247 Ill. 34, 93 N. E. 86; Kingsbury v. Cornelison, 122 Ill. App. 495.

²⁷ Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634; Glos v. Wilson, 198 Ill. 44, 64 N. E. 734; Hanly v. Blackford, 1 Dana (Ky.) 1, 25 Am. Dec. 114; Agnew v. Southern Ave. Land Co., 204 Pa. 192, 53 Atl. 752.

²⁸ Newman v. Perrill, 73 Ind. 153.

with the description "deed and redeed to the old lines as they stand at present,"²⁹ or a deed conveying one hundred acres off the west end of a tract, either then owned by the vendor, or to be afterward acquired by him,³⁰ has each been held too indefinite to be specifically enforced. But although the description is defective, the defect will be considered cured in an action to enforce specific performance where the vendee has been put in possession of the land.³¹ It has also been held that a contract to will real property in consideration of support must be certain, clear, definite and unambiguous before specific performance will be decreed.³² Likewise, a contract for a lease which is indefinite as to the duration of the term will not be specifically enforced.³³

§ 2292.—Certainty as to time of performance.—A contract enforceable in a court of equity must be clear and specific in all its essential elements, and, when labor or service is to be rendered, time is usually as essential an element as quantity or character. Thus, a contract to supply water with an election to continue the service from month to month for three years, reserving the right to elect to continue the service thereafter, is too indefinite to be enforced.³⁴ So, also, it is held that an executory agreement for the sale of land which does not designate the time of payment is not enforceable in a court of equity.³⁵ A contract which does not fix a time for performance and yet shows

²⁹ *Armstrong v. Henderson*, 16 Idaho 566, 102 Pac. 361.

³⁰ *Knight v. Alexander*, 42 Ore. 521, 71 Pac. 657.

³¹ *Meyer Bros. v. Mitchell*, 77 Ala. 312; *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719; *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146; *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 71 Iowa 164, 32 N. W. 315; *Overstreet v. Rice*, 4 Bush (Ky.) 1, 96 Am. Dec. 279; *Chicago, K. & S. R. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

³² *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274.

³³ *Lanahan v. Cockey*, 108 Md. 620, 71 Atl. 314.

³⁴ *Christian & Co. Grocery Co. v. Benville Water Supply Co.*, 106 Ala. 124, 17 So. 352. See also, *Easton, Eldridge & Co. v. Millington*, 105 Cal. 49, 38 Pac. 509; *Whitehill v. Lowe*, 10 Utah 419, 37 Pac. 589.

³⁵ *Luzader v. Richmond*, 128 Ind. 344, 27 N. E. 736; *Gates v. Gamble*, 53 Mich. 181, 18 N. W. 631; *Shumway v. Kitzman* (S. Dak.), 134 N. W. 325. Specific performance will not be decreed where a contract for the sale of coal in place fails to designate any time for payment. *Zimmerman v. Rhoads*, 226 Pa. 174, 75 Atl. 207.

that a definite time was intended, and not a reasonable time, is too indefinite for specific enforcement.³⁶ Thus, a contract for the sale of realty which does not show the time of payment of a mortgage to be given for a part of the purchase-price is also too indefinite to be specifically enforced.³⁷ But where a contract contains terms that are inconsistent, the subsequent conduct of the parties in construing them as consistent may make the contract sufficiently definite to be enforced specifically.³⁸

§ 2293. Certainty as to description of subject-matter.—

In order to specifically enforce a contract, the description of the subject-matter should be so definite that it describes with reasonable certainty that which the party contracting thinks he is contracting for, and that the court may ascertain therefrom what it is. It should not only express the names of the parties, the subject-matter and the price, but all material terms.³⁹ But where a contract refers to the subject-matter by a vague and insufficient description, the defect may be supplied by other instruments, pending and connected with the transaction, and coming from or adopted by the party against whom the contract is to be enforced.⁴⁰ Where real estate which the owner has contracted to convey has been described in the contract by its number or numbers as found on the ground or plat,⁴¹ or by a name by which it is known or designated,⁴² or where it is described

³⁶ *Oxford v. Crow*, L. R. (1893) 3 Ch. 535; *Todd v. Diamond State Iron Co.*, 8 *Houst. (Del.)* 372, 14 *Atl.* 27; *Williams v. Stewart*, 25 *Minn.* 516; *Moore v. Galupo*, 65 *N. J. Eq.* 194, 55 *Atl.* 628.

³⁷ *Tryce v. Dittus*, 199 *Ill.* 189, 65 *N. E.* 220.

³⁸ *Rank v. Garvey*, 66 *Nebr.* 767, 92 *N. W.* 1025, 99 *N. W.* 666.

³⁹ *Kofka v. Rosicky*, 41 *Nebr.* 328, 59 *N. W.* 788, 25 *L. R. A.* 207, 43 *Am. St.* 685; *Whitehill v. Lowe*, 10 *Utah* 419, 37 *Pac.* 589.

⁴⁰ *Wiswall v. McGowan*, 1 *Hoff. Ch. (N. Y.)* 125.

⁴¹ *Bride v. Reeves*, 36 *App. D. C.*

476; *Guillaume v. K. S. D. Fruit Land Co.*, 48 *Ore.* 400, 86 *Pac.* 883, 88 *Pac.* 586; *Shattuck v. Cunningham*, 166 *Pa. St.* 368, 31 *Atl.* 136.

⁴² *Koch v. Streuter*, 218 *Ill.* 546, 75 *N. E.* 1049, 2 *L. R. A. (N. S.)* 210; *Hayes v. O'Brien*, 149 *Ill.* 403, 37 *N. E.* 73, 23 *L. R. A.* 555; *Mull v. Smith*, 132 *Mich.* 618, 94 *N. W.* 183; *Smith v. Moore*, 5 *Rawle (Pa.)* 348; *Dunn v. Ralyea*, 6 *Watts & S. (Pa.)* 475. Merely giving the name by which the land is known without the state or county in which it is located is insufficient. *Wood v. Zeigler*, 99 *Tenn.* 515, 42 *S. W.* 447.

as a tract occupied by a particular person,⁴³ such description has been held sufficient to entitle the vendee to a specific performance, and this principle has been adhered to even where such description was followed by a further description by metes and bounds, which was repugnant to it.⁴⁴ And where the description of the real estate is too uncertain to justify specific performance, but the extrinsic facts remove any uncertainty, the contract may be specifically enforced.⁴⁵

§ 2294. Completeness of contract.—Since it is not the function of the court to make a contract for the parties, or supply any material stipulations thereof, relief will not be given unless the contract is complete and certain in all its essential elements,⁴⁶ or is capable of being made complete and certain by reformation.⁴⁷ To be enforceable in equity, a contract of purchase of land must be complete, fixing the price and terms as well as the identity of the land.⁴⁸ Thus, if certain terms are left open for future negotiation, the contract is not complete and specific performance will not be given;⁴⁹ or if an offer has not been accepted, there is really no contract, hence, no remedy will be given either in law or in equity.⁵⁰ So, also, a promise to convey land by the terms of which the purchaser has the option to accept and pay for the property, or reject it and relieve himself from all liability, does not impose any liability on either party to the transaction.⁵¹ Likewise, a promise to pur-

⁴³ Koch v. Dunkel, 90 Pa. St. 264.

⁴⁴ Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104; Union R. & Transit Co. v. Skinner, 9 Mo. App. 189; Lodge's Lessee v. Lee, 6 Cranch (U. S.) 237, 3 L. ed. 210.

⁴⁵ Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452.

⁴⁶ Armstrong v. Henderson, 16 Idaho 566, 102 Pac. 361; Zimmerman v. Rhoads, 226 Pa. 174, 75 Atl. 207.

⁴⁷ Ham v. Johnson, 55 Minn. 115, 56 N. W. 584; Nippolt v. Kammon, 39 Minn. 372, 40 N. W. 266.

⁴⁸ Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354.

⁴⁹ Lasher v. Gardner, 124 Ill. 441, 16 N. E. 919; Callanan v. Chapin, 158 Mass. 113, 32 N. E. 941; Huff v. Shepard, 58 Mo. 242; Camden & A. R. Co. v. Stewart, 18 N. J. Eq. 489; Reger v. McAllister (W. Va.), 73 S. E. 48.

⁵⁰ Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874; Fisher v. Buchanan, 2 Nebr. (Unof.) 158, 96 N. W. 339; Kennedy v. Parmelee, 3 Nebr. (Unof.) 402, 91 N. W. 490.

⁵¹ Goodale v. Hill, 42 Conn. 311; Winter v. Trainor, 151 Ill. 191, 37 N. E. 869; Graybill v. Braugh, 89 Va. 895, 17 S. E. 558, 2 L. R. A. 133, 37 Am. St. 894.

chase corporate stock, which the seller has the option to sell or not, as he wishes, is not binding on the vendor and consequently not on the vendee.⁵² Where by the terms of the contract the consideration is not definitely fixed, but is to be determined by arbitration or by the decision of a third person, a court of equity will not enforce specific performance until the consideration is determined.⁵³ But where either party refuses to appoint an arbitrator, or, on disagreement by arbitrators, a court of equity has the power to provide for fixing the consideration and to enforce the contract.⁵⁴

§ 2295. Capacity of parties in general.—If the contract is void or voidable as to the party against whom the relief of specific performance is sought, the decree will not be given.⁵⁵ A court of equity will not enforce specific performance of a contract where it is shown that the party against whom the relief is sought is an imbecile,⁵⁶ or, through ignorance of the English language, was unable to understand the nature of the contract,⁵⁷ or is old and infirm in mind and body.⁵⁸ But it has been held that it is no defense to a bill in equity for specific performance that at the time the contract was entered into the defendant was mentally and physically depressed, if no fraud was practiced upon him and the price was not grossly inadequate.⁵⁹

⁵² *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. 892.

⁵³ *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485; *Baker v. Glass*, 6 Munf. (Va.) 212.

⁵⁴ *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Town of Bristol v. Bristol & Warren Waterworks*, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

⁵⁵ *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257.

⁵⁶ *Reinicker v. Smith*, 2 Har. & J. (Md.) 421; *Sprague v. Jessup*, 48 Ore. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410.

⁵⁷ *Miller v. Tjexhus*, 20 S. Dak. 12, 104 N. W. 519.

⁵⁸ *Ratterman v. Campbell*, 26 Ky. L. 173, 80 S. W. 1155. The condition of mind of a defendant in a

suit for specific performance of a contract is an element to be considered in determining the circumstances attending the making of the agreement to discredit the transaction. *Sprague v. Jessup*, 48 Ore. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410.

⁵⁹ *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602. It is no defense to a suit for specific performance of a contract executed by one since deceased that at the time the agreement was entered into the decedent was eighty-three years old and had no one present to consult or advise with. *Ellis v. Keeler*, 126 App. Div. (N. Y.) 343, 110 N. Y. S. 542.

Specific performance can not be had against an infant, but if he ratify the contract on becoming of age, he may be compelled to perform it.⁶⁰ Nor will a contract executed by a person of unsound mind be enforced against his heirs.⁶¹ Intoxication of one of the parties to a contract at the time the same was entered into is no defense to a suit for specific performance unless it be shown that such intoxication was induced by the contrivance of the other party, or that such other party took undue advantage of it.⁶²

§ 2296. **Contracts of married women.**—Equity, in many jurisdictions, will not enforce specific performance of a contract made by a married woman, especially when not acknowledged before an officer.⁶³ Where a married woman has not capacity to convey real estate she can not make a contract for conveyance which equity will specifically enforce.⁶⁴ But where there is a statutory provision that a married woman may convey her separate estate by a joint deed with her husband, and that she may be sued jointly with him, a contract for the conveyance of her separate estate executed by her jointly with him may be specifically enforced in a suit against them jointly.⁶⁵ However, in case the husband did not join his wife in such contract of sale, he can not be compelled to join in the deed or to pay costs.⁶⁶ Where the real estate is owned by the husband, and his wife refuses to join him in a contract to convey, she will not be required by decree to join her husband in a conveyance and

⁶⁰ *Tillery v. Land*, 136 N. Car. 537, 48 S. E. 824.

⁶¹ *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579.

⁶² *Rodman v. Zilley*, 1 N. J. Eq. 320; *Maxwell v. Pittenger*, 3 N. J. Eq. 156.

⁶³ *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211. If by statute she would be bound by a contract to sell realty if acknowledged for recordation, such relief can not be given against her if

such contract is not thus acknowledged. *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257.

⁶⁴ *Blythe v. Dargin*, 68 Ala. 370; *Bowden v. Bland*, 53 Ark. 53, 13 S. W. 420, 22 Am. St. 179; *Butler v. Buckingham*, 5 Day (Conn.) 492, 5 Am. Dec. 174.

⁶⁵ *Klecka v. Ziegler*, 81 Md. 482, 32 Atl. 241; *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Hall v. Eccleston*, 37 Md. 510.

⁶⁶ *Mix v. Baldwin*, 156 Ill. 313, 40 N. E. 959; *Mathison v. Wilson*, 87 Ill. 51; *Deniston v. Hoagland*, 67 Ill. 265.

thus relinquish her inchoate right of dower.⁶⁷ Where by statute a married woman is incapacitated to make a parol contract for the sale of her real estate, she can not constitute her husband her agent to make it for her.⁶⁸ But where such contract was signed by the husband as the agent of the wife and it is afterwards accepted by her, she may have specific performance thereof.⁶⁹ Where a contract to convey real estate by a married woman can not be specifically enforced against her, it has been held that it can not be specifically enforced at her instance, even though she tenders performance on her part;⁷⁰ but where she has fully performed her part of the contract she may have specific performance.⁷¹

§ 2297. Contracts of corporations.—Where a corporation has power to take and hold land for its convenience in the transaction of its business or to secure its debts, but for no other purpose, it has no right to purchase land for the purpose of selling it again, and a court of equity will not enforce a contract made with that intent.⁷² But a contract made by a corporation whose business was that of holding and selling real estate may be specifically enforced.⁷³ And where such a contract is executed for the corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it before it will be specifically enforced.⁷⁴ Thus, a parol agreement with the vice-president of a corporation for the purchase of a lot, which was never ratified or acquiesced in by its

⁶⁷ *Brown v. Lapham*, 22 Colo. 264, 44 Pac. 504; *Venator v. Swenson*, 100 Iowa 295, 69 N. W. 522; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499. See also, *Seager v. Burns*, 4 Gil. (Minn.) 93; *Camden & T. R. Co. v. Adams*, 62 N. J. Eq. 656, 51 Atl. 24.

⁶⁸ *Percifield v. Black*, 132 Ind. 384, 31 N. E. 955.

⁶⁹ *Egle v. Morrison*, 27 Ohio C. C. 497.

⁷⁰ *Tarr v. Scott*, 4 Brews. (Pa.)

49; *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334.

⁷¹ *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076; *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334.

⁷² *Bank of Michigan v. Niles*, Walk. Ch. (Mich.) 99.

⁷³ *Davidson v. Cannabis Mfg. Co.*, 113 App. Div. (N. Y.) 664, 99 N. Y. S. 1018.

⁷⁴ *Parmele v. Heenan & Finlen*, 75 Nebr. 535, 106 N. W. 662.

proper officers, can not be enforced against the corporation.⁷⁵ Specific performance can not be had of an executory ultra vires promise of a corporation.⁷⁶

§ 2298. Oral contracts within the statute of frauds.—It may be stated as a general rule that a court of equity will not specifically enforce a contract void under the statute of frauds.⁷⁷ Where, however, a parol agreement is admitted or proven without objection, and the statute is not set up, specific performance has been decreed.⁷⁸ It has been held that a court of equity, in order to defeat fraud, will compel specific performance of a parol contract for the sale of land, if established by clear and convincing proof.⁷⁹

§ 2299. Part performance of parol contract.—To justify a decree in favor of a vendee for the specific performance of a parol contract for the sale of real estate, the contract and its performance on the part of the vendee must be clearly proved.⁸⁰ Such parol contract may be enforced in equity where there has been partial performance by the party seeking the aid of the court.⁸¹ In most jurisdictions

⁷⁵ *Jennings v. Brown*, 20 Okla. 294, 94 Pac. 557.

⁷⁶ *Railroad Co. v. Telegraph Co.*, 38 Ohio St. 24. See also, *Phillips Village Corporation v. Phillips Water Co.*, 104 Maine 103, 71 Atl. 474; *Smith v. Flathead River Coal Co.*, 64 Wash. 642, 117 Pac. 475.

⁷⁷ *Cascaden v. Dunbar*, 2 Alaska 408; *Etheridge v. Woodard*, 106 Ga. 251, 32 S. E. 122; *Ruff Brewing Co. v. Schanz*, 114 Ill. App. 508; *Sizemore v. Bowling's Admr.* (Ky.), 115 S. W. 737; *Roth v. Goerger*, 118 Mo. 556, 24 S. W. 176; *Clement v. Young Amusement Co.*, 71 N. J. Eq. 258, 65 Atl. 185; *Davis v. Yelton*, 127 N. Car. 348, 37 S. E. 464; *Otis v. Payne*, 86 Tenn. 663, 8 S. W. 848; *King v. Upper*, 57 Wash. 130, 106 Pac. 612; *Henderson v. Henrie*, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628; *Reel v. Reel*, 59 W. Va. 106, 52 S. E. 1023; *Popp v. Swanke*, 68 Wis. 364, 31 N. W. 916.

⁷⁸ *Shakespeare v. Alba*, 76 Ala.

351; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Clayton v. Lemen*, 233 Ill. 435, 84 N. E. 691; *Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Fall v. Hazelrigg*, 45 Ind. 581, 15 Am. Rep. 278; *Douglass v. Snow*, 77 Maine 91; *Woods v. Dille*, 11 Ohio 455, revd. 14 Ohio 122; *Brakefield v. Anderson*, 87 Tenn. 206, 10 S. W. 360.

⁷⁹ *McCullough v. Sutherland*, 153 Fed. 418; *Henderson v. McRae*, 148 Mich. 324, 111 N. W. 1057; *Gallagher v. Gallagher*, 135 App. Div. (N. Y.) 457, 120 N. Y. S. 18.

⁸⁰ *Steuer v. Torrent*, 99 Mich. 68, 57 N. W. 1087; *Rogers Locomotive & Works v. Helm*, 154 U. S. 610, 22 L. ed. 562, 14 Sup. Ct. 1177.

⁸¹ *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. 258. See also, *Parrish v. Steadham*, 102 Ala. 615, 15 So. 354; *Moore v. Gordon*, 44 Ark. 334; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; An-

technical part performance of an oral contract which is included in the terms of the statute of frauds makes such contract enforceable in equity, but not at law. In other cases the very fact that makes the contract unenforceable at law gives equity jurisdiction to enforce specific performance.⁸² The general view seems to be that there must have been such part performance by the party seeking relief that the parties can not be restored to their original relative positions.⁸³ A parol contract to convey lands is not affected by the statute of frauds, where the promisee takes possession of the land, and makes valuable improvements on it as part performance.⁸⁴ However, in a few jurisdictions, the doctrine of part performance of a contract as justifying specific enforcement, notwithstanding the statute of frauds is not recognized.⁸⁵ Want of mutuality arising from the failure of one party to sign may be regarded as cured by his suing for specific performance and thus binding himself and making the contract mutual.⁸⁶ The acts relied on

drew v. Babcock, 63 Conn. 109, 26 Atl. 715; Oliver v. Powell, 114 Ga. 592, 40 S. E. 826; Deeds v. Stephens, 8 Idaho 514, 69 Pac. 534; Wilke v. Miller, 171 Ill. 556, 49 N. E. 484; St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co., 156 Ind. 665, 59 N. E. 995; Lowery v. Lowery, 117 Iowa 704, 89 N. W. 1118; Janes v. Holmden, 60 Kans. 855, 55 Pac. 1101; Beinlein v. Johns, 102 Ky. 570, 19 Ky. L. 1969, 44 S. W. 128; Goldman v. Brinton, 90 Md. 259, 44 Atl. 1029; Perkins v. Perkins, 181 Mass. 401, 63 N. E. 926; Bushnell v. Rowland, 118 Mich. 618, 77 N. W. 271; Jorgenson v. Jorgenson, 81 Mich. 428, 84 N. W. 221; Howell v. Gibson, 30 Miss. 464; Green v. Ditsch, 143 Mo. 1, 44 S. W. 799; Lucas v. Lucas, 64 Nebr. 190, 89 N. W. 769; Shaw v. Abbott, 61 N. H. 254; Neibert v. Baghurst (N. J.), 25 Atl. 474; Hay v. Knauth, 169 N. Y. 298, 62 N. E. 395; Barrett v. Schleich, 37 Ore. 613, 62 Pac. 792.

⁸² Sullings v. Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742; Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N. W. 730.

⁸³ Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Borden v. Curtis, 48 N. J. Eq. 120, 21 Atl. 472; Hancock v. Melloy, 187 Pa. St. 371, 41 Atl. 313; Tillinghast v. Henderson, 59 S. Car. 388, 38 S. E. 5; Baker's Exrs. v. De Freese, 2 Tex. Civ. App. 524, 21 S. W. 963; Rigler v. Erney, 154 U. S. 244, 38 L. ed. 976, 14 Sup. Ct. 1083; Wright v. Pucket, 22 Grat. (Va.) 370; Biern v. Ray, 49 W. Va. 129, 38 S. E. 530; Wall v. Minneapolis & C. R. Co., 86 Wis. 48, 56 N. W. 367.

⁸⁴ MacDowell v. Lucas, 97 Ill. 489; Bohanan v. Bohanan, 96 Ill. 591; Starkey v. Starkey, 136 Ind. 349, 36 N. E. 287; Law v. Henry, 39 Ind. 414; Puterbaugh v. Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

⁸⁵ Fisher v. Kuhn, 54 Miss. 480; Pitt v. Moore, 99 N. Car. 85, 5 S. E. 389, 6 Am. St. 489; Ridley v. McNairy, 2 Humph. (Tenn.) 174. But compare North v. Bunn, 122 N. Car. 766, 29 S. E. 776.

⁸⁶ South & North Ala. R. Co. v. Highland Ave. & C. R. Co., 98 Ala. 400, 13 So. 682, 39 Am. St. 74; Woodruff v. Woodruff, 44 N. J. Eq.

to constitute part performance must have been performed in good faith and in reliance upon the parol contract sought to be enforced,⁸⁷ and must refer to, result from, and be of such a nature that but for the contract they would not have been performed.⁸⁸

§ 2300. Acts constituting part performance of parol contract.—We have said that it is a rule in equity that certain acts in performance of an oral contract which, in the absence of such acts, would be within the statute of frauds will take such contract out of the operation of the statute and leave even the executory part thereof enforceable, though oral.⁸⁹ The name of the doctrine “part performance” is misleading, inasmuch as it is frequently applied to acts which constitute full performance on one side. It is important, therefore, to keep in mind the distinction between the doctrine of part performance and that other doctrine recognized in some jurisdictions that if a contract has been partly performed on one side, the rights of the parties as to what has been performed are fixed by the contract.⁹⁰ Part performance involves actual possession or some act

349, 16 Atl. 4, 1 L. R. A. 380; Western Timber Co. v. Kalama River Co., 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. 137, and note citing many cases to this effect and reviewing others contra.

⁸⁷ Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783.

⁸⁸ Moore v. Gordon, 44 Ark. 334; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133; Small v. Northern Pac. R. Co., 20 Fed. 753; Rawlins v. Shropshire, 45 Ga. 182; Gorham v. Dodge, 122 Ill. 528, 14 N. E. 44; Shepherd v. Bevin, 9 Gill (Md.) 32; Lydick v. Holland, 83 Mo. 703; Lewis v. North, 62 Nebr. 552, 87 N. W. 312; Chamberlain v. Manning, 41 N. J. Eq. 651, 7 Atl. 634; Rathbun v. Rathbun, 6 Barb. (N. Y.) 98; Armstrong v. Kattenhorn, 11 Ohio 265; Moore v. Small, 19 Pa. St. 461; Boozer v. Teague, 27 S. Car. 348, 3 S. E. 551; Campbell v. Fetterman, 20 W. Va. 398.

⁸⁹ Riggles v. Erney, 154 U. S. 244, 38 L. ed. 976, 14 Sup. Ct. 1083. See also, St. Louis, A. & T. R. Co. v. Graham, 55 Ark. 294, 18 S. W. 56; Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149; Grant v. Grant, 63 Conn. 530, 38 Am. St. 379, 29 Atl. 15; Collins v. Moore, 115 Ga. 327, 41 S. E. 609; Deeds v. Stephens, 8 Idaho 514, 69 Pac. 534; Bogle v. Jarvis, 58 Kans. 76, 48 Pac. 558; Pike v. Pike, 121 Mich. 170, 80 N. W. 5, 80 Am. St. 488; Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960; McWhinne v. Martin, 77 Wis. 182, 46 N. W. 118.

⁹⁰ Greenville v. Greenville Water Works Co., 125 Ala. 625, 27 So. 764; Lagerfelt v. McKie, 100 Ala. 430, 14 So. 281; Murphy v. DeHaan, 116 Iowa 61, 89 N. W. 100; Graves County Water Co. v. Ligon, 112 Ky. 775, 23 Ky. L. 2149, 66 S. W. 725; Sanger v. French, 157 N. Y. 213, 51 N. E. 979.

whereby the party seeking relief has received an injury for which the law can not fully compensate him.⁹¹ In other words, the acts relied on for equitable performance must be "such part performance as can not be compensated in damages."⁹² Some of the cases hold that the party against whom the relief is sought must have been benefited by the acts done in performance of the contract in order to have the doctrine of part performance apply.⁹³

§ 2301. Payment as part performance.—As a rule, mere payment of a part or all of the purchase-price is not such part performance as to warrant a decree for specific performance.⁹⁴ So, it has been held that the fact of the defendant's insolvency creates no greater equity for specific performance.⁹⁵ And the rule includes payment in services performed, or goods delivered, as well as payment in money, where such services or goods can be estimated in money.⁹⁶ But where payment or part payment of the con-

⁹¹ *Smith v. Finch*, 8 Wis. 245; *Harney v. Burhans*, 91 Wis. 348, 64 N. W. 1031.

⁹² *Moore v. Small*, 19 Pa. St. 461; quoted in *Hancock v. Melloy*, 187 Pa. St. 371, 41 Atl. 313.

⁹³ *Schumate v. Farlow*, 125 Ind. 359, 25 N. E. 432; *Bristol v. Sutton*, 119 Mich. 693, 78 N. W. 885; *Lydick v. Holland*, 83 Mo. 703; *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. 486.

⁹⁴ *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107; *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981; *Neal v. Gregory*, 19 Fla. 356; *Grant v. Derrick*, 134 Ga. 644, 68 S. E. 422; *Lyons v. Bass*, 108 Ga. 573, 34 S. E. 721; *Fraser v. Gates*, 118 Ill. 99, 1 N. E. 817; *Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Green v. Groves*, 109 Ind. 519, 10 N. E. 401; *Nay v. Mograin*, 24 Kans. 75; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Townsend v. Fenton*, 30 Minn. 528, 16 N. W. 421; *Baker v. Wiswell*, 17 Nebr. 52, 22 N. W. 111; *Brown v. Drew*, 67 N. H. 569, 42 Atl. 177; *Cochrane v. McEntee* (N. J.), 51 Atl. 279; *Titus v. Taylor* (N. J. Eq.), 65 Atl. 1003; *Cooley*

v. Lobdell, 153 N. Y. 596, 47 N. E. 783; *McKinley v. Hessen*, 135 App. Div. (N. Y.) 832, 120 N. Y. S. 257; *Cooper v. Thomason*, 30 Ore. 161, 45 Pac. 296; *Jamison v. Dimock*, 95 Pa. St. 52; *McMillan v. McMillan*, 77 S. Car. 511, 58 S. E. 431; *Mims v. Chandler*, 21 S. Car. 480; *Munk v. Weidner*, 9 Tex. Civ. App. 491, 29 S. W. 409; *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530; *Harney v. Burhans*, 91 Wis. 348, 64 N. W. 1031.

⁹⁵ *Townsend v. Fenton*, 32 Minn. 482, 21 N. W. 726; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

⁹⁶ *Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Quinn v. Stark County Telephone Co.*, 122 Ill. App. 133; *Collins v. Collins*, 138 Iowa 470, 114 N. W. 1069; *McPherson v. Wiswell*, 16 Nebr. 625, 21 N. W. 391; *Crabill v. Marsh*, 38 Ohio St. 331. Specific performance of a parol contract to convey an interest in realty in consideration of personal services rendered by a child to his aged parent was denied such child after he had rendered such services, there being no

sideration is accompanied by other acts which it is difficult to compensate in damages, such as the assumption of possession, or the making of improvements, specific performance will be decreed.⁹⁷

§ 2302. Possession as an element of part performance of an oral contract.—As a rule, the mere taking of possession by the purchaser of real estate pursuant to a parol contract to convey the same does not justify a decree of specific performance,⁹⁸ yet where possession has been taken and the purchase-price paid,⁹⁹ or there has been a change of plans or sacrifice of business interests, specific performance has been decreed.¹ And there are cases holding that the delivery of possession alone, by a vendor or lessor, is such part performance on his part to entitle him to a decree.² It has also been held that possession alone with the consent of the vendor,³ or such possession as is open, exclusive, continuous, notorious and in pursuance of the contract, will justify a decree of specific performance.⁴

showing that the services could not be measured by a pecuniary standard. *Cordano v. Ferretti*, 15 Cal. App. 670, 115 Pac. 657.

⁹⁷*Brewer v. Brewer*, 19 Ala. 481; *Day v. Cohn*, 65 Cal. 508, 4 Pac. 511; *Taylor v. Mathews*, 53 Fla. 776, 44 So. 146; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Timmonds v. Taylor* (Ind. App.), 96 N. E. 331; *Felton v. Smith*, 84 Ind. 485; *Marsh v. Davis*, 33 Kans. 326, 6 Pac. 612; *Goodwin v. Smith*, 89 Maine 506, 36 Atl. 997; *Bechtel v. Cone*, 52 Md. 698; *Low v. Low*, 173 Mass. 580, 54 N. E. 257; *Rosenberger v. Jones*, 118 Mo. 559, 24 S. W. 203; *Baker v. Hussey*, 63 S. Car. 551, 41 S. E. 758.

⁹⁸*Gladville v. McDole*, 247 Ill. 34, 93 N. E. 86; *Baldrige v. Centgraf*, 82 Kans. 240, 108 Pac. 83; *Cobb v. Johnson*, 101 Tex. 440, 108 S. W. 811.

⁹⁹*Arkadelphia Lumber Co. v. Thornton*, 83 Ark. 403, 104 S. W. 169; *Timmonds v. Taylor* (Ind. App.), 96 N. E. 331; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404;

Krah v. Radcliffe, 78 N. J. Eq. 305, 81 Atl. 1133.

¹*Simonton v. Godsey*, 174 Ill. 28, 51 N. E. 75; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647; *Mills v. McCaustland*, 105 Iowa 187, 74 N. W. 930; *Brown v. Lord*, 7 Ore. 302; *Ballard v. Ward*, 89 Pa. St. 358; *Martin v. Patterson*, 27 S. Car. 621, 2 S. E. 859; *Montgomery v. Carlton*, 56 Tex. 361; *Griffith v. Abbott*, 56 Vt. 356; *Bowman v. Wolford*, 80 Va. 213.

²*Arrington v. Porter*, 47 Ala. 714; *Pledger v. Garrison*, 42 Ark. 246; *Calanchini v. Barnstetter*, 84 Cal. 249, 24 Pac. 149; *White v. Crew*, 16 Ga. 416; *Savage v. Lee*, 101 Ind. 514; *Anderson v. Simpson*, 21 Iowa 399; *Walker v. Owen*, 79 Mo. 563; *Southmayd v. Southmayd*, 4 Mont. 100, 5 Pac. 318; *Cooper v. Thomason*, 30 Ore. 161, 45 Pac. 296.

³*Steenland v. Noel* (S. Dak.), 134 N. W. 207; *Jomsland v. Wallace*, 39 Wash. 487, 81 Pac. 1094.

⁴*Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104;

§ 2303. Improvements as part performance of parol contract.—The making of valuable and substantial improvements by the vendee, donee or lessee in possession of real estate upon the faith of a parol contract has often been held to amount to such part performance as will justify a decree of specific performance.⁵ But to warrant such decree it must appear by satisfactory proof that the contract was in fact made and that under the contract and in reliance thereon, complainant entered into possession and made such valuable improvements as will take the case out of the statute of frauds.⁶ It has been further held that the erection of valuable and permanent improvements on the land is such part performance as will warrant a decree, though no part of the purchase-money has been paid.⁷ Nor will the fact that the plaintiff's possession and use of the premises for such time as will more than compensate him for the improvements made thereon be a bar to specific performance where, in addition to the improvements, plaintiff has paid the purchase-price and the taxes, for which the use of the land was no compensation.⁸ But mere minor

Baldwin v. Baldwin, 73 Kans. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957; Muir v. Chandler, 16 N. Dak. 51, 113 N. W. 1038; Baldridge v. George, 216 Pa. 231, 65 Atl. 662; Babcock v. Lewis, 52 Tex. Civ. App. 8, 113 S. W. 584. Where possession is relied on as part performance, the rule that possession must be exclusive is satisfied where the possession was as exclusive as the terms of the contract would permit. Taylor v. Taylor, 79 Kans. 161, 99 Pac. 814.

⁵ Latimer v. Hamill, 5 Ariz. 274, 52 Pac. 364; Mooney v. Rowland, 64 Ark. 19, 40 S. W. 259; Calanchini v. Barnstetter, 84 Cal. 249, 24 Pac. 149; Hunt v. Hayt, 10 Colo. 278, 15 Pac. 410; Barton v. Dunlap, 8 Idaho 82, 66 Pac. 832; Gaines v. Kendall, 176 Ill. 228, 52 N. E. 141; Standard v. Standard, 223 Ill. 255, 79 N. E. 92; Horner v. McConnell, 158 Ind. 280, 63 N. E. 472; Gilmore v. Ashbury, 64 Kans. 383, 67 Pac. 864; Potter v. Jacobs, 111 Mass. 32; Felt v. Felt, 155 Mich. 237, 118

N. W. 953; Mournin v. Trainor, 63 Minn. 230, 65 N. W. 444; Stevens v. Trafton, 36 Mont. 520, 93 Pac. 810; Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783; Schirmer v. Rehill, 57 Misc. (N. Y.) 439, 109 N. Y. S. 745; Sutherland v. Taintor, 17 Okla. 427, 87 Pac. 900; Cooper v. Thomason, 30 Ore. 161, 45 Pac. 296; West v. Washington & C. R. Co., 49 Ore. 436, 90 Pac. 666; McMillan v. McMillan, 77 S. Car. 511, 58 S. E. 431; Stewart v. Tomlinson, 21 S. Dak. 337, 112 N. W. 849; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed 383, 16 Sup. Ct. 258; Karren v. Rainey, 30 Utah 7, 83 Pac. 333; Price v. Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870; Henriksen v. Henriksen, 143 Wis. 314, 127 N. W. 962.

⁶ White v. White, 241 Ill. 551, 89 N. E. 682.

⁷ Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Steensland v. Noel (S. Dak.), 134 N. W. 207.

⁸ Jorgenson v. Jorgenson, 81

improvements, or such as adequate compensation for may be had in damages, will not, ordinarily, warrant a decree of specific performance.⁹ The doctrine of some of the cases is to the effect that unless the vendee has taken possession of the premises, no act of alleged part performance on his part will be sufficient.¹⁰

§ 2304. **Necessity of consideration.**—The rule is well settled that a court of equity will not decree the specific performance of a contract that is not supported by a valuable consideration.¹¹ The presence of a seal affixed to a contract is a sufficient recital of consideration to satisfy the statute of frauds and to entitle a party to its specific performance.¹² A court of equity may, however, go behind a seal and inquire into the consideration.¹³ It has been repeatedly held that the words “for value received” sufficiently comply with the statutes which require the consideration to be expressed.¹⁴ But mere inadequacy of con-

Minn. 428, 84 N. W. 221; *La Master v. Dickson*, 17 Tex. Civ. App. 473, 43 S. W. 911, *affd.* 91 Tex. 593, 45 S. W. 1. Compare *Marr v. Shaw*, 51 Fed. 860. But see, *Cook v. Erwin* (Tex. Civ. App.), 133 S. W. 897.

⁹ *Cobb v. Johnson*, 101 Tex. 440, 108 S. W. 811; *Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.*, 108 Va. 862, 62 S. E. 954, 1119; *Hoover v. Baugh*, 108 Va. 695, 62 S. E. 968, 128 Am. St. 985.

¹⁰ *Ackerman v. Fisher*, 57 Pa. St. 457; *Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. 818; *Goodwin v. Bartlett*, 43 W. Va. 332, 27 S. E. 325.

¹¹ *Andrews v. Andrews*, 28 Ala. 432; *Shields v. Trammell*, 19 Ark. 51; *Wilson v. White*, 161 Cal. 453, 119 Pac. 895; *Winter v. Geobner*, 21 Colo. 279, 40 Pac. 570; *Maloy v. Boyett*, 53 Fla. 956, 43 So. 243; *Wycke v. Greene*, 16 Ga. 49; *Bear Track Min. Co. v. Clark*, 6 Idaho 196, 54 Pac. 1007; *Wyatt v. Mayfield*, 91 Ill. 577; *Corbett v. Cronk-hite*, 239 Ill. 9, 87 N. E. 874; *Holland v. Hensley*, 4 Iowa 222; *Northup v. Standifer*, 15 Ky. L.

740, 23 S. W. 348; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. 417; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Vasser v. Vasser*, 23 Miss. 378; *Shinkle v. Vickery*, 156 Mo. 1, 55 S. W. 456; *Lipscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. 500; *Schroeder v. Gemeinder*, 10 Nev. 355; *In re Heath's Appeal*, 100 Pa. St. 1; *Sprague v. Schotte*, 48 Ore. 609, 87 Pac. 1046; *Williams v. Graves*, 7 Tex. Civ. App. 356, 26 S. W. 334; *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870; *Graybill v. Braugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. 894; *Hanson v. Michelson*, 19 Wis. 498.

¹² *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 131.

¹³ *Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Bosley v. Bosley*, 85 Mo. App. 424.

¹⁴ *Whitney v. Stearns*, 16 Maine 394; *Osborne v. Baker*, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; *Day v. Elmore*, 4 Wis. 214. See also, *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

sideration, at least if not gross, will not in general prevent specific performance of a valid contract.¹⁵ Thus, where plaintiff paid one dollar for an option to purchase land for an agreed price, and later elected, within the time specified in the option, to purchase for the agreed price, which was adequate, the adequacy of the consideration paid for the option was immaterial, in a suit to enforce specific performance of the contract.¹⁶ But a recited consideration of one dollar has been held inadequate to support an action for specific performance of a contract otherwise unsupported by a consideration.¹⁷ And though mere inadequacy of consideration, when standing alone, may not bar the right to specific performance, it is a circumstance which, with others, will contribute to influence a court of equity in withholding its decree.¹⁸ The promise to do a thing which the promisor is already under legal obligation to do is not a sufficient consideration to warrant a decree of specific performance.¹⁹

§ 2305. Fairness and reasonableness of consideration.—

While, as we have seen, mere inadequacy of consideration alone is not sufficient to defeat a decree for specific performance, yet if such inadequacy be coupled with any element of fraud or unfairness, a court of equity will withhold its relief.²⁰ So, a court of equity will not lend its aid

¹⁵ *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469; *Winch v. Edmunds*, 34 Colo. 359, 83 Pac. 632; *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509; *Emerson v. Fleming*, 246 Ill. 353, 92 N. E. 890; *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221; *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Boyce v. Holloway* (Ind. App.), 91 N. E. 34; *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938; *Schapiro v. Howard* (Md.), 78 Atl. 58; *Barney v. Chamberlain*, 85 Nebr. 785, 124 N. W. 482; *Combes v. Adams*, 150 N. Car. 64, 63 S. E. 186.

¹⁶ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689.

¹⁷ *Berry v. Frisbie*, 120 Ky. 337, 27 Ky. L. 724, 86 S. W. 558.

¹⁸ *Powers v. Hale*, 25 N. H. 145; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 120.

¹⁹ *Dunkel v. Dunkel*, 56 Hun (N. Y.) 25, 29 N. Y. St. 477, 8 N. Y. S. 888; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171.

²⁰ *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Kirkman v. Kenyon*, 17 Ind. 607; *Eaton v. Eaton*, 64 N. H. 493, 14 Atl. 867; *Graham v. Pancoast*, 30 Pa. St. 89; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, revd. 75 Tex. 385, 12 S. W. 841; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332.

to enforce a contract which is in any way unfair,²¹ inequitable,²² or unconscionable.²³ And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance even though there is no such fraud or the like as would require a cancellation.²⁴ The contract may be perfectly legal, and yet it will not be specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties.²⁵ Thus, a decree of specific performance of a contract for an exchange of farms was denied where it appeared that the defendant's farm was worth twenty-five thousand dollars and the plaintiff's farm was worth but little, if anything, above the incumbrance upon it, which incumbrance defendant assumed.²⁶ Before a court of equity will lend its aid to enforce an antenuptial contract it must appear that the agreement was fair and just.²⁷ So, also, a contract to will real property in consideration of support will not be enforced if the contract is unfair.²⁸ Where a party comes into a court of equity seeking to enforce specific performance of a contract that is oppressive and unconscionable, such relief may be denied even where the proof of the defendant shows little more than improvidence, surprise, or even mere hardship, as in such a case

²¹ *Winchester v. Becker*, 8 Cal. App. 362, 97 Pac. 74.

²² *Ehrenstrom v. Phillips* (Del. Ch.), 77 Atl. 81.

²³ *Clark v. Rosario Min. & Mill. Co.*, 176 Fed. 180, 99 C. C. A. 534; *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 119 N. W. 969; *Work v. Fidelity Oil & Gas Co.*, 79 Kans. 118, 98 Pac. 801; *Van Nordsall v. Smith*, 141 Mich. 355, 104 N. W. 660.

²⁴ *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, and note reviewing many cases and stating amounts or circumstances showing such inadequacy of consideration or other circumstances rendering the contract unconscionable. Among such cases are the following: *Day v. New-*

man, cited 10 Ves. Jr. 300; *Christian v. Ransome*, 46 Ga. 138; *Woollmus v. Horsley*, 93 Ky. 582, 20 S. W. 781; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513, affd. 14 Johns. (N. Y.) 527; *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332.

²⁵ *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321; *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S. E. 524, 123 Am. St. 990.

²⁶ *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072. See also, *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, and note.

²⁷ *Kennedy v. Borah*, 157 Ill. App. 90.

²⁸ *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274.

a court of equity may properly adhere to the ancient maxim that a decree is of grace, not of right.²⁹

§ 2306. Mistake in execution of contract.—Where there has been a mistake in the execution of a contract sought to be enforced in equity the relief will usually be denied.³⁰ But the mere misconception of the legal effect of an agreement will not operate to defeat specific performance.³¹ Nor will specific performance be denied where a mistake does not go to the foundation of the contract, but is of such a character that it may be corrected in the decree.³² In the absence of fraud or deception, it is generally incumbent on a party, on signing a contract, to read it carefully or have it read, and to take no chances touching the contents of the act.³³ And one who has the means of knowing the contents of a written contract which he signs is said to be estopped to deny that he knew its contents.³⁴ So, in a number of cases specific performance has been enforced where the mistake was wholly due to the negligence of the defendant and there was no gross inadequacy of consideration.³⁵

²⁹ Reynolds v. Craft, 38 Pa. Super. Ct. 46.

³⁰ James v. State Bank, 17 Ala. 69; Wilkin v. Voss, 120 Iowa 500, 90 N. W. 1123; Somerville v. Coppage, 101 Md. 519, 61 Atl. 318; Hall v. Loomis, 63 Mich. 709, 30 N. W. 374; Cawley v. Jean, 189 Mass. 220, 75 N. E. 614 (when the mistake is not attributable to the defendant's own negligence); Krah v. Radcliffe, 78 N. J. Eq. 305, 81 Atl. 1133; King v. Spaeth, 50 N. J. Eq. 378, 25 Atl. 257; Eiseman v. Josephthal, 71 Misc. (N. Y.) 288, 128 N. Y. S. 699. Where the defendant was an aged and illiterate woman, and her contract purports to distribute her deceased husband's estate, in violation of his will, and at the time she signed the contract she was ignorant of her legal rights and was overreached by her children, specific performance of her contract will be denied. Loosing v. Loosing, 85

Nebr. 66, 122 N. W. 707; Rudisill v. Whitener, 146 N. Car. 403, 59 S. E. 995, 15 L. R. A. (N. S.) 81 and note.

³¹ Hay v. Kirk, 116 Ill. App. 45; Greenleaf v. Blakeman, 25 Misc. (N. Y.) 564, 56 N. Y. S. 76; Pittsburgh, Bessemer & Lake Erie R. Co. v. Glant, 29 Pittsb. L. J. (N. S.) (Pa.) 113.

³² North v. Percival, L. R. (1898) 2 Ch. 128, 67 L. J. Ch. 321; Keim v. Lindley (N. J.), 30 Atl. 1063. See also, Dewey v. Whitney, 85 Fed. 325, affd. 93 Fed. 533, 35 C. C. A. 414.

³³ Murphy v. Hussey, 117 La. 390, 41 So. 692.

³⁴ Minneapolis & St. L. R. Co. v. Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. 216.

³⁵ Van Praagh v. Everidge, L. R. (1902) 2 Ch. 266; McKenzie v. Hesketh, L. R. 7 Ch. Div. 675; Tamplin v. James, 43 L. T. 520; Cape Fear Lumber Co. v. Mathe-

§ 2307. **Misrepresentation and fraud.**—Specific performance will be refused when there has been misrepresentation of a material matter relied upon by the defendant or fraud in the execution of the contract.³⁶ And this is true, though the fraud or misrepresentation be not of a nature to justify a rescission of the contract at law.³⁷ So, also, where the party seeking specific performance has taken an unfair advantage of the ignorance or inexperience of the other, specific performance will, as a rule, be denied.³⁸ Whether misrepresentations will operate to defeat the specific performance of a contract depends upon their materiality. For material misrepresentations the remedy will be denied,³⁹ but it is usually otherwise where the misrepresentations are not material,⁴⁰ or were of a character upon which the party seeking to defeat the relief had no right to rely.⁴¹ To constitute a defense in a suit for specific performance, the misrepresentations must have been relied upon by the party with whom the contract was made.⁴² These general principles are illustrated in numerous decided cases. Thus, a misrepresentation of the location with reference to a subur-

son, 69 S. Car. 87, 48 S. E. 111; *Kemper v. Ewing*, 25 Grat. (Va.) 427.

³⁶ *Andrews v. Andrews*, 28 Ala. 432; *Jacobs v. George*, 3 Ariz. 9, 20 Pac. 183; *Webster v. Gibson*, 7 Cal. App. 160, 93 Pac. 1040; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372, 14 Atl. 27; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. 44; *Maltby v. Thews*, 171 Ill. 264, 49 N. E. 486; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Louisville, N. A. & C. R. Co. v. Bodenschatz-Bedford Stone Co.*, 141 Ind. 251, 39 N. E. 703; *New York Brokerage Co. v. Wharton*, 143 Iowa 61, 119 N. W. 969; *Flynn v. Finch*, 137 Iowa 378, 114 N. W. 1058; *Wolford v. Steele*, 27 Ky. L. 1177, 87 S. W. 1071; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Ginther v. Townsend*, 114 Md. 122, 78 Atl. 908; *Riggins v. Trickey*, 46 Tex. Civ. App. 569, 102 S. W. 918;

Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; *Huston v. Harrington*, 58 Wash. 51, 107 Pac. 874; *Cleavenger v. Sturm*, 59 W. Va. 658, 53 S. E. 593. ³⁷ *Frisby v. Ballance*, 4 Scam. Ill. 287, 39 Am. Dec. 409; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 120.

³⁸ *Bird v. Logan*, 35 Kans. 228, 10 Pac. 564; *Margraf v. Muir*, 57 N. Y. 155.

³⁹ *Race v. Weston*, 86 Ill. 91; *Mansfield v. Watson*, 2 Iowa 111; *Crane v. Judik*, 86 Md. 63, 38 Atl. 129, 131; *Hicks v. Turek*, 72 Mich. 311, 40 N. W. 339; *Jones v. Booth*, 38 Ohio St. 405; *Wells v. Millet*, 23 Wis. 64.

⁴⁰ *McManus v. Boston*, 171 Mass. 152, 50 N. E. 607; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

⁴¹ *Hallinger v. Zimmerman*, 59 N. J. Eq. 644, 44 Atl. 1100.

⁴² *Crotty v. Efler*, 60 W. Va. 258, 54 S. E. 345.

ban street, of platted lots, where the plat is not accessible to the purchaser, is one on which the purchaser has a right to rely and involves a material matter, even justifying a rescission.⁴³ And specific performance has often been denied the vendor in such cases.⁴⁴ But where the purchaser has actual independent knowledge of the true facts and situation the rule is otherwise.⁴⁵ The vendor may praise his property, and a mere expression of opinion as to its value will not ordinarily amount to such fraud as will defeat specific performance.⁴⁶

§ 2308. Illegal contracts.—A party to an illegal contract can not have it specifically enforced.⁴⁷ Thus, if the subject-matter of the contract is such as to render the contract void at law, equity will not grant specific performance.⁴⁸ So, a court of equity will not enforce contracts to pay money to influence legislation,⁴⁹ nor agreements founded upon violations of public trust or confidence,⁵⁰ nor agreements for the purpose of stifling criminal prosecutions.⁵¹

⁴³ *Ballard v. Lyons*, 114 Minn. 264, 131 N. W. 320, 38 L. R. A. (N. S.) 301.

⁴⁴ *Griffith v. Hahl* (Tex. Civ. App.), 129 S. W. 400.

⁴⁵ *Dyer v. Hargrave*, 10 Ves. Jr. 506; *Brooks v. Hamilton*, 15 Gil. (Minn.) 10; *Anderson v. Burnett*, 5 How. (Miss.) 165, 35 Am. Dec. 425; *Sulkin v. Gilbert*, 218 Pa. St. 255, 67 Atl. 415.

⁴⁶ *Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997; *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641; *Flynn v. Finch*, 137 Iowa 378, 114 N. W. 1058. See also, *Phyfe v. Cohen*, 74 Misc. (N. Y.) 269, 131 N. Y. S. 620.

⁴⁷ *Clay Center v. Clay Center Light & Power Co.*, 78 Kans. 390, 97 Pac. 377, rehearing denied 97 Pac. 800; *Hackley v. Oakford*, 98 Fed. 781, 39 C. C. A. 284; *Sayer v. Brown* (Ind. Ter.), 104 S. W. 877; *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

⁴⁸ *Simons v. Bedell*, 122 Cal. 341, 55 Pac. 3, 63 Am. St. 35; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. 44; *South Chicago City R. Co. v. Calumet Electric R. Co.*, 171 Ill. 391, 49 N. E. 576; *Bowman v. Cun-*

ningham, 78 Ill. 48; *Parks v. McKamy*, 3 Head (Tenn.) 297; *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953; *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. 854.

⁴⁹ *McBratney v. Chandler*, 22 Kans. 692, 31 Am. Rep. 213; *Cummings v. Saux*, 30 La. Ann. 207; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Marshall v. Baltimore & C. R. Co.*, 16 How. (U. S.) 314, 14 L. ed. 953; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

⁵⁰ *Kenworthy v. Stringer*, 27 Ind. 498; *Churchill v. Perkins*, 5 Mass. 541; *Newson v. Thighen*, 30 Miss. 414; *Gilmore v. Lewis*, 12 Ohio 281; *Hopkinson v. Leeds*, 78 Pa. St. 396.

⁵¹ *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. 325; *Gorham v. Keyes*, 137 Mass. 583; *Riddle v. Hall*, 99 Pa. St. 116; *Baron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684.

Likewise, specific performance will not be decreed of contracts in contravention of an express statute.⁵² But the mere fact that a contract is illegal in a part of its provisions, as in restraint of trade, is no bar to the specific enforcement of such of its provisions as are legal and capable of independent specific performance.⁵³

§ 2309. Alternative stipulations in contracts.—Where a contract stipulates for one of two things in the alternative—the performance of certain acts, or the payment of a certain amount of money in lieu thereof—equity will not decree a specific performance of the first alternative.⁵⁴ Thus, it is held that specific performance of a contract to make a will in a particular manner can not be enforced where the contract is in the alternative, either to make the will, or pay a sum of money.⁵⁵ And where an agreement to convey land at a designated price also provided that the vendees should prospect the land for coal, and, in case enough was found in their opinion to warrant them, should organize a company, and issue to the vendor a certain amount of stock, but, if not, the vendees might abandon the contract, it was held not a case for specific performance.⁵⁶ Where by the terms of a contract one agrees either to perform an act which is not within the statute of frauds or at his election to perform a different act which is within the statute, such contract is unenforceable. Thus, an oral contract to pay money or convey realty,⁵⁷ or such a contract to devise land or bequeath personalty, is not enforceable.⁵⁸ But

⁵² Buettgenbach v. Gerbig, 2 Neb. (Unof.) 889, 90 N. W. 654; Rochevot v. Rochevot, 74 App. Div. (N. Y.) 585, 77 N. Y. S. 788. See also, Leonis v. Lazzarovich, 55 Cal. 52; Dickinson v. Glenney, 27 Conn. 104; Lane v. McKeen, 15 Maine 304; Gebb v. Rose, 40 Md. 387; White v. Holly, 91 N. Car. 67.

⁵³ Trenton Potteries Co. v. Olyphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. 612.

⁵⁴ Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.)

210; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

⁵⁵ Barrett v. Geisinger, 179 Ill. 240, 53 N. E. 576.

⁵⁶ Sturgis v. Galindo, 59 Cal. 28, 43 Am. Rep. 239.

⁵⁷ Patterson v. Cunningham, 12 Maine 506; Andrews v. Broughton, 78 Mo. App. 179; Russell v. Briggs, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556; Dyer v. Graves, 37 Vt. 369; Clark v. Davidson, 53 Wis. 317, 10 N. W. 384.

⁵⁸ Howard v. Brower, 37 Ohio St. 402.

where a party covenants to do one of two things, both of which alternatives are valid and enforceable, but on demand refuses to do either, it has been held that the other may elect which to enforce.⁵⁹

§ 2310. Optional contracts. — Specific performance can not be given of a contract the performance of which is optional with both parties.⁶⁰ Many cases hold that one can not have specific performance against the adversary party before an election is made by him, since he may afterward elect not to perform, and thus leave his adversary without right or remedy.⁶¹ But the authorities very generally hold that an optional contract for the conveyance of land founded on a proper and valuable consideration may be specifically enforced upon an acceptance of the terms of the contract and tender of the price by the option-holder within the time specified.⁶² The early cases held that the want of mutuality of obligation rendered an optional contract incapable of specific enforcement, but it is now well settled that such a contract to convey, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be specifically enforced in equity, if it is made upon a proper consideration and accepted within the time fixed in the agreement.⁶³

⁵⁹ *Greenlief v. Blakeman*, 25 Misc. (N. Y.) 564, 56 N. Y. S. 76, modified 40 App. Div. (N. Y.) 371, 58 N. Y. S. 76.

⁶⁰ *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220.

⁶¹ *Iron Age Publishing Co. v. Western N. Tel. Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. 758; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428.

⁶² *Moses v. McClain*, 82 Ala. 370, 2 So. 741; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Estes v. Furlong*, 59 Ill. 298; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874; *Donahue v. Potter & George Co.*, 63 Nebr. 128, 88 N. W. 171; *Miller v. Cameron*, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; *Schroeder v.*

Gemeinder, 10 Nev. 355; *Clarno v. Grayson*, 30 Ore. 111, 46 Pac. 426; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Schaeffer v. Herman* (Pa.) 85 Atl. 94; *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342.

⁶³ *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853; *Marthinson v. King*, 150 Fed. 48; *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Goodpaster v. Porter*, 11 Iowa 161; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Schroeder v. Gemeinder*, 10 Nev. 355; *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485; *Yerkes v. Richards*, 153 Pa. St. 646, 26 Atl. 221, 34 Am. St. 721. See also, *Walter G. Reese Co. v. House* (Cal.),

§ 2311. **Stipulations for liquidated damages.**—It has been held that where the contract provides for liquidated damages on default, equity will not enforce specific performance.⁶⁴ But if it appears that the object of the provision for liquidated damages was not to give the obligor an election to pay the damages in lieu of performing, but merely to secure performance, the contract may be specifically enforced.⁶⁵ This is no doubt true where the provision is in reality in the nature of a penalty to compel performance.⁶⁶ An illustration of the above is a bond for a deed providing for the payment of a stipulated sum in case of a failure to make the conveyance.⁶⁷

§ 2312. **Contracts subject to conditions.**—A court of equity will not decree specific performance of a conditional contract unless the condition has occurred or has been performed.⁶⁸ This is in conformity with the rule that specific performance will not be enforced against one party if it can not be so enforced by the other. The remedy in such a case must be mutual.⁶⁹ Specific enforcement will not be decreed where the contract is contingent upon the subse-

124 Pac. 442 (even though no consideration for the option a binding agreement results from its acceptance); *Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281.

⁶⁴ *Clark v. Rosario Min. & Mill. Co.*, 176 Fed. 180; *Dukes v. Bash*, 29 Ind. App. 103, 64 N. E. 47; *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477, 24 Pac. 266; *Hoskins v. Dougherty*, 29 Tex. Civ. App. 318, 69 S. W. 103.

⁶⁵ *Koch v. Streuter*, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *Lone Star Salt Co. v. Texas Short Line R. Co.* (Tex. Civ. App.), 86 S. W. 355; *Moss & Raley v. Wren* (Tex.), 113 S. W. 739; *Hudman v. Henderson* (Tex. Civ. App.), 124 S. W. 186; *Redwine v. Hudman* (Tex.), 133 S. W. 426; *Newton v. Dickson*, *Moore & Smith*, 53 Tex. Civ. App. 429, 116 S. W. 143 (holding a contract for the purchase and sale of land enforceable, notwithstanding it con-

tains a clause of forfeiture for failure to perform). See also, *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

⁶⁶ See *French v. Macale*, 2 Dr. & War. 269; *Amanda Consol. Gold Min. & Co. v. People's Min. & Mill Co.*, 28 Colo. 251, 64 Pac. 218; *Dooley v. Watson*, 1 Gray (Mass.) 414; *Higbie v. Farr*, 28 Minn. 439, 10 N. W. 592.

⁶⁷ *Plunkett v. Methodist Episcopal Soc.*, 3 Cush. (Mass.) 561; *Thornburgh v. Fish*, 11 Mont. 53, 27 Pac. 381.

⁶⁸ *Putnam v. Grace*, 161 Mass. 237, 37 N. E. 166; *Johnson v. Johnson*, 16 Gil. (Minn.) 462; *Hector Johnston Co. v. Billings*, 65 Nebr. 214, 91 N. W. 183; *Easton v. Lockhart*, 10 N. Dak. 181, 86 N. W. 697; *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

⁶⁹ *Wollensak v. Briggs*, 119 Ill. 453; *Whiteaker v. Vanschoiack*, 5 Ore. 113; *Barrett v. Schleich*, 37 Ore. 613, 62 Pac. 792.

quent consent or agreement of the parties thereto,⁷⁰ or is dependent on a future event which may never happen.⁷¹ But it has been held that a contract which the happening of a condition or contingency may defeat will be enforced until it is so defeated.⁷² A contract may be conditional in its inception as to one party and unconditional as to the other, and by waiver of the condition become valid and enforceable.⁷³

§ 2313. Modification and rescission.—Courts of equity will not, ordinarily, compel specific performance of a contract with variations, additions or new terms to be made and introduced into it by parol evidence.⁷⁴ Thus, if a written contract is modified by subsequent oral agreement, an action can not be brought upon the original contract, but must be brought, if brought at all, upon the contract as modified,⁷⁵ and an action will not lie upon the original contract, even if the new contract is broken.⁷⁶ Where the parties to a contract have abandoned or rescinded it, an action for specific performance of the same will not lie.⁷⁷ A party after making default in the performance of his contract to purchase, after the tender of a deed and demand of performance, will be denied specific performance of the contract.⁷⁸ Where the contract has been abandoned by the party seeking performance, or both parties have mutually

⁷⁰ Glidden v. Korter, 90 Maine 269, 38 Atl. 159.

⁷¹ Bradley v. Morgan, 2 A. K. Marsh (Ky.) 369.

⁷² In re Parker's Estate, 4 Pa. Dist. 221.

⁷³ Northern Texas Realty & Const. Co. v. Lary (Tex. Civ. App.), 136 S. W. 843.

⁷⁴ Moody v. McFadden, 64 Iowa 601, 21 N. W. 102; Whiteaker v. Vanschoick, 5 Ore. 113.

⁷⁵ Iroquois Furnace Co. v. Hardware Co., 201 Ill. 297, 66 N. E. 237; Herreshoff v. Misch, 21 R. I. 524, 45 Atl. 145.

⁷⁶ Sioux City Stock Yards Co. v. Sioux City Packing Co., 110 Iowa 396, 81 N. W. 712; Napa Valley

Wine Co. v. Daubner, 63 Minn. 112, 65 N. W. 143.

⁷⁷ Walworth v. Miles, 23 Ark. 653; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Maxfield v. Terry, 4 Del. Ch. 618; York v. Pas-saic Rolling Mill Co., 30 Fed. 471; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Smith v. Hogle, 116 Iowa 645, 88 N. W. 820; Fowler v. Marshall, 29 Kans. 665; Cathro v. Gray, 108 Mich. 429, 66 N. W. 346; Falls v. Carpenter, 21 N. Car. 237, 28 Am. Dec. 592; Saxon v. White, 21 Okla. 194, 95 Pac. 783; Russell v. Baughman, 94 Pa. St. 400.

⁷⁸ Pearis v. Covillaud, 6 Cal. 617, 65 Am. Dec. 543.

agreed to abandon the same, specific performance will be denied.⁷⁹ But the drafting of a substituted contract in accordance with a verbal agreement of the parties, but which was never signed, has been held not to amount to an abandonment of the original contract.⁸⁰ The recovery of a judgment at law for damages for breach of a contract will operate as a waiver of the remedy of specific performance.⁸¹ But a party is not necessarily deprived of the right to sue in equity for specific performance by reason of his having commenced an action at law.⁸²

§ 2314. Subject-matter of contracts—In general.—The extraordinary remedy of specific performance may be said to extend to almost every class of contracts which admit of no adequate remedy at law in damages for their breach, and which are of such a nature that the court can compel their specific performance.⁸³ And this without regard to the character of the property involved.⁸⁴ Thus, it has been held that a contract to renew a license may be specifically enforced.⁸⁵ But in certain instances courts of equity have refused to enforce a mere duty to make a contract as distinguished from the contract itself.⁸⁶ It has also been held that a court of equity can not specifically enforce a contract to form a corporation,⁸⁷ or an agreement to enter into a co-

⁷⁹ *Weir Inv. Co. v. Scattergood*, 42 Colo. 54, 94 Pac. 19; *Stone v. Fowlkes*, 29 App. D. C. 379; *York v. Passaic Rolling-Mill Co.*, 30 Fed. 471; *Lasher v. Loeffler*, 190 Ill. 150, 60 N. E. 85; *Cuppy v. Allen*, 176 Ill. 162, 52 N. E. 61; *Swanson v. James*, 82 Nebr. 42, 116 N. W. 780; *Mahon v. Leech*, 11 N. Dak. 181, 90 N. W. 807; *Herman v. Gieseke* (Tex. Civ. App.), 33 S. W. 1006.

⁸⁰ *Bourke v. Kissack*, 242 Ill. 233, 89 N. E. 990.

⁸¹ *Buckmaster v. Grundy*, 3 Gilm. (Ill.) 626; *Funk v. McKeoun*, 4 J. J. Marsh. (Ky.) 162; *Marston v. Humphrey*, 24 Maine 513; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175, 29 Am. Dec. 208.

⁸² *Hughes v. McKinsey*, 5 T. B.

Mon. (Ky.) 38; *Brush v. Vandenberg*, 1 Edw. Ch. (N. Y.) 21.

⁸³ *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732. As will hereinafter be shown, however, there are some contracts for which there is no such remedy, because their nature is such that the court could not well enforce a decree of specific performance in regard to them.

⁸⁴ *Duff v. Fisher*, 15 Cal. 375; *Frue v. Houghton*, 6 Colo. 318.

⁸⁵ *Domestic Tel. &c. Co. v. Metropolitan Tel. &c. Co.*, 39 N. J. Eq. 160, affd. 40 N. J. Eq. 287.

⁸⁶ *Marcus v. Boston*, 136 Mass. 350.

⁸⁷ *Perrin v. Whipple*, 118 N. Y. S. 551, 64 Misc. (N. Y.) 289.

partnership.⁸⁸ It has been held, however, that a court of equity will decree specific performance of a marriage contract, though plaintiff may have redress at law.⁸⁹ Courts of equity will also exercise the same jurisdiction over the contracts of corporations as they do over the contracts of private individuals, and in proper cases will decree specific performance.⁹⁰

§ 2315. Contracts relating to realty.—A court of equity has jurisdiction to compel the specific performance of an executory contract for the conveyance of real estate if the other elements of the contract are such as to make this remedy proper.⁹¹ So, a contract to exchange realty,⁹² or to rescind an exchange already made,⁹³ or to lease realty,⁹⁴

⁸⁸ *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84. See also, *Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683; *Roberts v. Kelsey*, 38 Mich. 602. But compare, *Somerby v. Buntin*, 118 Mass. 279, 19 Am. R. 459; *Whitworth v. Harris*, 40 Miss. 483. ⁸⁹ *Foster v. Foster*, 4 Call (Va.) 231.

⁹⁰ *Hooper v. Savannah &c. R. Co.*, 69 Ala. 529. Compare *Covington Gaslight Co. v. Covington*, 22 Ky. L. 796, 58 S. W. 805; *Roberts v. Cambridge*, 164 Mass. 176, 41 N. E. 230; *Desper v. Continental Water-Meter Co.*, 137 Mass. 252; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315.

⁹¹ *Marks v. Gates*, 2 Alaska 519; *Speer v. Craig*, 16 Colo. 478, 27 Pac. 891; *Edmons v. Gracy*, 61 Fla. 593, 54 So. 899; *Harding v. Gibbs*, 125 Ill. 85, 17 N. E. 60, 8 Am. St. 345; *Throckmorton v. Davidson*, 68 Iowa 643, 27 N. W. 794; *Moayon v. Moayon*, 114 Ky. 855, 24 Ky. L. 1641, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. 303; *Girault v. Feucht*, 117 La. 276, 41 So. 572; *Newbold v. Peabody Heights Co.*, 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579; *Abrahams v. King*, 111 Md. 104, 73 Atl. 694; *Revere Water Co. v. Winthrop*, 192 Mass. 455, 78 N. E. 497; *Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142; *Svanberg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am.

St. 490; *Gates v. Dudgeon*, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. 608; *Lighton v. Syracuse*, 48 Misc. (N. Y.) 134, 96 N. Y. S. 692; *Combes v. Adams*, 150 N. Car. 64, 63 S. E. 186; *King v. Millard*, 15 R. I. 426, 7 Atl. 405; *Lothrop v. Marble*, 12 S. Dak. 511, 81 N. W. 885, 76 Am. St. 626; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501; *Farrier v. Reynolds*, 88 Va. 141, 13 S. E. 393; *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. 797; *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853.

⁹² *Cusack v. Budasz*, 187 Ill. 392, 58 N. E. 326; *Overstreet v. Rice*, 4 Bush. (Ky.), 1, 96 Am. Dec. 279; *Tepoel v. Shutt*, 57 Nebr. 592, 78 N. W. 288; *Union Pacific R. Co. v. McAlpine*, 129 U. S. 305, 32 L. ed. 673, 9 Sup. Ct. 286; *Purcell v. Miner*, 4 Wall. (U. S.) 513, 18 L. ed. 435.

⁹³ *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245.

⁹⁴ *Hexter v. Pearce*, L. R. (1900) 1 Ch. 341; *Clark v. Clark*, 49 Cal. 586; *Switzer v. Gardner*, 41 Mich. 164, 2 N. W. 191; *Schultz v. Hastings Lodge No. 50*, I. O. O. F., 90 Nebr. 454, 133 N. W. 846; *Jacoby v. Viele*, 87 Nebr. 258, 126 N. W. 1006; *Smith v. St. Philips Church*, 107 N. Y. 610, 14 N. E. 825; *Wallace v. Scoggins*, 17 Ore. 476, 18 Ore. 502, 21 Pac. 558, 17 Am. St.

or, it seems, to license the use of real estate for advertising purposes,⁹⁵ or to execute a mortgage may be specifically enforced.⁹⁶ The same principle extends to contracts concerning easements,⁹⁷ or to contracts concerning the right of way of railroads,⁹⁸ or to contracts giving to one railroad the right to run trains over the road of another.⁹⁹ Specific performance may also be decreed of restrictive building covenants based on a valuable consideration.¹

§ 2316. Enforcement of contract by purchaser of realty.

—In a large majority of the cases specific performance of contracts to convey real estate has been awarded at the instance of the purchaser. And where a purchaser has complied with the conditions of the contract on his part to be performed, and all the necessary elements are present, he may compel specific performance on the part of the vendor.² It has been said, however, that the party seeking the relief must satisfy the court that his claim for a deed under the contract is fair, just and reasonable in all its parts and founded on an adequate consideration.³ A contract which binds the owner to pay a certain sum of

749; *Seaman v. Aschermann*, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849.

⁹⁵ *Borough Bill Posting Co. v. Levy*, 70 Misc. (N. Y.) 608, 129 N. Y. S. 181.

⁹⁶ *Hicks v. Turck*, 72 Mich. 311, 40 N. W. 339; *Irvine v. Armstrong*, 31 Minn. 216, 17 N. W. 343; *Ogden v. Ogden*, 4 Ohio St. 182.

⁹⁷ *Puttman v. Haltey*, 24 Iowa 425.

⁹⁸ *In re Cornwall & L. Co.'s Appeal*, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243. See also, 2 Elliott R. R. (2d ed.), §§ 935, 936; *Byers v. Denver & C. R. Co.*, 13 Colo. 552, 22 Pac. 951; *Boston & M. R. Co. v. Babcock*, 3 Cush. (Mass.) 228.

⁹⁹ *Prospect Park & C. I. R. Co. v. Coney Island & C. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Union Pacific R. Co. v. Chi-*

cago & C. R. Co., 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. 1173.

¹ *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591.

² *Robbins v. Porter*, 12 Idaho 738, 88 Pac. 86; *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221; *Ridgeley v. Clodfelter*, 43 Ill. 195; *Cumberland v. Brooks*, 235 Ill. 249, 85 N. E. 197; *Lawson v. McKenzie*, 44 Iowa 663; *Johnson v. Johnson*, 40 Md. 189; *Stott v. Avery*, 156 Mich. 674, 121 N. W. 825; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Hull v. Angus*, 60 Ore. 95, 118 Pac. 284; *Taylor v. Rowland*, 26 Tex. 293; *Murphy v. McVicker*, 4 McLean (U. S.) 252, Fed. Cas. No. 9951; *Stark v. Wilder*, 36 Vt. 752; *Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492.

³ *Sunrise Land Co. v. Root*, 160 Cal. 95, 116 Pac. 72. See also, note in 19 L. R. A. (N. S.) 178.

money for each day he fails, after a fixed time, to execute the deed and making such sum a lien on the land will not be specifically enforced, though the purchaser may be willing to waive the forfeiture.⁴ Nor will a court of equity ordinarily decree specific performance by the vendor of a contract when such vendor is not the owner of even the equitable title of the land which he has agreed to convey.⁵ Nor will a contract to sell land be specifically enforced against the vendor by a purchaser whose identity was concealed from the vendor and who rescinded the contract before he was apprised of the purchaser's claim.⁶ But specific performance has often been decreed where the vendor, although he does not have the legal title at the time, has a right to it and power to compel the holder of the legal title to convey it.⁷ So, in some instances, where the vendor's wife refused to sign or there was some defect in title, or the like, the purchaser has been awarded specific performance with a proportionate abatement in the price to protect or compensate him.⁸ Optional contracts to purchase real estate, based on a valuable consideration, may be converted into contracts of sale by acceptance according to their terms, and within the time limited may be specifically enforced in equity by the vendee.⁹ A contract to sell real

⁴ *Hagler v. Ferguson*, 102 Tex. 432, 118 S. W. 133, 132 Am. St. 895.

⁵ *Flattau v. Logan*, 72 N. J. Eq. 338, 65 Atl. 714.

⁶ *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322.

⁷ *McDonald v. Yungbluth*, 46 Fed. 836; *Shreck v. Pierce*, 3 Iowa 350; *Slaughter v. Nash*, 1 Litt. (Ky.) 322; *Hyde v. Kelley*, 10 Ohio 215. See also, *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884.

⁸ *Noecker v. Wallingford*, 133 Iowa 605, 111 N. W. 37; *Saldutti v. Flynn*, 72 N. J. Eq. 157, 65 Atl. 246; *Gallimore v. Grubb*, 156 N. Car. 575, 72 S. E. 628 (lien); *Wanamaker v. Brown*, 77 S. Car. 64, 57 S. E. 665; *Garrett v. Goff*, 61

W. Va. 221, 56 S. E. 351 (deficiency in amount). See also, *Shepherd v. Croft* (1911), 1 Ch. 521, 80 L. J. Ch. (N. S.) 170, 103 L. T. 874. But compare *Aifle-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480, 14 Am. & Eng. Ann. Cas. 652 (specific performance refused unless purchaser would pay entire price and accept deed signed by husband alone); *Bateman v. Riley*, 72 N. J. Eq. 316, 73 Atl. 1006; *Kuratli v. Jackson*, 60 Ore. 203, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195n.

⁹ *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213; *Couch v. McCoy*, 138 Fed. 696; *Schaeffer v. Herman* (Pa.), 85 Atl. 94, ante § 2310.

estate made by an authorized agent of the vendor may be specifically enforced by the purchaser.¹⁰

§ 2317. Enforcement of contract by vendor of realty.— Under the equitable rule that the enforcement of contracts must be mutual, the vendor of real estate has a right to go into a court of equity and compel the vendee to comply with his agreement by accepting the land and paying for it. This he may do, even though he may have an action at law for the purchase-money.¹¹ The vendor has a choice of remedies on a breach of a contract for the sale of real estate. He may proceed in equity for specific performance of the contract of purchase, or at law for the purchase-price.¹² But a decree for specific performance will usually be denied a vendor if he can not offer the purchaser a marketable title, or one the validity of which is free from reasonable doubt.¹³ The purchaser can not be compelled to accept a title with reference to which there is reasonable

¹⁰ *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651; *Littlefield v. Dawson*, 47 Wash. 644, 92 Pac. 428.

¹¹ *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305, 138 Am. St. 167; *Heatherwick v. Heatherwick*, 32 Ill. 73; *Dickson v. Turner*, 149 Ill. App. 394; *Rock Island Lumber & Co. v. Fairmount Town Co.*, 51 Kans. 394, 32 Pac. 1100; *Johns v. Union Ice Cream Co.*, 145 Ky. 178, 140 S. W. 145; *O. W. Kerr Co. v. Nygren*, 114 Minn. 268, 130 N. W. 1112; *Lenning v. Bush*, 23 Ky. L. 65, 63 S. W. 284, 62 S. W. 489; *Paris v. Haley*, 61 Mo. 453; *Davey v. Dakota County*, 19 Nebr. 721, 28 N. W. 276; *Moore v. Baker*, 62 N. J. Eq. 208, 49 Atl. 836; *Baumann v. Pinckney*, 118 N. Y. 604, 28 N. E. 916; *Paul v. Swears*, 122 N. Y. S. 740; *Springs v. Sanders*, 62 N. Car. 67; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Anderson v. Wallace Lumber & Co.*, 30 Wash. 147, 70 Pac. 247; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

¹² *Smyth v. Sturges*, 30 Hun (N. Y.) 89, 13 Abb. N. Cas. 75, affd. 108 N. Y. 495, 15 N. E. 544; *Rindge*

v. Baker, 57 N. Y. 209, 15 Am. Rep. 475.

¹³ *Bigelow v. Armes*, 108 U. S. 10, 27 L. ed. 631, 1 Sup. Ct. 83; *Bruck v. Tucker*, 42 Cal. 346; *Goodkind v. Bartlett*, 153 Ill. 419, 38 N. E. 1045; *Conley v. Dibber*, 91 Ind. 413; *Early v. Douglass*, 110 Ky. 813, 62 S. W. 860, 23 Ky. L. 298; *Fitzpatrick v. Leake*, 47 La. Ann. 1643, 18 So. 649; *Gill v. Wells*, 59 Md. 492; *Chesman v. Cummings*, 142 Mass. 65; *Powell v. Conant*, 33 Mich. 396; *Williams v. Schembri*, 44 Minn. 250, 46 N. W. 403; *Taylor v. Williams*, 45 Mo. 80; *Cornell v. Andrews*, 35 N. J. Eq. 7, affd. 36 N. J. Eq. 321; *Fisher v. Eggert* (N. J. Eq.), 64 Atl. 957; *Dyker Meadow Land & Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690; *Walsh v. Hall*, 66 N. Car. 233; *Ludlow v. O'Neil*, 29 Ohio St. 181; *In re Reighard's Estate*, 192 Pa. St. 108, 43 Atl. 413; *Charleston v. Blohme*, 15 S. Car. 124, 40 Am. Rep. 690; *Gober v. Hart*, 36 Tex. 139; *Hudson v. Max Meadows Land & Co.*, 99 Va. 537, 39 S. E. 215; *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245.

ground to apprehend litigation.¹⁴ And further, to entitle the vendor to such decree it is generally essential that a conveyance or deed be tendered or an offer to execute and tender be made.¹⁵ Yet there are cases in which the vendor has been given a reasonable time by the court in which to perfect his title, especially where the conduct of the vendee has led him to fail to do so before.¹⁶

§ 2318. Contracts relating to personalty.—It may be stated as a general rule that a court of equity will not decree specific performance of a contract for the sale of personal property because, ordinarily, there is an adequate remedy at law.¹⁷ As to most kinds of personal property and many stocks, a similar purchase can be made in the market so that a decree of specific performance is needless. But this rule is neither inflexible nor without exceptions. Cases which involve trusts are among recognized exceptions.¹⁸ Another exception is that a bill will lie in a proper case where the loss can not be adequately compensated by damages in an action at law.¹⁹ Thus, specific performance has been awarded for paintings and other works of art,²⁰ heirlooms and property valuable for sentimental reasons,²¹

¹⁴ Early v. Douglass, 110 Ky. 813, 23 Ky. L. 298, 62 S. W. 860; Michener v. Reinach, 49 La. Ann. 360, 21 So. 552; Daniel v. Shaw, 166 Mass. 582, 44 N. E. 991; Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221.

¹⁵ Soper v. Gabe, 55 Kans. 646, 41 Pac. 969; Tinney v. Ashley, 15 Pick. (Mass.) 546, 26 Am. Dec. 620; Bidwell v. Garrison (N. J.), 36 Atl. 941; Johnston v. Wadsworth, 24 Ore. 494, 34 Pac. 13.

¹⁶ Coffin v. Cooper, 14 Ves. Jr. 205; Van Riper v. Wickersham, 77 N. J. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25; Merchants' Bank v. Thomson, 55 N. Y. 7. See also, Logan v. Bull, 78 Ky. 607; Gaither v. O'Doherty, 11 Ky. L. 594, 12 S. W. 306.

¹⁷ Cooper v. Roland, 95 Ark. 569, 130 S. W. 559; Graham v. Herlong, 50 Fla. 521, 39 So. 111; Harle v. Brenning, 131 App. Div. (N. Y.)

742, 116 N. Y. S. 51; Chafee v. Sprague, 16 R. I. 189, 13 Atl. 121; Lumley v. Miller, 23 S. Dak. 16, 119 N. W. 1014; Webb v. Durrett (Tex. Civ. App.), 136 S. W. 1189.

¹⁸ Johnson v. Brooks, 93 N. Y. 337; Appeal of Goodwin Gas Stove & Co., 117 Pa. St. 514, 12 Atl. 736, 2 Am. St. 696; Chafee v. Sprague, 16 R. I. 189, 13 Atl. 121.

¹⁹ Treasurer v. Commercial Mining Co., 23 Cal. 390; O'Donnell v. Chamberlain, 36 Colo. 395, 91 Pac. 39; Todd v. Taft, 7 Allen (Mass.) 371; Eckstein v. Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. 404; Curtice Bros. Co. v. Catts, 72 N. J. Eq. 831, 66 Atl. 935; Johnson v. Brooks, 93 N. Y. 337; Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776.

²⁰ Fells v. Read, 3 Ves. 70; Lowther v. Lowther, 13 Ves. 95; Falcke v. Gray, 4 Drew. 651.

²¹ Pusey v. Pusey, 1 Vern. 273;

and documents of various kinds.²² So, where personal property is simply an incident of real estate, specific performance may be awarded.²³

§ 2319. Specific chattels, stock or patent rights.—As a general rule, an action for specific enforcement of a contract relating to chattels will not lie, because the law affords adequate and complete redress in an action for damages.²⁴ But a sale of a house will be specifically enforced though personal property, such as furniture, be sold with it.²⁵ A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors, to be disposed of by them as they may see fit, where the evidence shows that none of the stock of the corporation has ever been sold on the market or otherwise than by transfer to the directors and no fraud in the appraisal is charged, the remedy by an action for damages being inadequate.²⁶ Where jurisdiction is acquired on the ground that the suit is to enforce a trust, the court may compel performance of an obligation to transfer stock, the subject of such trust, the value of which is uncertain.²⁷ So, generally, specific performance of a contract for the sale of stocks of a particular company may be decreed where they can not be secured except by force of the particular contract.²⁸ So,

Thorn v. Comrs. of Her Majesty's Works & Pub. Buildings, 32 Beav. 490; *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830.

²² *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558; *McMullen v. Vanzant*, 73 Ill. 190; *Pattison v. Skillman*, 34 N. J. Eq. 344; *Dock v. Dock*, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. 617.

²³ *Young v. Porter*, 27 Wash. 551, 68 Pac. 362; *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418.

²⁴ *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735; *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683.

²⁵ *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067.

²⁶ *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. 438; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

²⁷ *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Krohn v. Williamson*, 62 Fed. 869; *Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621; *Johnson v. Brooks*, 93 N. Y. 337.

²⁸ *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801; *Northern Cent. R. Co. v. Walworth*, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. 683. See also, *Duncuft v. Albrecht*, 12 Sim. 189; *Hyer v. Richmond Trac. Co.*, 168 U. S. 471, 42 L. ed. 547, 18 Sup. Ct. 114.

also, equity will compel specific performance of a contract for the transfer of stocks and bonds having a peculiar value to the party demanding the transfer,²⁹ or where the value of the stock is not provable,³⁰ or where the stock has no known value and the damages are incapable of ascertainment.³¹ The assignment of a patent on future inventions is not in violation of public policy and may be specifically enforced, where it is necessary to secure to the assignee the value of the patent purchased.³² And a contract for the sale of a copyright has also been held specifically enforceable.³³

§ 2320. Contracts of service.—It may be stated as a general rule that a contract for personal service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or by an injunction restraining him from violating it.³⁴ And this rule applies in cases where the relief is sought by the employer,³⁵ as well as by the employé.³⁶ However, specific performance of a parol contract for services will be enforced by a court of equity where one party has wholly and the other partly

²⁹ *Lathrop v. Columbia Collieries Co.* (W. Va.), 73 S. E. 299.

³⁰ *Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248, 104 S. W. 5, 120 Am. St. 745; *Safford v. Barber*, 74 N. J. Ch. 352, 70 Atl. 371.

³¹ *Rau v. Seidenberg*, 53 Misc. (N. Y.) 386, 104 N. Y. S. 798.

³² *Fairchild v. Dement*, 164 Fed. 200; *McRae v. Smart*, 120 Tenn. 413, 114 S. W. 729. See also, *Hull v. Pitiat*, 45 Fed. 94; *Whitney v. Burr*, 115 Ill. 289, 3 N. E. 434; *Adams v. Messenger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. 679; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Valley Iron Works Mfg. Co. v. Goodrich*, 103 Wis. 436, 78 N. W. 1096. See also, *Cogent v. Gibson*, 33 Beav. 557.

³³ *Sweet v. Cater*, 11 Sim. 572.

³⁴ *Roquemore v. Mitchell Bros.*, 167 Ala. 475, 52 So. 423; *Joliffe v. Steele*, 9 Cal. App. 212, 98 Pac. 544; *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R.

A. 779, 18 Am. St. 278; *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Kennicott v. Leavitt*, 37 Ill. App. 435; *H. W. Gossard Co. v. Crosby*, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115n; *Stewart v. Pierce*, 116 Iowa 733, 89 N. W. 234; *Healy v. Allen*, 38 La. Ann. 867; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635; *Miller v. Warner*, 42 App. Div. (N. Y.) 208, 59 N. Y. S. 956; *Carrico v. Stevenson* (Tex. Civ. App.), 135 S. W. 260.

³⁵ *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98.

³⁶ *Stewart v. Pierce*, 116 Iowa 733, 89 N. W. 234; *Seiler v. Fairrex*, 23 La. Ann. 397; *Healy v. Allen*, 38 La. Ann. 867.

performed it, and a part performance only by the latter would amount to a fraud on the party who has fully performed it, and the court can enforce its decree.³⁷ Equity will not enforce the specific performance of a contract for personal services involving continuous superintendence by the court, and the exercise of skill, judgment, taste and discretion by the employé, especially where the services called for are to be rendered in different jurisdictions and places.³⁸ Nor will equity compel the specific performance of such a contract by injunction where it does not contain a negative covenant not to render the services in question to another during the contract period, nor even then, except in cases where the remedy at law would be wholly inadequate.³⁹ But it has been held that equity will enjoin the breach of an express negative covenant, though no substantial injury is caused by the breach, and though the damages, if any, may be recoverable at law.⁴⁰ However, where there is a clear contract and a plain breach of it, equity may decree a specific performance and enjoin a breach of the contract if there is not a complete remedy at law.⁴¹

§ 2321. Contracts to construct and repair buildings or other structures.—As a general rule, specific performance of contracts to construct, erect or repair buildings or other

³⁷ *Kofka v. Rosicky*, 41 Nebr. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. 685; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135.

³⁸ *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. 758; *O'Brien v. Perry*, 130 Cal. 526, 62 Pac. 927; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. 278; *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381; *Allegheny Baseball Club v. Bennett*, 14 Fed. 257; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; *Wood v. Iowa Bldg. & Loan Assn.*, 126 Iowa 464,

102 N. W. 410; *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 19 Ky. L. 666, 41 S. W. 1015, 38 L. R. A. 809; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339, 19 L. ed. 955.

³⁹ *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180; *Taylor Iron & Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946.

⁴⁰ *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145.

⁴¹ *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal &c. Co.*, 119 Fed. 942; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Wabaska Electric Co. v. Wymore*, 60 Nebr. 199, 82 N. W. 626.

structures will not be awarded.⁴² The reason for the rule is based on the impracticability or the inconvenience caused the court in enforcing such contracts,⁴³ and also the fact that damages at law would, in general, afford adequate redress.⁴⁴ But like most other general rules of equity, the above rule is subject to important exceptions. Courts of equity have often enforced specific performance of contracts of the character under consideration in cases in which there is no adequate remedy at law,⁴⁵ as where the defendant, as a consideration for the contract, has obtained a conveyance of land.⁴⁶ Courts of equity have also decreed specific performance of a contract whereby a railway agreed to construct a grade or crossing,⁴⁷ to construct and maintain a bridge,⁴⁸ or to maintain a railroad or station at a stipulated location.⁴⁹

⁴² *Leonard v. Plum Bayou Levee Dist.*, 79 Ark. 42, 94 S. W. 922; *Strang v. Richmond, P. & C. R. Co.*, 101 Fed. 511, 41 C. C. A. 474; *LaHogue Drainage Dist. No. 1 of Iriquois County, Ill., v. Watts*, 179 Fed. 690, 103 C. C. A. 236; *Braithwaite v. Henneberry*, 124 Ill. App. 407, affd. 222 Ill. 50, 78 N. E. 34; *Columbus & S. R. Co. v. Watson*, 26 Ind. 50; *Kansas & C. R. Const. Co. v. Topeka & C. R. Co.*, 135 Mass. 34, 46 Am. Rep. 439; *Ward v. Newbold*, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A, 919; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Mastin v. Halley*, 61 Mo. 196; *Armour v. Connolly (N. J.)*, 49 Atl. 1117; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *Port Clinton R. Co. v. Cleveland & C. R. Co.*, 13 Ohio St. 544; *Dove v. Commonwealth Title Ins. & C. Co.*, 6 Pa. Dist. 263; *Ewing v. Litchfield*, 91 Va. 575, 22 S. E. 362; *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466, 17 Am. St. 118.

⁴³ *Mastin v. Halley*, 61 Mo. 196; *Madison Athletic Assn. v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430.

⁴⁴ *Columbus & S. R. Co. v. Watson*, 26 Ind. 50; *Minneapolis Mill Co. v. Bassett*, 31 Minn. 390, 18 N.

W. 100; *Mastin v. Halley*, 61 Mo. 196; *Armour v. Connolly (N. J.)*, 49 Atl. 1117; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *Dove v. Commonwealth Title Ins. & C. Co.*, 6 Pa. St. 263. See also, *Rushbrooke v. O'Sullivan (1908)*, 7 Ir. R. 232. ⁴⁵ *Stuyvesant v. New York*, 11 Paige (N. Y.) 414.

⁴⁶ *Lane v. Pacific & C. R. Co.*, 81 Idaho 230, 67 Pac. 656; *Kelly v. Nypano R. Co.*, 23 Pa. County Ct. 177; *Ross v. Union Pac. R. Co.*, Woolw. (U. S.) 26; *Birchett v. Bolling*, 5 Munf. (Va.) 442; *Johnson v. Ohio River R. Co.*, 61 W. Va. 141, 56 S. E. 200.

⁴⁷ *Owens v. Carthage & W. R. Co.*, 110 Mo. App. 320, 85 S. W. 987; *Post v. West Shore & C. R. Co.*, 123 N. Y. 580, 26 N. E. 7. See as to when such a contract will and will not be enforced, 3 Elliott R. R. (2d ed.), §§ 1141, 1145. Compare also, *Patton Twp. v. Monongahela St. R. Co.*, 226 Pa. St. 372, 75 Atl. 589.

⁴⁸ *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 467.

⁴⁹ *Crane v. Chicago & C. R. Co.*, 20 Fed. 402, affd. 113 U. S. 424, 28 L. ed. 1064, 5 Sup. Ct. 578; *Minneapolis & St. L. R. Co. v. Cox*, 76 Iowa 306, 41 N. W. 24, 14 Am. St. 216.

§ 2322. Contracts for continuous acts.—Specific performance is generally denied where the terms of the contract stipulate for continuous acts during a long period, the performance of which would require the protracted supervision of the court.⁵⁰ The above is merely a rule of decision and not a limitation of the jurisdiction of the court, so that it will not operate to prevent specific performance where public interest seems to require it.⁵¹ Thus, specific performance of a covenant in a deed to a railroad company to establish and maintain a freight and passenger station,⁵² or to stop all regular passenger trains at a particular station,⁵³ or to maintain a passway for cattle under its tracks have been specifically enforced.⁵⁴ Likewise, a contract with a city to maintain a water-works system for a long term of years may be specifically enforced.⁵⁵

§ 2323. Contracts to indemnify or secure and to insure.—As a rule, a contract to indemnify or give security, if sufficiently definite and certain, and if there is no adequate

⁵⁰ *Roquemore v. Mitchell Bros.*, 167 Ala. 475, 52 So. 423, 140 Am. St. 52n; *Bromberg v. Eugenotto Const. Co.*, 158 Ala. 323, 48 So. 60, 19 L. R. A. (N. S.) 1175; *Tombigbee Valley R. Co. v. Fairford Lumber Co.*, 155 Ala. 575, 47 So. 88; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Pacific Electric R. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; *Sewerage & Water Board of New Orleans v. Howard*, 175 Fed. 555; *General Electric Co. v. Westinghouse Electric & Mfg. Co.*, 144 Fed. 458; *Shubert v. Woodward*, 167 Fed. 47; *Pantages v. Grauman*, 191 Fed. 317; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Harley v. Sanitary Dist.*, 54 Ill. App. 337; *Dukes v. Bash*, 29 Ind. App. 103, 64 N. E. 47; *Brown v. Boston & M. R. Co.*, 106 Maine 248, 76 Atl. 692; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Bomer v. Canaday*, 79 Miss. 222, 30 So. 638, 55 L. R. A. 328, 89 Am. St. 593;

Mowers v. Fogg, 45 N. J. Eq. 120, 17 Atl. 296; *Clarno v. Grayson*, 30 Ore. 111, 46 Pac. 426; *Lone Star Salt Co. v. Texas Short Line R. Co.*, 99 Tex. 434, 90 S. W. 863; *Ewing v. Litchfield*, 91 Va. 575, 22 S. E. 362.

⁵¹ *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 43 L. R. A. 854, 68 Am. St. 749; *Prospect Park & C. I. R. Co. v. Coney Island & C. R. Co.*, 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243.

⁵² *Taylor v. Florida East Coast R. Co.*, 54 Fla. 635, 45 So. 574; *Murray v. Northwestern R. Co.*, 64 S. Car. 520, 42 S. E. 617.

⁵³ *Lawrence v. Saratoga Lake R. Co.*, 36 Hun 467, 42 Hun (N. Y.) 655, 3 N. Y. St. 734. See also, *In re Cornwall & L. R. Co.'s Appeal*, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. 889 and note.

⁵⁴ *Blair v. St. Louis, K. & N. W. R. Co.*, 92 Mo. App. 538.

⁵⁵ *Bounds v. Hubbard*, 47 Tex. Civ. App. 233, 105 S. W. 56.

remedy at law, will be specifically enforced.⁵⁶ But an executory contract for the transfer of corporate stock as collateral security for a debt, where the debtor has died insolvent, will not be specifically enforced to the injury of other creditors of decedent.⁵⁷ Equity will enforce an oral contract to insure by a decree compelling payment of the loss as if a policy had issued.⁵⁸ But a court of equity will not compel an insurance company to issue a policy in pursuance of an alleged contract, unless the proof shows clearly that such contract was consummated.⁵⁹

§ 2324. **Gifts.**—Equity will not specifically enforce a mere agreement, whether oral or written, to give land where the obligation rests solely on the promise of the donor and may be revoked by him at will.⁶⁰ But, under some circumstances, a parol agreement to convey land will be upheld by a court of equity.⁶¹ Thus, equity will enforce a parol gift of land where the donee has taken possession and made valuable improvements on the strength of and in reliance on the gift.⁶² But the mere possession, without the

⁵⁶ *Reybold v. Herdman*, 2 Del. Ch. 34; *Shockley v. Davis*, 17 Ga. 177, 63 Am. Dec. 233; *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Footte v. Garland, Sm. & M. Ch.* (Miss.) 95; *Hoy v. Hansborough*, *Freem.* (Miss.), 533; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. 409; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; *Ladd v. Stevenson*, 43 Hun (N. Y.) 541, 6 N. Y. St. 652, *affd.* 112 N. Y. 325, 19 N. E. 842, 8 Am. St. 748 (holding an agreement calling for "satisfactory, security" too vague and indefinite to justify specific performance); *Morris v. McCutcheon*, 213 Pa. 349, 62 Atl. 982; *Speer v. Allen* (Tex. Civ. App.), 135 S. W. 231; *Robinson v. Cathcart*, 2 Cranch C. C. (U. S.) 590, Fed. Cas. No. 11946.

⁵⁷ *City Fire Ins. Co. v. Olmsted*, 33 Conn. 476. See also, *Shipman v. Aetna Ins. Co.*, 29 Conn. 245.

⁵⁸ *Hughes v. Piedmont &c. Life Ins. Co.*, 55 Ga. 111; *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108, 29 N. E. 480; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290; *Baile v. St. Joseph Fire Ins. Co.*, 73 Mo. 371; *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854, 52 Am. St. 902.

⁵⁹ *Neville v. Merchants' &c. Mut. Ins. Co.*, 19 Ohio 452.

⁶⁰ *Anderson v. Scott*, 94 Mo. 637, 8 S. W. 235.

⁶¹ *Svenburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. 490; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. 769; *Crosdale v. Lanigan*, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. 551; *Lothrop v. Marble*, 12 S. Dak. 511, 81 N. W. 885, 76 Am. St. 626; *Coleman v. Larson*, 49 Wash. 321, 95 Pac. 262; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. 838.

⁶² *Guyann v. McCauley*, 32 Ark. 97; *Burlingame v. Rowland*, 77 Cal.

making of valuable improvements, is insufficient to warrant a decree of specific performance.⁶³ And it has been held that as between father and son or son-in-law, possession of the land alone, under promise of gift, is not sufficient to warrant specific performance.⁶⁴

§ 2325. Contracts for testamentary provisions.—As a general rule, a contract for the testamentary disposition of the estate of a decedent, if supported by a sufficient and valid consideration, will be specifically enforced in equity.⁶⁵ But the agreement can not be specifically enforced until

315, 19 Pac. 526, 1 L. R. A. 829; Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; Garbutt & Donovan v. Mayo, 128 Ga. 269, 57 S. E. 495, 13 L. R. A. (N. S.) 58n; Causey v. Causey, 106 Ga. 188, 32 S. E. 138; Sanford v. Davis, 181 Ill. 570, 54 N. E. 977; Drum v. Stevens, 94 Ind. 181; Peters v. Jones, 35 Iowa 512; Galbraith v. Galbraith, 5 Kans. 402; Loney v. Loney, 86 Md. 652, 38 Atl. 1071; Whitaker v. McDaniel, 113 Md. 388, 78 Atl. 1; Briggs v. Briggs, 113 Mich. 371, 71 N. W. 632; Gibbs v. Whitwell, 164 Mo. 387, 64 S. W. 110; Story v. Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; Dawson v. McFaddin, 22 Nebr. 131, 34 N. W. 338; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; In re Houston's Estate, 5 Pa. Dist. 413; Hunter v. Mills, 29 S. Car. 72, 6 S. E. 907; Atchley v. Perry, 55 Tex. Civ. App. 538, 120 S. W. 1105 (holding that an expenditure of \$100 in improvements on a section of land worth \$13 to \$14 an acre not sufficient to warrant specific enforcement); Wells v. Davis, 77 Tex. 636, 14 S. W. 237; Darke v. Smith, 14 Utah 35, 45 Pac. 1006; Lightner v. Lightner (Va.), 23 S. E. 301; Coleman v. Larson, 49 Wash. 321, 95 Pac. 262; Crim v. England, 46 W. Va. 480, 76 Am. St. 826.

⁶³ West v. Webster, 39 Tex. Civ. App. 272, 87 S. W. 196.

⁶⁴ Bright v. Bright, 41 Ill. 97; Anderson v. Scott, 94 Mo. 637, 8 S. W. 235.

⁶⁵ Klussman v. Wessling, 238 Ill. 568, 87 N. E. 544; Jones v. Bean, 136 Ill. App. 545; Chehak v. Battles, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130n; Anderson v. Anderson, 75 Kans. 117, 88 Pac. 743; 9 L. R. A. (N. S.) 229; Berg v. Moreau, 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157n; Peterson v. Bauer, 83 Nebr. 405, 119 N. W. 764; Hesper v. Wendeln, 85 Nebr. 172, 122 N. W. 852; Phalen v. United States Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N. S.) 734; Starnes v. Hatcher, 121 Tenn. 330, 117 S. W. 219. See also, Naylor v. Shelton (Ark.), 143 S. W. 117; Flood v. Templeton, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579n; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667; Schaadt v. Mutual Life Ins. Co. of New York, 2 Cal. App. 715, 84 Pac. 249; Barry v. Beamer, 8 Cal. App. 200, 96 Pac. 373; Carl v. Northcutt, 48 Colo. 47, 108 Pac. 994; Hood v. McGehee, 189 Fed. 205; Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619; Dalby v. Maxfield, 244 Ill. 214, 91 N. E. 420, 135 Am. St. 312; Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998; Bless v. Blizard, 86 Kans. 230, 120 Pac. 351; Ayers v. Short, 142 Mich. 501, 105 N. W. 1115; Taylor v. Hudson (Mo. App.), 129 S. W. 261; Brown v. Webster, 90 Nebr. 591, 134 N. W. 185; Townsend v. Perry, 124 N. Y. S. 143; Wallace v. Wallace, 71 Misc. (N. Y.) 305, 130 N. Y. S. 58; Prince v. Prince, 64 Wash. 552, 117 Pac. 255.

the death of the party agreeing to execute the will.⁶⁶ The remedy is against the heirs, devisees or representatives of the deceased promisor,⁶⁷ and the heirs will be treated as trustees, whose duty under the decree is to convey the property in accordance with the terms of the contract.⁶⁸ But the terms of a contract to devise or bequeath must be clear and certain to justify specific performance,⁶⁹ and it must be shown that the consideration on the part of the party seeking relief has been fully performed, and that he can not be adequately compensated in money.⁷⁰

§ 2326. **Good faith of party seeking specific performance.**—If the party seeking specific performance of a contract did not intend to perform the terms thereof on his part to be performed when he entered into the contract, a court of equity will deny him relief.⁷¹ The party must show, as a condition precedent to obtaining relief, that he has done or offered to do all material acts required of him by the contract, and that he is ready and willing to do everything required of him in the specific execution of the contract,⁷² and that he has acted in good faith in the transaction.⁷³ If the party seeking relief has obtained his con-

⁶⁶ *Manning v. Pippen*, 86 Ala. 357, 5 So. 572, 11 Am. St. 46; *Chantland v. Sherman*, 148 Iowa 352, 125 N. W. 871.

⁶⁷ *Manning v. Pippen*, 86 Ala. 357, 5 So. 572, 11 Am. St. 46; *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; *Weingaertner v. Pabst*, 115 Ill. 412, 5 N. E. 385; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503; *Leonardson v. Halin*, 64 Mich. 1, 31 N. W. 26; *Sutton v. Hayden*, 62 Mo. 101; *Davison v. Davison*, 13 N. J. Eq. 246; *Parsell v. Stryker*, 41 N. Y. 480; *Taylor v. Mitchell*, 87 Pa. St. 518, 30 Am. Rep. 383.

⁶⁸ *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Korminsky v. Korminsky*, 2 Misc. (N. Y.) 138, 50 N. Y. St. 223, 21 N. Y. S. 611. See also, *Milton v. Kite* (Va.), 76 S. E. 313.

⁶⁹ *Walters v. Walters*, 132 Ill. 467,

23 N. E. 1120; *Franklin v. Tuckerman*, 68 Iowa 572, 27 N. W. 759; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Van Horn v. Demarest*, 76 N. J. Eq. 386, 77 Atl. 354; *Graham v. Graham Exrs.*, 34 Pa. St. 475; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. 273.

⁷⁰ *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120; *Berg v. Moreau*, 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157n.

⁷¹ *George Melies Co. v. Motion Picture Patents Co.*, 190 Fed. 859; *Engberry v. Rousseau*, 117 Wis. 52, 93 N. W. 824.

⁷² *Launtz v. Vogt*, 133 Ill. App. 255; *In re Grogan's Estate*, 38 Mont. 540, 100 Pac. 1044; *Chandler v. Chandler*, 220 Pa. 311, 69 Atl. 806; *McRae v. Smart*, 120 Tenn. 413, 114 S. W. 729. See also, *Smith v. Canady* (Mass.), 99 N. E. 968.

⁷³ *Nash v. Milford*, 33 App. D. C.

tract by unscrupulous practices and by concealment of important facts, the court will deny the decree.⁷⁴ Specific performance will be denied complainant where he does not come into court with clean hands or where equities exist which would render it unjust to grant the relief.⁷⁵

§ 2327. Inequitable conduct of plaintiff subsequent to contract.—A party seeking specific performance must not only come to enforce a fair and reasonable contract, but must show that his own conduct in reference to the contract has been fair and candid.⁷⁶ Where the plaintiff, prior to bringing suit for specific performance, had refused an offer of the defendant to perform the contract,⁷⁷ or had himself refused to perform his contract, he can not have specific relief.⁷⁸ So, also, where a vendee does not insist on performance, but demands a return of the deposit made, and a rescission, he can not later seek and compel performance.⁷⁹ And where the plaintiff has by fraudulent practices and a threat to repudiate his contract secured a change thereof to his own advantage, he can not have specific performance of the contract as it was originally made.⁸⁰ Where one party can not fully perform and the other refuses to accept part performance, the latter can not later compel performance.⁸¹

§ 2328. Necessity of diligence of party seeking specific performance.—In all equitable proceedings it is incumbent upon the party seeking relief to act promptly and without

142; *Houtz v. Hellman* (Mo.), 128 S. W. 1001 (where specific performance was denied a party who had acted through the medium of an irresponsible person to obtain an advantage in a prospective rise in the price of land contracted for). See also, *Buffalo Coal & Coke Co. v. Vance* (W. Va.), 76 S. E. 177.

⁷⁴ *Blondel v. Bolander*, 80 Nebr. 531, 114 N. W. 574.

⁷⁵ *York v. Searles*, 189 N. Y. 573, 82 N. E. 1134; *Chandler v. Chandler*, 220 Pa. 311, 69 Atl. 806.

⁷⁶ *Garrett v. Besborough*, 2 Dru. & Wall. (Irish Ch.) 452; *Schultz*

v. Hastings Lodge No. 50, I. O. O. F., 90 Nebr. 454, 133 N. W. 846; *Mahon v. Leech*, 11 N. Dak. 181, 90 N. W. 807.

⁷⁷ *Skinner v. Creasy* (Ky.), 116 S. W. 753; *Hammond v. Noble*, 150 Mich. 269, 114 N. W. 58.

⁷⁸ *Clark v. West*, 137 App. Div. (N. Y.) 23, 122 N. Y. S. 380.

⁷⁹ *Whalen v. Stuart*, 194 N. Y. 495, 87 N. E. 819.

⁸⁰ *Blondel v. Bolander*, 80 Nebr. 531, 114 N. W. 574.

⁸¹ *Newman v. Johnson*, 108 Md. 367, 70 Atl. 116.

unreasonable delay, and especially is this necessary where specific performance is the relief sought.⁸² Where the action is delayed until circumstances so change as to produce special hardship to the defendant if the relief is granted, specific performance may be denied in cases where relief would have been granted had the plaintiff proceeded promptly.⁸³ The necessity of acting promptly is especially clear where the subject-matter of a contract of sale is of fluctuating value.⁸⁴ A party must be diligent in the assertion of a claim for specific performance of a contract for the sale of land,⁸⁵ and where the land contracted for undergoes considerable change in value, a delay in seeking relief may prevent the injured party from obtaining specific performance.⁸⁶ Both the party seeking the relief and the party defending on the ground of laches must show himself ready, desirous, prompt and eager.⁸⁷

§ 2329. Time for performance by plaintiff.—It has been held that a vendor of real estate may compel specific performance of the contract if he tender a good title, although he perfect such title during the pendency of the suit.⁸⁸ Al-

⁸² *Seenlovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. 106; *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11; *Tate v. Pensacola Development Co.*, 37 Fla. 439, 20 So. 542, 53 Am. St. 251; *Bennett v. Welch*, 25 Ind. 140, 87 Am. Dec. 354; *Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007; *Fuller v. Hovey*, 2 Allen (Mass.) 324, 79 Am. Dec. 782; *Campbell v. Hicks*, 19 Ohio St. 433; *Bracken v. Martin*, 3 Yerg. (Tenn.) 55; *Davison v. Davis*, 125 U. S. 90, 31 L. ed. 635, 8 Sup. Ct. 825; *Towner v. Blue*, 59 Wash. 164, 109 Pac. 601; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027.

⁸³ *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358; *Nobles v. L'Engle*, 61 Fla. 696, 55 So. 839; *Smith v. Cansler*, 83 Ky. 367, 7 Ky. L. 317; *Rogers v. Saunders*, 16 Maine 92, 33 Am. Dec. 635; *Anderson v. Luther Mining Co.*, 70 Minn. 23, 72 N. W. 820; *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. 224;

Newberry v. French, 98 Va. 479, 36 S. E. 519; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027. See also, *Buffalo Coal & Coke Co. v. Vance (W. Va.)*, 76 S. E. 177.

⁸⁴ *Wonson v. Fenno*, 129 Mass. 405; *Davison v. Davis*, 125 U. S. 90, 31 L. ed. 635, 8 Sup. Ct. 825; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757.

⁸⁵ *Hathcock v. Société Anonyme La Floridienne*, 54 Fla. 631, 45 So. 481.

⁸⁶ *Johns v. Norris*, 22 N. J. Eq. 102, revd. 27 N. J. Eq. 485; *In re Ruff's Appeal*, 117 Pa. St. 310, 11 Atl. 553; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532. ⁸⁷ *Roberts v. Braffett*, 33 Utah 51, 92 Pac. 789.

⁸⁸ *Day v. Mountin*, 137 Fed. 756, 70 C. C. A. 190; *Kentucky Distilleries & Warehouse Co. v. Blanton*, 149 Fed. 31; *Finnegan v. Summers*, 28 Ky. L. 1180, 91 S. W. 261;

so, where a party has contracted to exchange property by an agreement in which time is not of the essence, and the delay has not prejudiced the rights of his adversary, such party may have specific performance if he can perform at the time of trial.⁸⁹ Where time is not made the essence of the contract, delay of plaintiff in furnishing title to defendant will not relieve defendant of his duty to perform his contract.⁹⁰ But in such case the party delaying is entitled to reasonable notice that performance must be made by a certain time.⁹¹ Generally a party can not enforce specific performance of a contract to convey until he has demanded performance; but demand is unnecessary where it would be unavailing.⁹² So, also, an express repudiation of the contract and a refusal to perform by one party excuse the other from any subsequent formal tender or offer to perform.⁹³

§ 2330. Time as of the essence of the contract.—As a general rule, time is not deemed in equity as of the essence of the contract unless expressly made so, or it follows from the nature and circumstances of the transaction.⁹⁴ And where time is not of the essence of the con-

Agens v. Koch, 74 N. J. Eq. 528, 70 Atl. 348; *Pakas v. Clarke*, 136 App. Div. (N. Y.) 492, 121 N. Y. S. 192; *Hugel v. Habel*, 56 Misc. (N. Y.) 402, 106 N. Y. S. 581; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195.

⁸⁹ *Scudder v. Lehman*, 142 App. Div. (N. Y.) 631, 127 N. Y. S. 470. But see, *Schenck v. Ballou*, 253 Ill. 415, 97 N. E. 704, Ann. Cas. 1913A, 251.

⁹⁰ *Woodward v. McCollum*, 16 N. Dak. 42, 111 N. W. 623. See also, *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885.

⁹¹ *Roberts v. Braffett*, 33 Utah 51, 92 Pac. 789. But see *Leinhardt v. Solomon*, 57 Misc. (N. Y.) 238, 109 N. Y. S. 144.

⁹² *Timmonds v. Taylor* (Ind. App.), 96 N. E. 331; *Detroit United R. Co. v. Smith*, 144 Mich. 235, 107 N. W. 922.

⁹³ *Johnson v. Higgins* (Nebr.), 108 N. W. 168.

⁹⁴ *Brown v. Guarantee Trust & Co.*, 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. 127. See also, *Louisville & N. R. Co. v. Philyaw*, 94 Ala. 463, 10 So. 83; *Martin v. Skipwith*, 50 Ark. 141, 6 S. W. 514; *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337; *Pritchard v. Todd*, 38 Conn. 413; *Burton v. Adkins*, 2 Del. Ch. 125; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Bragg v. Olson*, 128 Ill. 540, 21 N. E. 519; *Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Struble v. Allin*, 110 Iowa 101, 81 N. W. 164; *Eubank v. Hampton*, 1 Dana (Ky.) 343; *Somerville v. Trueman's Devises*, 4 Har. & McH. (Md.) 43, 1 Am. Dec. 389; *Ingersoll v. Horton*, 7 Mich. 405; *Lake v. Lewis*, 16 Nev. 94; *Dynan v. McColloch*, 46 N. J. Eq. 11, 18 Atl. 822, affd. 46 N. J. Eq. 608, 22

tract, specific performance may be decreed, although the plaintiff can not show a prompt performance of his part of the contract.⁹⁵ But where time is of the essence of the contract, specific performance will not be decreed to one who has omitted to execute his part of the contract within the time fixed in the contract.⁹⁶ Where time is made the essence of the contract for the sale of land, a delay of over two years after the maturity of the last instalment of the purchase-price is such laches on the part of the vendor as will preclude him from specifically enforcing the contract.⁹⁷

§ 2331. Sufficiency of performance by plaintiff.—Equity looks at the substance of transactions, and regards the spirit of an obligation rather than its mere form. So all that is required in equity is a substantial compliance with the agreement sought to be specifically enforced on the part of one who asks the aid of equity to give it effect.⁹⁸ But where the facts show that the plaintiff has wholly failed to meet the substantial terms of the very agreement on which he relies, he can not complain if a court of equity

Atl. 56; *Agens v. Koch*, 74 N. J. Eq. 528, 70 Atl. 348; *Havens v. Patterson*, 43 N. Y. 218; *Scarlett v. Hunter*, 56 N. Car. 84; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Williams v. Lewis*, 5 Leigh (Va.) 686; *Janson v. Peterson*, 2 Wash. 447, 27 Pac. 273; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. 122.

⁹⁵ *Martin v. Skipwith*, 50 Ark. 141, 6 S. W. 514; *Quinn v. Roath*, 37 Conn. 16; *Moote v. Scriven*, 33 Mich. 500; *Langan v. Thummel*, 24 Nebr. 265, 38 N. W. 782; *Fred v. Fred* (N. J.), 50 Atl. 776; *Day v. Hunt*, 112 N. Y. 191, 19 N. E. 414; *Lese v. Lamprecht*, 196 N. Y. 32, 89 N. E. 365; *Arnett v. Smith*, 11 N. Dak. 55, 88 N. W. 1037; *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337; *Upton v. Maurice* (Tex. Civ. App.), 34 S. W. 642.

⁹⁶ *Peterson v. Moore*, 3 Alaska 155; *Kentucky Distilleries & Warehouse Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363; *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381;

Machold v. Farnan, 14 Idaho 258, 94 Pac. 170; *Skeen v. Patterson*, 180 Ill. 289, 54 N. E. 196; *Wood v. Sheffer*, 248 Ill. 617, 94 N. E. 24; *Stembridge v. Stembridge's Adms.*, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. 948; *Frey v. Camp*, 131 Iowa 109, 107 N. W. 1106; *McQuary v. Missouri Land Co. of Scotland*, 230 Mo. 342, 130 S. W. 335; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Brown v. Ulrich*, 48 Nebr. 409, 67 N. W. 168; *Reed v. Breeden*, 61 Pa. St. 460; *Chambers v. Roseland*, 21 S. Dak. 298, 112 N. W. 148; *Keifer v. Carter Contracting & Hauling Co.*, 59 Wash. 108, 109 Pac. 332. See also *Schenck v. Ballou*, 253 Ill. 415, 97 N. E. 704, Ann. Cas. 1913A, 251.

⁹⁷ *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910.

⁹⁸ *Farnum v. Clarke*, 148 Cal. 610, 84 Pac. 166; *Moody v. Eastern Oregon Land Co.*, 180 Fed. 532; *Kentucky Distilleries & Warehouse Co. v. Blanton*, 149 Fed. 31; *Peterson v. Bauer*, 83 Nebr. 405, 119 N. W. 764.

leaves him where he has placed himself.⁹⁹ Neither party to a contract will be permitted to enforce it specifically against the other until he has shown that he has done, or offered to do, or is ready and willing to do, all acts required of him in the execution of the contract in accordance with its terms and conditions.¹ And where the plaintiff himself is unable to perform his part of the contract he can not compel performance by defendant.² But a failure on the part of the plaintiff to perform a covenant which is not a condition precedent will not prevent him from enforcing specific performance.³

§ 2332. Sufficiency of vendor's title.—It is the duty of the vendor to tender to his vendee a safe title, and a promise to convey such title is always implied in an executory contract for the sale of real estate, and a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects.⁴ Equity will not compel a purchaser to specifically perform his contract of purchase of real estate where title to the same is

⁹⁹ Brooklyn Min. & Mill. Co. v. Miller, 13 Ariz. 217, 108 Pac. 471; Rust v. Strickland, 21 Colo. 177, 40 Pac. 350; Murphy v. Schnell, 248 Ill. 182, 93 N. E. 738; Stacy v. Feltner, 142 Ky. 754, 135 S. W. 276; Watson v. Chandler, 133 Ky. 757, 119 S. W. 186; Electric Secret & Co. v. Gill & Co., 125 Mo. 140, 28 S. W. 486; McQuary v. Missouri Land Co. of Scotland, 230 Mo. 342, 130 S. W. 335; Hill v. Cheatham, 129 Mo. 71, 31 S. W. 261; Flanders v. Rosoff, 188 N. Y. 616, 81 N. E. 1164; Rogers & Co. Mach. Works v. Helm, 154 U. S. 610, 22 L. ed. 562, 14 Sup. Ct. 1177. See also, Clark v. Jackson, 222 Ill. 13, 78 N. E. 6.

¹ Pensacola Gas Co. v. Provisional Municipality, 33 Fla. 322, 14 So. 826; Olympia Mining Co. v. Kerns, 13 Idaho 514, 91 Pac. 92; Lonergan v. Goodman, 241 Ill. 200, 89 N. E. 349; Thorp v. Pettit, 16 N. J. Eq. 488; Flanders v. Rosoff, 111 App. Div. (N. Y.) 1, 97 N. Y. S. 514, affd. 188 N. Y. 616, 81 N.

E. 1164; Case v. Perrigo, 47 Wash. 675, 92 Pac. 432.

² Powell v. Huey, 241 Ill. 132, 89 N. E. 299; New York Brokerage Co. v. Wharton, 143 Iowa 61, 119 N. W. 969.

³ Tidewater R. Co. v. Hurt, 109 Va. 204, 63 S. E. 421.

⁴ Brunswick Co. v. Dart, 93 Ga. 747, 20 S. E. 631; McDonald v. Minnick, 147 Ill. 651, 35 N. E. 367; Lockhart v. Smith, 47 La. Ann. 121, 16 So. 660; Hill v. Hobart, 16 Maine 164; Peabody Heights Co. v. Willson, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393; Corey v. Clarke, 55 Minn. 311, 56 N. W. 1063; Bowen v. Vickers, 2 N. J. Eq. 520, 35 Am. Dec. 516; Irving v. Campbell, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620; Rife v. Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403; Egle v. Morrison, 27 Ohio C. C. 497; Burwell v. Sollock (Tex. Civ. App.), 32 S. W. 844; Garnett v. Macon, 2 Brock. (U. S.) 185, Fed. Cas. No. 5245.

doubtful.⁵ While a purchaser can not be compelled to take a doubtful title, he will not be permitted to object to a title on account of a bare possibility that it will prove defective.⁶ Where there is any doubt about the validity of the title, or its being free from liens or incumbrances, the court will not decree a specific performance. The title must not be doubtful, its validity resting upon some fact not before the court.⁷ The vendor must own the land at the time suit is brought or the relief will usually be denied.⁸ Where the vendor's title rests on an indefeasible title under the statute of limitations, however, it has been held that equity may enter a decree in his favor enforcing specific performance of the contract.⁹

§ 2333. Conveyance or tender thereof.—To entitle a vendor in a contract for the sale of real estate to a specific performance of same as against the purchaser, it is necessary that a conveyance or deed be tendered or an offer to execute and tender be made.¹⁰ And it has been held that where such tender is made, it must be kept good by bringing the deed into court, or by offering to execute such a deed as will vest title in the purchaser.¹¹ Where the stipu-

⁵ *Diamond State Iron Co. v. Husbands*, 8 Del. Ch. 205, 68 Atl. 240; *Lindsey v. Humbrecht*, 162 Fed. 548; *McNutt v. Nellans*, 82 Kans. 424, 108 Pac. 834; *Garth v. Runner's Exrs.* (Ky.), 121 S. W. 681; *Shea v. Evans*, 109 Md. 229, 72 Atl. 600; *Institution for Savings in Newburyport v. Puffer*, 201 Mass. 41, 87 N. E. 562; *Cunningham v. Blake*, 121 Mass. 333; *Butts v. Andrews*, 136 Mass. 221; *Hunting v. Damon*, 160 Mass. 441, 35 N. E. 1064; *Montrose Realty & Imp. Co. v. Zimmerman* (N. J. Ch.), 73 Atl. 846; *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020; *Kohlepp v. Ram*, 79 N. J. Eq. 386, 81 Atl. 1103; *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703; *Triplett v. Williams*, 149 N. Car. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514n; *Roos v. Thigpen* (Tex. Civ. App.), 140 S. W. 1180.

⁶ *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *First African &c. Soc. v. Brown*, 147 Mass. 296,

17 N. E. 549; *Cambreleng v. Purton*, 125 N. Y. 610, 26 N. E. 907; *Spring v. Sandford*, 7 Paige (N. Y.) 550; *Moser v. Cochrane*, 107 N. Y. 35, 13 N. E. 442.

⁷ *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; *Burns v. Berry*, 42 Mich. 176, 3 N. W. 924; *Deseumeur v. Rondel*, 76 N. J. Ch. 394, 74 Atl. 703; *Doutney v. Lambie*, 78 N. J. Eq. 277, 78 Atl. 746.

⁸ *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689; *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120.

⁹ *Watkins v. Pfeiffer*, 29 Ky. L. 97, 92 S. W. 562.

¹⁰ *Robinson v. Yetter*, 238 Ill. 320, 87 N. E. 363; *Soper v. Gabe*, 55 Kans. 646, 41 Pac. 969; *Tinney v. Ashley*, 15 Pick (Mass.) 546, 26 Am. Dec. 620; *Bidwell v. Garrison* (N. J.), 36 Atl. 941; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13.

¹¹ *Goodwine v. Morey*, 111 Ind. 68, 12 N. E. 82; *Overly v. Tipton*, 68 Ind. 410.

lations of the contract are mutual, dependent and concurrent, neither party can legally place the other in default until he himself has tendered performance by tender of a deed, and accounting for the purchase-money paid.¹² By the weight of authority, after the time fixed in the contract for the delivery of the deed has arrived, a suit by an action in equity for the purchase-money is necessary.¹³

§ 2334. Payment or tender of consideration.—A contract to convey land on payment of the purchase-price can not be specifically enforced unless it is shown that the entire purchase has been paid or tendered.¹⁴ However, where a vendee has paid part of the purchase-price under a contract providing that the balance need not be paid until the delivery of the deed, it is not necessary that he tender the balance before filing suit for specific performance.¹⁵ As a general rule, the repudiation of an executory contract by one party relieves the other party from the necessity of tendering performance as a prerequisite to maintaining a suit to enforce specific performance.¹⁶ But where the defendant did not refuse to convey as agreed, or did not

¹² *Roberts v. Braffett*, 33 Utah 51, 92 Pac. 789. See also, *Pittsburg Amusement Co. v. Ferguson*, 115 App. Div. (N. Y.) 241, 101 N. Y. S. 217; *Spolek v. Hatch*, 21 S. Dak. 386, 113 N. W. 75.

¹³ *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910.

¹⁴ *Grice v. Jones*, 33 App. D. C. 278; *Rosbach v. Micks*, 89 Nebr. 821, 132 N. W. 526; *Portland Iron Works v. Willett*, 49 Ore. 245, 89 Pac. 421, 90 Pac. 1000; *Mosely v. Witt*, 79 S. Car. 141, 60 S. E. 520; *Thompson v. Robinson*, 65 W. Va. 506, 64 S. E. 718.

¹⁵ *Campbell v. Lombardo*, 153 Ala. 489, 44 So. 862; *Morgan v. Morgan*, 54 Wash. 406, 103 Pac. 478; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

¹⁶ *Niquette v. Green*, 81 Kans. 569, 106 Pac. 270; *Wood v. Sheffer*,

248 Ill. 617, 94 N. E. 24; *Cumberland v. Brooks*, 235 Ill. 249, 85 N. E. 197; *Malloy v. Foley* (Iowa), 133 N. W. 778; *Harper v. Runner*, 85 Nebr. 343, 123 N. W. 313; *Roche v. Osborne* (N. J. Eq.), 69 Atl. 176; *Trenton St. R. Co. v. Lawlor*, 73 N. J. Eq. 203, 75 Atl. 996; *Connely v. Haggarty*, 65 N. J. Eq. 596, 56 Atl. 371, affd. 68 N. J. Eq. 794, 64 Atl. 1133; *Murray v. Harbor & Suburban Bldg. & Sav. Assn.*, 184 N. Y. 596, 77 N. E. 1191; *West v. Washington R. Co.*, 49 Ore. 436, 90 Pac. 666; *Guillaume v. K. S. D. Fruit Land Co.*, 48 Ore. 400, 86 Pac. 883, 88 Pac. 586; *Whiteside v. Winans*, 29 Pa. Super. Ct. 244; *Babcock v. Lewis*, 52 Tex. Civ. App. 8, 113 S. W. 584; *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103; *Bruggemann v. Converse*, 47 Wash. 581, 92 Pac. 429; *McLeod v. Morrison*, 66 Wash. 683, 120 Pac. 528.

repudiate his contract, the plaintiff must tender the purchase-money before he can demand specific performance.¹⁷ The holder of an option for the purchase of real estate can not have specific enforcement against the vendor in the absence of a showing of the tender of the purchase-price.¹⁸ It is held that where great injury will result to a purchaser if the vendor is allowed to repudiate his contract, equity will give the purchaser specific performance, though he has violated its conditions as to payment of the price.¹⁹

§ 2335. Effect of delay or default of plaintiff.—Mere delay on the part of the plaintiff will not, as a rule, bar his suit for specific performance, provided there has been no change of circumstances or conditions in the relation of the parties between themselves or with reference to the subject-matter.²⁰ Also, where there is sufficient excuse for the delay, mere lapse of time will not bar a suit for specific performance.²¹ And where the delay occurs without fault of the party seeking to enforce the contract, the delay does not bar relief.²² But where the plaintiff is guilty of gross laches in making the payments stipulated for and time is made the essence of the contract by the agreement, specific performance will be denied.²³ Where the plaintiff delays

¹⁷ *Mitchem v. Wallace*, 150 N. Car. 640, 64 S. E. 901. See also, *Smith v. Canady* (Mass.), 99 N. E. 968.

¹⁸ *Levy v. Lyon*, 153 Cal. 213, 94 Pac. 881; *Cape Fear Lumber Co. v. Small*, 84 S. Car. 434, 66 S. E. 880; *Herman v. Winter*, 20 S. Dak. 196, 105 N. W. 457.

¹⁹ *Packard v. Booth*, 62 Wash. 333, 113 Pac. 774.

²⁰ *Nowell v. McBride*, 162 Fed. 432, 89 C. C. A. 318; *Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824; *Spalding v. Alexander*, 6 Bush (Ky.) 160; *Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007; *Derrett v. Bowman*, 61 Md. 526; *Peters v. Canfield*, 74 Mich. 498, 42 N. W. 125; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409; *Harrison v. Rice*, 78 Nebr. 659, 114 N. W. 151; *White v. Poole*, 74 N. H. 71, 65 Atl. 255;

Harrigan v. Smith, 57 N. J. Eq. 635, 42 Atl. 579; *Day v. Devitt*, 79 N. J. Eq. 342, 81 Atl. 368; *Hobart v. Fredericksen*, 20 S. Dak. 248, 105 N. W. 168; *Primm v. Barton*, 18 Tex. 206; *Cosby v. Honaker*, 57 W. Va. 512, 50 S. E. 610; *Ballard v. Ballard*, 25 W. Va. 470; *Hall v. Delaphine*, 5 Wis. 206, 68 Am. Dec. 57.

²¹ *Craig v. Leiper*, 2 Yerg. (Tenn.) 193, 24 Am. Dec. 479; *Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664, 9 Sup. Ct. 273.

²² *Price v. Immel*, 48 Colo. 163, 109 Pac. 941; *Lawlor v. Densmore-Compton Bldg. Co.*, 135 App. Div. (N. Y.) 920, 120 N. Y. S. 1131.

²³ *Machold v. Farnum*, 14 Idaho 258, 94 Pac. 170; *David Bradley v. Union Pac. R. Co.*, 76 Nebr. 172, 107 N. W. 238; *Roberts v. Braffett*, 33 Utah 51, 92 Pac. 789.

his suit until the evidence of the contract is lost or its proof becomes uncertain by lapse of time, a court of equity will generally deny specific performance.²⁴ If, during the delay of the plaintiff, the interest of third parties has intervened, specific performance as against such third parties will be denied.²⁵

§ 2336. Effect of change in value of property during delay.—If the property contracted for undergoes considerable change in value, a delay in filing suit for specific performance may prevent the injured party from obtaining relief.²⁶ Thus, a delay of six years,²⁷ five years,²⁸ three years,²⁹ two years,³⁰ eighteen months³¹ has each been held to be such delay as to prevent the injured party from obtaining specific performance. But in some other jurisdictions greater delay is allowed in which to file suit. Thus, one court has held that a delay of fourteen years was not so great as to prevent specific performance.³² Where the plaintiff is a vendee in possession of the land contracted for, greater latitude of delay is usually allowed.³³ And the mere fact that the realty contracted for has undergone a change in value since the execution of the contract will not ordinarily warrant a refusal of specific performance in the absence of undue delay, fraud or bad faith.³⁴

²⁴ *Van Buren v. Stocking*, 86 Mich. 246, 49 N. W. 50 (where the contract was lost and the evidence conflicting); *Eyre v. Eyre*, 19 N. J. Eq. 102; *Frame v. Frame*, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323.

²⁵ *Warder v. Cornell*, 105 Ill. 169; *Gray v. Crockett*, 35 Kans. 66, 10 Pac. 452; *Grummett v. Gingrass*, 77 Mich. 369, 43 N. W. 999; *Porter v. Dougherty*, 25 Pa. St. 405; *Frame v. Frame*, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323.

²⁶ *Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007; *Johns v. Norris*, 22 N. J. Eq. 102, revd. 27 N. J. Eq. 485; *In re Ruff's Appeal*, 117 Pa. St. 310, 11 Atl. 553; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

²⁷ *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

²⁸ *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305.

²⁹ *Hathcock v. Société Anonyme La. Floridienne*, 54 Fla. 631, 45 So. 481.

³⁰ *Haughwout v. Murphy*, 21 N. J. Eq. 118, affd. 22 N. J. Eq. 531; *Merritt v. Brown*, 21 N. J. Eq. 401.

³¹ *Woodenbury v. Spier*, 122 App. Div. (N. Y.) 396, 106 N. Y. S. 817.

³² *Parish v. Parish*, 32 Beav. 207.

³³ *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Tate v. Pensacola Development Co.*, 37 Fla. 439, 20 So. 542, 53 Am. St. 251; *Sheldon v. Dunbar*, 200 Ill. 490, 65 N. E. 1095; *Low v. Low*, 173 Mass. 580, 54 N. E. 257; *Minneapolis &c. R. v. Chisholm*, 55 Minn. 374, 57 N. W. 63.

³⁴ *Walton v. McKinney*, 11 Ariz. 385, 94 Pac. 1122; *Anderson v. An-*

§ 2337. Waiver and estoppel to urge objections to delay.

—A right of action for specific performance will not lie where the party seeking relief has consented to a rescission of the contract.³⁵ So, also, where the defendant has continuously acquiesced in the delay of the plaintiff in seeking relief, and no serious harm has resulted from such delay, the defense of laches is of no avail.³⁶ And where a party to a contract waives a condition precedent to performance of a contract after default, he can not insist on the forfeiture provided for in the contract as the result of the non-performance.³⁷ A defendant vendor can not set up as a defense in a suit for specific performance the delay of the vendee to bring suit where such delay has been due to the inability of the vendor to make title, and the vendee has been at all times ready and willing to complete, and the vendor has not repudiated nor attempted to rescind the contract.³⁸

§ 2338. Form of remedy.—A suit for the specific performance of a contract is an equitable proceeding, and ordinarily means the performance of a contract according to the precise terms agreed upon or substantially in accordance therewith.³⁹ In a suit in equity where specific enforcement of a contract is the ultimate relief sought, the complainant may ask for and obtain such other relief as in justice and equity may be proper. Thus, in an action for specific performance it has been held competent for com-

derson, 251 Ill. 415, 96 N. E. 265, Ann. Cas. 1912, C. 557 and note.

³⁵ Hubbard v. Gray, 21 Ark. 501; Green v. Covillard, 10 Cal. 317, 70 Am. Dec. 725; Maxfield v. Terry, 4 Del. Ch. 618; York v. Passaic Rolling-Mill Co., 30 Fed. 471; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Fowler v. Marshall, 29 Kans. 665; Cathro v. Gray, 108 Mich. 429, 66 N. W. 346; Kingston v. Walters, 16 N. Mex. 95, 113 Pa. 594; Russell v. Baughman, 94 Pa. St. 400.

³⁶ Welch v. Whelpley, 62 Mich.

15, 28 N. W. 744, 4 Am. St. 810; Lovejoy v. Stewart, 23 Minn. 94.

³⁷ Izard v. Kimmel, 26 Nebr. 51, 41 N. W. 1068; Rausch v. Hanson, 26 S. Dak. 273, 128 N. W. 611.

³⁸ Hickman v. Chaney, 155 Mich. 217, 118 N. W. 993; Keim v. Lindley (N. J. Eq.), 30 Atl. 1063; Huffman v. Hummer, 18 N. J. Eq. 83; Stevens v. Kittredge, 44 Wash. 347, 87 Pac. 484.

³⁹ Strauss v. Yeager (Ind. App.), 93 N. E. 877; Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510; Rison v. Newberry, 90 Va. 513, 18 S. E. 916.

plainant to ask for the correction of a mistake in the contract,⁴⁰ or the reformation thereof,⁴¹ or he may ask for and have ejectment in the same suit.⁴² It is held that a petition praying an injunction to enforce a covenant in a conveyance is equivalent to a petition for specific performance.⁴³ Where a contract provides for damages in lieu of specific performance, and an action is brought to recover such damages, it is an equitable proceeding and not one at law, since the right to such damages depends upon the right to specific performance and is not recoverable until the latter is established.⁴⁴

§ 2339. Jurisdiction.—The specific performance of contracts is a branch of the equitable jurisdiction of a court of equity. This jurisdiction arises out of the inability of the courts of law to enforce the actual performance of the contract.⁴⁵ The power of courts to entertain suits for specific performance is usually conferred by statute, and where a court is invested with general equity powers, it will entertain jurisdiction of suits for the specific performance of contracts. This jurisdiction, however, is affected by the location of the subject-matter of the suit as well as by the residence of the parties. Suits to compel the specific performance of contracts to convey land are suits in personam and not in rem.⁴⁶ However, in a limited and qualified sense a decree for specific performance may also operate in rem in case where the property to be conveyed under the contract is within the court's jurisdiction, but the defendant

⁴⁰ *Scott v. Granger*, 3 Iowa 447.

⁴¹ *Waterman v. Dutton*, 6 Wis. 265. Or a cloud on the title may be canceled in order to give complete relief. *Miller v. Watson* (Ga.), 76 S. E. 585.

⁴² *Galloway v. Horne*, 2 Del. County, Ct. (Pa.) 515.

⁴³ *Launtz v. Vogt*, 133 Ill. App. 255; *Doty v. Martin*, 32 Mich. 462. See also, *Gillespie v. Fulton Oil & Gas Co.*, 140 Ill. App. 147.

⁴⁴ *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783.

⁴⁵ *Peake v. Young*, 40 S. Car. 41, 18 S. E. 237.

⁴⁶ *Griffith v. Stewart*, 31 App. D. C. 29; *Coon v. Cook*, 6 Ind. 268; *DeHart v. Dehart*, 15 Ind. 167; *Bethell v. Bethell*, 92 Ind. 318; *Close v. Wheaton*, 65 Kans. 830, 70 Pac. 891; *Davis v. Parker*, 14 Allen (Mass.) 94, affd. 12 Wall. (U. S.) 457, 20 L. ed. 287; *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Hearst's Heirs v. Kuykendall's Heirs*, 16 Tex. 327; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

is absent therefrom.⁴⁷ It has also been held that a court of equity can decree specific performance of a contract to sell land in another state if it has jurisdiction of all the parties.⁴⁸ But such decree is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before the decree was granted until the person in whom the title resides either voluntarily or perforce obeys the decree and divests himself of the title by a conveyance valid under the *lex loci*.⁴⁹ So, also, specific performance of a contract to convey land in one state may be decreed against an inhabitant of another state who has been personally served with process.⁵⁰ A suit to compel specific performance of a contract to transfer corporate stock may be brought in the county where the corporation has its domicile.⁵¹

§ 2340. Venue.—A cause of action for breach of an executory contract during the life and after the death of the promisor is transitory, and the action may usually be maintained against the personal representative of the promisor without reference to where the contract was made, or to the fact that it was to be performed in a foreign jurisdiction.⁵² Such a suit operates only upon the person, and may properly be instituted in any county where the defendant resides,⁵³ or where one of several defendants re-

⁴⁷ *Wait v. Kern River Min. & Mill &c. Co.*, 157 Cal. 16, 106 Pac. 98.

⁴⁸ *Poole v. Koons*, 252 Ill. 49, 96 N. E. 556; *Barringer v. Ryder*, 119 Iowa 121, 93 N. W. 56; *Rea v. Ferguson*, 126 Iowa 704, 102 N. W. 778; *Cleveland v. Burrill*, 25 Barb. (N. Y.) 532; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Orr's Heirs v. Irwin's Heirs*, 4 N. Car. 351, 2 Car. L. Repos. 465; *Penn v. Hayward*, 14 Ohio St. 302.

⁴⁹ *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. 168; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Fall v. Fall*, 75 Nebr. 104, 106 N. W. 412, 113 N. W. 175; *Proctor v. Ferebee*, 36 N. Car. 143, 36 Am. Dec. 34; *Carrington v. Brents*, 1

McLean (U. S.) 167, Fed. Cas. No. 2446, affd. 9 Pet. (U. S.) 86, 9 L. ed. 60.

⁵⁰ *Dooley v. Watson*, 1 Gray (Mass.) 414.

⁵¹ *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961.

⁵² *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158.

⁵³ *DeHart v. Dehart*, 15 Ind. 167; *Coon v. Cook*, 6 Ind. 268; *Close v. Wheaton*, 65 Kans. 830, 70 Pac. 891; *Timma v. Timma*, 72 Kans. 73, 82 Pac. 481; *Owens v. Hall*, 13 Ohio St. 571; *Miller v. Rusk*, 17 Tex. 170; *Hearst's Heirs v. Kuykendall's Heirs*, 16 Tex. 327. It makes no difference that the land is situated in another state or country. *Griffith v. Stewart*, 31 App. Cas. (D. C.) 29; *Potter v.*

sides.⁵⁴ But in some jurisdictions a suit for specific performance of a contract to convey real estate must be brought in the county in which the real estate is situated, the residence of the parties not conferring jurisdiction.⁵⁵ However, where a suit for specific performance is joined with another action for different relief, the venue of such other action may govern the venue of the case.⁵⁶ In a recent case it is held that in an action by the vendor for specific performance, it is immaterial that the land is located in a foreign state or country, but that the rule is different where the action is by the vendee and a transfer of title is effected by decree of court.⁵⁷

§ 2341. Accrual of cause of action.—The rule in equity may be different from that in law in regard to the time in which a contract is to be performed.⁵⁸ It is generally essential that a party seeking specific performance should not have been backward, that he should not have held off until circumstances may have changed, or kept himself aloof so as either to enforce or abandon the contract as events might prove most advantageous.⁵⁹ Suit may be brought as soon as the contract is wholly broken, even though the time for complete performance has not arrived.⁶⁰ And where one party to a contract notifies the other that he does not intend to stand by or perform it, the other may bring an

Hollister, 45 N. J. Eq. 508, 18 Atl. 204, *affd.* 46 N. J. Eq. 609, 22 Atl. 56, note in Ann. Cas. 1912C, 539.

⁵⁴ Wactor v. Saulsbury, 73 Ga. 811; Lowe v. Mann, 74 Ga. 387.

⁵⁵ Ensworth v. Holly, 33 Mo. 370.

⁵⁶ Henderson v. Perkins, 94 Ky. 207, 14 Ky. L. 782, 21 S. W. 1035; Collins v. Park, 93 Ky. 6, 13 Ky. L. 905, 18 S. W. 1013; Councill v. Bailey, 154 N. Car. 54, 69 S. E. 760; Morgan v. Bell, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614. But see Cavin v. Hill, 83 Tex. 73, 18 S. W. 323.

⁵⁷ O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112, Ann. Cas. 1912, C. 538.

⁵⁸ Peake v. Young, 40 S. Car. 41, 18 S. E. 237.

⁵⁹ Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Rison v. Newberry, 90 Va. 513, 18 S. E. 916.

⁶⁰ Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780; White v. Dobson, 17 Grat. (Va.) 262; James v. Kibler's Admr., 94 Va. 165, 26 S. E. 417; Lee v. Mutual Reserve Fund Life Assn., 97 Va. 160, 33 S. E. 556; Miller v. Jones, 68 W. Va. 526, 71 S. E. 248, 36 L. R. A. (N. S.) 408n; James v. Adams, 16 W. Va. 245; Davis v. Grand Rapids &c. Furniture Co., 41 W. Va. 717, 24 S. E. 630; Pancake v. George Campbell Co., 44 W. Va. 82, 28 S. E. 719.

immediate suit for specific performance without waiting for the time of performance to expire.⁶¹

§ 2342. Limitations.—An action for specific performance brought by a vendor against his vendee is not governed by the statute of limitations applicable to an action at law for the recovery of the balance due on the purchase-price.⁶² Where a person has been guilty of unreasonable delay in bringing a suit for specific enforcement, he may be barred from obtaining relief, although the lapse of time may not be sufficient to bring the case within the statute of limitations.⁶³ However, upon breach of a contract for the sale of real estate by the vendor, a considerable delay on the part of the vendee in bringing suit, the delay being induced by the hope of a settlement, does not deprive the vendee of his remedy, if the vendor has not been injured by such delay.⁶⁴ But, if during the vendee's delay there has come a great increase in the value of the land, so that enforcement would impose a loss on the vendor, equity will, as a general rule, refuse to enforce the contract.⁶⁵ No mere lapse of time in bringing a suit for specific performance will bar the party seeking the remedy where he has fully performed his part of the contract.⁶⁶

⁶¹ *Brassell v. McLemore*, 50 Ala. 476; *Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997; *Balanewsky v. Galaher*, 105 N. Y. S. 77; *Payne v. Melton*, 67 S. Car. 233, 45 S. E. 154; *McRae v. Smart*, 120 Tenn. 431, 114 S. W. 729 (where defendant had repudiated his contract to give plaintiff an interest in an invention to be patented, it was held that plaintiff could sue at once though the article had not been patented); *Ayres v. Robins*, 30 Grat. (Va.) 105; *Smith v. Henkel*, 81 Va. 524; *Kane v. Mann*, 93 Va. 239, 24 S. E. 938; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Miller v. Jones*, 68 W. Va. 526, 71 S. E. 248, 36 L. R. A. (N. S.) 408n.

⁶² *Peake v. Young*, 40 S. Car. 41,

18 S. E. 237; *Nichols v. Briggs*, 18 S. Car. 473.

⁶³ *Cocanaugher v. Green*, 93 Ky. 519, 14 Ky. L. 507, 20 S. W. 542; *Wolf v. Great Falls Water Power & Townsite Co.*, 15 Mont. 49, 38 Pac. 115; *Darrow v. Bush*, 45 App. Div. (N. Y.) 262, 61 N. Y. S. 2; *Peters v. Delaplaine*, 49 N. Y. 362. ⁶⁴ *Tutt v. Davis*, 13 Cal. App. 715, 110 Pac. 690; *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. 126; *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836.

⁶⁵ *Campbell v. Bartlett*, 122 Tenn. 208, 122 S. W. 250, 25 L. R. A. (N. S.) 639n; *Crawford v. Workman*, 64 W. Va. 10, 61 S. E. 319.

⁶⁶ *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Koen v. White's Heirs*, Meigs. (Tenn.) 358.

§ 2343. **Parties to action.**—As a general rule, the parties to the contract are the only proper parties to a suit for its performance, except in case of an assignment of the entire contract, or unless there are some special circumstances authorizing a departure from the rule.⁶⁷ And it has been held that all parties in interest must be joined.⁶⁸ Thus, all joint purchasers⁶⁹ and subsequent vendees must be made parties to a suit to enforce a contract to convey.⁷⁰ But the rule that all parties having an interest in the subject-matter must be made parties to the suit does not have full application to suits for specific performance, the general rule being that no persons are necessary parties except the parties to the contract.⁷¹ The suit may be maintained by an assignee of the vendee,⁷² the original vendee not being a necessary party.⁷³ But in order that an assignee may be entitled to maintain a suit for specific performance of the original contract, it has been held that he must have succeeded to the entire interest of the assignor,⁷⁴ and must have assumed some liability to perform on his part.⁷⁵

§ 2344. **Process and appearance.**—A decree for specific performance of a contract, being an action in personam and not in rem, to have effect beyond the jurisdiction of the court, must be founded either upon personal service of

⁶⁷ *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608; *State Nat. Bank of Springfield v. United States Life Ins. Co.*, 238 Ill. 148, 87 N. E. 396; *Thompson v. McKee* (Ky.), 119 S. W. 229; *Bennett v. Glaspell*, 15 N. Dak. 239, 107 N. W. 45; *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501; *Steinman v. Hagan*, 108 Va. 563, 62 S. E. 348, 128 Am. St. 978; *Bittrick v. Consolidated Imp. Co.*, 51 Wash. 469, 99 Pac. 303.

⁶⁸ *Otto v. Young*, 227 Mo. 193, 127 S. W. 9; *Collins v. Leary*, 74 N. J. Eq. 852, 71 Atl. 603; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Hald v. Claffy*, 31 App. Div. (N. Y.) 251, 115 N. Y. S. 561; *Triplett v. Williams*, 149 N. Car. 394, 63 S. E. 79, 24 L. R. A. (N. S.)

514n; *Mootz v. Petraschefski*, 137 Wis. 315, 118 N. W. 865.

⁶⁹ *Thompson v. McKee* (Ky.), 119 S. W. 229.

⁷⁰ *Bentley v. Barnes*, 162 Ala. 524, 50 So. 361; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689.

⁷¹ *State Nat. Bank of Springfield v. United States Life Ins. Co.*, 238 Ill. 148, 87 N. E. 396.

⁷² *Lenman v. Jones*, 33 App. D. C. 7; *Bateman v. Riley*, 72 N. J. Eq. 316, 73 Atl. 1006; *Whipple v. Lee*, 58 Wash. 253, 108 Pac. 601.

⁷³ *Lenman v. Jones*, 33 App. D. C. 7.

⁷⁴ *Wheeling Creek Gas &c. Co. v. Elder*, 170 Fed. 215.

⁷⁵ *Genevets v. Feiering*, 136 App. Div. (N. Y.) 736, 121 N. Y. S. 392.

process or upon a voluntary appearance.⁷⁶ And it is not necessary in equity that the subject-matter of a suit should be corporeally within the jurisdiction of the court, provided that the parties are in person within the jurisdiction, so that they can be personally summoned to answer the complaint; hence, the familiar rule that where the court has jurisdiction of the proper parties it may compel them to do equity in relation to lands located without its jurisdiction in another county or state.⁷⁷ Where the defendant in a suit for specific performance is a nonresident, he can not be brought into court by a notice by publication. His act in performing the contract is personal to him alone, and hence he must have personal service.⁷⁸ Defective process is waived if the parties appear and proceed in the cause without objecting thereto.⁷⁹ But where the appearance is special and for the purpose of objecting to the process, the irregularities are not necessarily waived.⁸⁰

§ 2345. **Injunction.**—An injunction to prevent the breach of a contract will often be equivalent to a decree for its specific performance.⁸¹ It follows, as a matter of course, that an injunction in aid of specific performance should not be granted where the complaint does not make out a cause of action for specific performance,⁸² nor where it does not appear that there is any danger of loss to complainant for which he can not obtain compensation in damages.⁸³ But

⁷⁶ *Worthington v. Lee*, 61 Md. 530; *Silver Camp Min. Co. v. Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940; *Edichal Bullion Co. v. Columbia Gold Min. Co.*, 87 Va. 641, 13 S. E. 100.

⁷⁷ *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753.

⁷⁸ *First Nat. Bank v. Henry*, 156 Ind. 1, 58 N. E. 1057.

⁷⁹ *Cullum v. Batre's Exrx.*, 2 Ala. 415; *Thebant v. Canova*, 11 Fla. 143.

⁸⁰ *Standley v. Arnou*, 13 Fla. 361; *Merrill v. Houghton*, 51 N. H. 61.

⁸¹ *Dills v. Doebler*, 62 Conn. 366, 26 Atl. 398, 20 L. R. A. 432, 36 Am. St. 345; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E.

436, 60 L. R. A. 822; *Hug v. Van Burkleo*, 58 Mo. 202; *Biddle v. Ramsey*, 52 Mo. 153; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243.

⁸² *Baldwin v. Society*, 9 Sim. 393; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395; *Taylor v. Florida East Coast R. Co.*, 54 Fla. 635, 45 So. 574, 16 L. R. A. (N. S.) 307n, 127 Am. St. 155; *Allen v. Burke*, 2 Md. Ch. 534; *Campbell v. Hough*, 73 N. J. Ch. 601, 68 Atl. 759; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Fargo v. New York &c. R. Co.*, 3 Misc. (N. Y.) 205, 52 N. Y. St. 205, 23 N. Y. S. 360.

⁸³ *Lucas v. Milliken*, 139 Fed. 816.

where there is a clear contract and a plain breach of it, equity may decree a specific performance and enjoin a breach of the contract if there is not a complete remedy at law.⁸⁴

§ 2346. Payment of consideration into court.—Neither party to a contract will be permitted to enforce it specially against the other until he has shown that he has done, or offered to do, or is ready and willing to do, every material act or thing required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all acts required of him in the execution of the contract in accordance with its terms and conditions.⁸⁵ But where a vendee pleads and proves his willingness to pay the entire balance due, it has been held that he is not required, before obtaining a decree for specific performance, to make actual payment, or tender of payment, but is entitled to relief, provided that, within a time to be fixed by the decree, he shall pay the amount due.⁸⁶ When a tender is relied on, it must usually be brought into court.⁸⁷ But it is held that where the plaintiff relies upon a tender of money, it is sufficient, to keep such tender good, that he offer to bring the money into court and stand ready to comply with the directions of the court in regard to it.⁸⁸

§ 2347. Pleading—In general.—Many jurisdictions have abolished the distinctions in practice between actions at law and suits in equity, and in such jurisdictions, so far as

⁸⁴ *Roquemore v. Mitchell Bros.* 167 Ala. 475, 52 So. 423, 140 Am. St. 52n; *Rice v. Doherty*, 184 Fed. 878, 107 C. C. A. 202; *Doherty v. Rice*, 186 Fed. 204; *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183n, 130 Am. St. 906n; *Inglis v. Fohey*, 136 Wis. 28, 116 N. W. 857.

⁸⁵ *Pensacola Gas Co. v. Provisional Municipality*, 33 Fla. 322, 14 So. 826.

⁸⁶ *Kalklosh v. Haney*, 4 Tex. Civ. App. 118, 23 S. W. 420.

⁸⁷ *Hamlett v. Tallman*, 30 Ark. 505; *Doyle v. Teas*, 4 Scam. (Ill.) 202; *Allen v. Cheever*, 61 N. H. 32; *Frost v. Flanders*, 37 N. H. 549; *Becker v. Boon*, 61 N. Y. 317; *Gilkeson v. Smith*, 15 W. Va. 44.

⁸⁸ *Dunbar v. De Boer*, 44 Ill. App. 615; *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854; *LeVine v. Whitehouse*, 37 Utah 260, 109 Pac. 2; *Breitenbach v. Turner*, 18 Wis. 140; *Mankel v. Belscamper*, 84 Wis. 218, 54 N. W. 500.

the proceedings are concerned, both remedies are administered in one form under the denomination of civil actions. However, this change does not abridge the inherent powers of courts, nor affect the rights of the parties, nor the remedies formerly given, further than to change, in some instances, the means by which the remedy may be obtained,⁸⁹ and the code applies the same rules as to pleading and practice in actions at law or suits in equity that are tried before the court.⁹⁰ The pleadings in a suit for specific performance are the formal allegations of the parties of their respective claims and defenses, for the judgment of the court. In order that the decree may be granted the allegations and proof must correspond.⁹¹ The first pleading on the part of the party seeking specific performance is the bill, complaint or petition, which should contain allegations of all the facts necessary to make out his right to relief.⁹² To this pleading the defendant may demur, by which it has been held he may raise the question of laches,⁹³ or that there is no sufficient contract in writing as required by the statute of frauds.⁹⁴ The defendant may file a cross-bill, cross-complaint or counterclaim for specific performance, or he may file a plea or answer to the general issue. But the mere filing of general denial does not entitle defendant to judgment, for the court is entitled to know defendant's version of the contract to determine the facts necessary to a full performance by plaintiff before refusing the relief to which his showing entitles him.⁹⁵

§ 2348. Bill, complaint or petition.—The bill, complaint or petition for specific performance should show that the

⁸⁹ *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28.

⁹⁰ *Terre Haute & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401, revd. 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. 767.

⁹¹ *Rives v. Lamar*, 94 Ga. 186, 21 S. E. 294.

⁹² *Stiles v. Hermosa Beach Land & Water Co.*, 8 Cal. App. 352, 97 Pac. 91; *Peckham v. Lane*, 81 Kans. 489, 106 Pac. 464, 25 L. R.

A. (N. S.) 967; *Hobart v. Kehoe*, 126 Minn. 490, 126 N. W. 66; *Krah v. Wassmer*, 75 N. J. Eq. 109, 71 Atl. 404; *Kelsey v. Distler*, 133 App. Div. (N. Y.) 916, 117 N. Y. S. 1084.

⁹³ *Marsh v. Lott*, 156 Cal. 643, 105 Pac. 968.

⁹⁴ *Miller v. Burt*, 196 Mass. 395, 82 N. E. 39.

⁹⁵ *Stevens v. Trafton*, 36 Mont. 20, 93 Pac. 810.

contract sought to be enforced is just and reasonable as to the defendant, and it has been held that it should also show that the consideration is adequate.⁹⁶ But where the agreed consideration is accepted and retained, its adequacy can not then be questioned and the rule does not apply.⁹⁷ It has also been held that the complaint should also allege title in the defendant, but need not allege good title.⁹⁸ The complaint should set forth with sufficient certainty the terms of the contract.⁹⁹ The plaintiff should also allege that he has performed or is ready, able and willing to perform,¹ or a tender pursuant to the terms of the contract.² It is held in some cases that the complaint must allege that the plaintiff is without an adequate remedy at law.³ Where the complaint makes out a case of specific performance, a general prayer for relief is sufficient.⁴

§ 2349. Averment as to contract.—A complaint for specific performance is defective in averment which fails to set forth with sufficient certainty and clearness the terms of the contract.⁵ And where other writings are relied upon to supply defects in the contract, it must be alleged that such writings were executed in compliance with the agreement of the parties.⁶ Where the contract which is

* *Fraser v. Bentel*, 161 Cal. 390, 119 Pac. 509; *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469; *Kerr v. Moore*, 6 Cal. App. 305, 92 Pac. 107.

⁹⁷ *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469.

⁹⁸ *Harrigan v. Dodge*, 200 Mass. 357, 86 N. E. 780; *Krah v. Wasserman*, 75 N. J. Eq. 109, 71 Atl. 404; *Morrissey v. Strom*, 57 Wash. 487, 107 Pac. 191; *Loar v. Wilfong*, 63 W. Va. 306, 61 S. E. 333.

⁹⁹ *Jones v. Jones*, 155 Ala. 644, 47 So. 80; *Campbell v. Timmerman*, 139 Ill. App. 151; *McCauley v. Schatzley*, 44 Ind. App. 262, 88 N. E. 972; *In re Grogan's Estate*, 38 Mont. 540, 100 Pac. 1044.

¹ *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459.

² *Meckel v. Johnson*, 231 Ill. 540, 83 N. E. 209; *Fordtran v. Duno-*

vant, 54 Tex. Civ. App. 564, 118 S. W. 768.

³ *Wait v. Kern River Min., Mill. & Devel. Co.*, 157 Cal. 16, 106 Pac. 98; *Bernier v. Griscom-Spencer Co.*, 161 Fed. 438; *contra*, *Belanewsky v. Gallaher*, 55 Misc. (N. Y.) 150, 105 N. Y. S. 77; *Bishop v. Tartt*, 48 Tex. Civ. App. 551, 107 S. W. 359.

⁴ *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183n, 130 Am. St. 906n.

⁵ *Mitchell v. Wright*, 155 Ala. 458, 46 So. 473; *Newman v. Johnson*, 108 Md. 367, 70 Atl. 116; *Stonehouse v. Stonehouse*, 156 Mich. 43, 120 N. W. 23; *Bogard v. Barhan*, 52 Ore. 121, 96 Pac. 673; 132 Am. St. 676; *Clinchfield Coal Co. v. Clintwood Coal & Timber Co.*, 108 Va. 433, 62 S. E. 329.

⁶ *McCauley v. Schatzley*, 44 Ind. App. 262, 88 N. E. 972.

sought to be enforced consists of an offer to sell on the part of plaintiff, accepted by the defendant, it must be alleged that the defendant accepted the offer in conformity with its terms and conditions.⁷ In some jurisdictions it is held that the complaint should state that there is no adequate remedy at law.⁸ But it is held that such allegation is not essential where such fact is apparent from other allegations, or where the contract sued on is for the conveyance of real estate.⁹ Where the complaint seeks to enforce an oral agreement, which is subject to the operation of the statute of frauds, it should allege sufficient facts to take it out of the statute.¹⁰ Where the contract relied on was made by an agent, the complaint need not allege that the agent's authority was in writing.¹¹

§ 2350. Averments as to parties and property.—A complaint for specific performance should allege all facts necessary to entitle the plaintiff to equitable relief, and to bring in the necessary parties to be affected by that relief. It should show the capacity of the plaintiff and defendant to perform the contract.¹² But an allegation that the plaintiff is ready and willing to perform, and that he has made a tender pursuant to the agreement, is a sufficient allegation of capacity to perform.¹³ If the complaint is to enforce a contract to convey real estate the land should be described with sufficient certainty that the court may know

⁷ *Koons v. Markle*, 94 Ark. 572, 127 S. W. 959; *Fogarty v. Smith*, 30 Ky. L. 1237, 100 S. W. 829.

⁸ *Wait v. Kern River Min., Mill. & Developing Co.*, 154 Cal. 16, 106 Pac. 98; *Bernier v. Griscom-Spencer Co.*, 161 Fed. 438.

⁹ *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. (N. Y.) 56, 86 N. Y. S. 736; *Belanewsky v. Gallaher*, 55 Misc. (N. Y.) 150, 105 N. Y. S. 77; *Bishop v. Tartt*, 48 Tex. Civ. App. 551, 107 S. W. 359.

¹⁰ *People's Min. & Mill. Co. v. Central Consol. Mines Corp.*, 20

Colo. App. 561, 80 Pac. 479; *Maloy v. Boyett*, 53 Fla. 956, 43 So. 243; *Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; *Miller v. Burt*, 196 Mass. 395, 82 N. E. 39.

¹¹ *Butman v. Butman*, 213 Ill. 104, 72 N. E. 821.

¹² *Kissack v. Bourke*, 224 Ill. 352, 79 N. E. 619; *Broder v. Gordon*, 50 Misc. (N. Y.) 282, 100 N. Y. S. 463; *Newell v. Lamping*, 45 Wash. 304, 88 Pac. 195.

¹³ *Crovatt v. Baker*, 130 Ga. 507, 61 S. E. 127. See also, *Meckel v. Johnson*, 231 Ill. 540, 83 N. E. 209; *Clextion v. Tunnard*, 119 App. Div. (N. Y.) 709, 104 N. Y. S. 665.

exactly the land of which it is asked to decree a conveyance.¹⁴ A description of the land by metes and bounds is sufficient.¹⁵ But it is not necessary to aver the value of the land,¹⁶ or that the defendant was the owner of the land at the time the contract was made, since, if defendant was not the owner, or had placed himself in such a position that he could not perform his contract, such facts are matters of defense.¹⁷ Where the specific performance of a contract relating to chattels is sought, all the exceptional facts authorizing equitable relief must be averred.¹⁸

§ 2351. Averments as to performance, good faith and diligence.—The complaint in a suit for specific performance should allege performance or an offer and ability to perform the contract on the part of the party seeking equitable relief.¹⁹ But a mere assertion by the plaintiff that he was at all times ready, willing and able to carry out the contract on his part will not suffice, when the admitted facts on the face of the complaint refute the assertion.²⁰ There must be proof or allegation to the effect that plaintiff was able to perform the contract at the time of the tender in accordance with the terms of such contract, and that, at all times since, he has been ready, able and willing to perform.²¹ An allegation on the part of the plaintiff of his readiness and willingness to perform and a tender pursuant to the contract is a sufficient allegation of ability to perform.²² But in a suit by the vendee for the

¹⁴ *Harper v. Kellar*, 110 Ga. 420, 35 S. E. 667; *Allen v. Chambers*, 39 N. Car. 125. See also, *Hecke v. Meyer*, 68 Ill. App. 65; *Gigos v. Cochran*, 54 Ind. 593; *Rodman v. Robinson*, 134 N. Car. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. 877.

¹⁵ *Blake v. Flatley*, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. 886; *Rodman v. Robinson*, 134 N. Car. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. 877.

¹⁶ *Brainard v. Jordan* (Tex. Civ. App.), 60 S. W. 784.

¹⁷ *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.

¹⁸ *Lewman v. Ogden Bros.*, 143 Ala. 351, 42 So. 102.

¹⁹ *Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Chandler v. Chandler*, 220 Pa. 311, 69 Atl. 806; *Fordtran v. Dunovant*, 54 Tex. Civ. App. 564, 118 S. W. 768; *Hoover v. Baugh*, 108 Va. 695, 62 S. E. 968, 128 Am. St. 985.

²⁰ *Clinchfield Coal Co. v. Clintwood Coal & Timber Co.*, 108 Va. 433, 62 S. E. 329.

²¹ *Dietz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

²² *Crovatt v. Baker*, 130 Ga. 507,

specific performance of a contract to convey real estate it is not necessary that he should allege tender of a deed for execution by the vendor unless under the terms of the contract the preparation of the deed devolved on the vendee.²³ Nor is it necessary to allege tender of the purchase-price where it appears that the defendant has repudiated his contract and would have refused the money. In such case all that is necessary in this respect is an allegation of readiness to perform.²⁴

§ 2352. Allegation of ability of defendant to perform.—

The fact that the defendant is unable to perform the contract is a matter of defense, and it is held that the complaint need not allege that the defendant was the owner of the land at the time the contract was entered into.²⁵ The defendant might not be able to perform at the time of bringing the suit, but be able at the time of the decree.²⁶ But in a suit on a bond for a deed against the personal representatives of the deceased vendor the complaint should allege that the deceased was the owner of the land at the time of his death.²⁷

§ 2353. Prayer for relief.—Where it is apparent from the complaint that a case for specific performance has been made out, a general prayer for relief will be sufficient.²⁸ But in case the complaint for specific performance discloses other relief to which the plaintiff is entitled, such other relief can not be granted where the prayer is for specific performance alone.²⁹ Where it is sought to obtain specific performance to convey against one tenant in com-

61 S. E. 127; *Clextion v. Turnard*, 119 App. Div. (N. Y.) 709, 104 N. Y. S. 665.

²³ *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436.

²⁴ *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.

²⁵ *Greenfield v. Carlton*, 30 Ark. 547; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Clextion v. Tunnard*, 119

App. Div. (N. Y.) 709, 104 N. Y. S. 665.

²⁶ *Clextion v. Tunnard*, 119 App. Div. (N. Y.) 709, 104 N. Y. S. 665; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

²⁷ *Driver v. Hudspeth*, 16 Ala. 348.

²⁸ *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183n, 130 Am. St. 906n.

²⁹ *Laird v. Boyle*, 2 Wis. 431.

mon, the contract being void as to the other, such relief must be specially prayed for.³⁰ Or where the contract is indefinite, the complainant should pray that the contract be reformed before it is enforced.³¹ Where, however, the complaint fails to state a cause of action for specific performance, a prayer for general relief will not cure a defect caused by the single specific prayer for specific performance.³² Where, in addition to the prayer for specific performance the plaintiff inserts a prayer for damages, the complaint is not objectionable as stating two separate causes of action.³³

§ 2354. Plea or answer.—It is generally necessary to make the defense of the statute of frauds by answer, since, in counting upon a contract, it is not necessary that the pleader should set out a contract good under the statute of frauds, and usually the contract is set out without stating whether it is in writing or not,³⁴ in which case the law presumes a legal contract, and the only way the defense can then be made is by plea or answer.³⁵ But when the contract set out in the complaint appears upon the face thereof to be within the statute of frauds, there is no reason why the defense should not be made by demurrer, and such now is generally the practice in this country in actions both at law and in equity.³⁶ The general denial puts in issue all the facts alleged as entitling plaintiff to the relief,³⁷ and allegations not traversed are deemed admitted. In a case where the defendant in his answer sets up a contract different from the one counted on by the plaintiff and demands its specific performance as affirmative relief, the failure of the plaintiff to file a special reply thereto is an

³⁰ *Campbell v. Hough*, 73 N. J. 621, 82 S. W. 932, *revd.* 149 Fed. Eq. 601, 68 Atl. 759.

³¹ *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734.

³² *Broder v. Gordon*, 50 Misc. (N. Y.) 282, 100 N. Y. S. 463.

³³ *Messer v. Hibernia Sav. & Loan Soc.*, 149 Cal. 122, 84 Pac. 835.

³⁴ *Wilhite v. Skelton*, 5 Ind. T.

³⁵ *Crovatt v. Baker*, 130 Ga. 507, 61 S. E. 127; *Clayton v. Lemen*, 233 Ill. 435, 84 N. E. 691.

³⁶ *Galway v. Shields*, 1 Mo. App. 546; *Roth v. Goerger*, 118 Mo. 556, 24 S. W. 176.

³⁷ *Southern Missouri & A. R. Co. v. Graves*, 182 Mo. 211, 81 S. W. 405.

admission of its truth and entitles defendant to the relief prayed for.³⁸ The mere filing of a general denial does not entitle the defendant to a judgment, for the court is entitled to know defendant's version of the contract to determine the facts necessary to a full performance by the plaintiff before denying the relief to which his showing entitles him.³⁹ Where defendant relies upon mutual abandonment of the contract he must plead it.⁴⁰ Also, any fraud in procuring the contract must be set up in the answer.⁴¹

§ 2355. Demurrer.—A demurrer to a complaint in equity for want of parties must point out the necessary parties, either by name or in some other manner, so as to enable plaintiff to amend by joining the proper parties.⁴² Where it appears from the complaint for specific performance that there is no sufficient contract in writing, as required by the statute of frauds, a demurrer is proper.⁴³ It has been held that the defense of laches may be raised by demurrer.⁴⁴ Where an answer to a complaint for specific performance of a contract to convey land admits the execution of the contract, but not all the essential facts entitling plaintiff to relief, and further pleaded facts which, if true, were a good defense, a general demurrer to such answer will not lie.⁴⁵

§ 2356. Issue, proof and variance.—Where it is sought to specifically enforce the performance of a contract to convey land, the proof must conform to the allegations of the complaint.⁴⁶ Thus, the plaintiff can not allege a con-

³⁸ Garrett v. Goff, 61 W. Va. 221, 56 S. E. 351.

³⁹ Stevens v. Trafton, 36 Mont. 520, 93 Pac. 810.

⁴⁰ Lipscomb v. Amend, 49 Tex. Civ. App. 300, 108 S. W. 483.

⁴¹ Marthinson v. McCutcheon, 84 S. Car. 256, 66 S. E. 120; Riggins v. Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

⁴² Chambers v. Wright, 52 Ala. 444; Dwight v. Central Vermont R. Co., 9 Fed. 785, 20 Blatchf. (U. S.) 200; Parker v. Cochran, 97 Ga. 249, 22 S. E. 961; Dias v. Bouch-

aud, 10 Paige (N. Y.) 445, revd. 1 N. Y. 201, 4 How. Pr. (N. Y.) 291; Caldwell v. Blackwood, 54 N. Car. 274; Robinson v. Dix, 18 W. Va. 528.

⁴³ Miller v. Burt, 196 Mass. 395, 82 N. E. 39.

⁴⁴ Marsh v. Lott, 156 Cal. 643, 105 Pac. 968.

⁴⁵ Benedict v. Minton, 83 Nebr. 782, 120 N. W. 429.

⁴⁶ Jones v. Mahone, 157 Ala. 105, 47 So. 195; Brandon v. West, 29 Nev. 135, 85 Pac. 449, 88 Pac. 140.

tract made with one person and recover on proof of a contract made with another.⁴⁷ Nor can the question of an implied trust, which is not presented by the pleadings or evidence, be considered.⁴⁸ To justify a decree in favor of a vendee for the specific performance of a parol contract for the sale of land, the contract and its performance on the part of the vendee must be clearly proved.⁴⁹ The identical contract pleaded must be proved so that no reasonable doubt can be entertained of its truth.⁵⁰ The rule is well established that the contract sought to be enforced must either be admitted by the pleadings, or proved with a reasonable degree of certainty.⁵¹ In order to enforce specifically a parol gift of land upon the ground that the donee has made valuable improvements on the faith of the gift, the allegations and the proof must correspond.⁵²

§ 2357. Evidence in general.—The general rule that parol testimony is inadmissible to vary the terms of a written instrument applies to suits in equity as well as to actions at law.⁵³ Statements made in a bill in chancery which is sworn to, or statements in a cross-bill if taken as confessed, are evidence against the complainant or cross-complainant as admissions.⁵⁴ The burden of proof is on one seeking a specific performance of a contract,⁵⁵ and where the vendor of real estate is seeking specific performance of

⁴⁷ *Van Keuren v. Siedler* (N. J. Eq.), 68 Atl. 920; *Cooper v. Cooper*, 65 W. Va. 712, 64 S. E. 927. See also, *Free v. Little*, 31 Utah 449, 88 Pac. 407.

⁴⁸ *People's Min. & Mill. Co. v. Central Consol. Mines Corp.*, 20 Colo. App. 561, 80 Pac. 479.

⁴⁹ *Stott v. Avery*, 156 Mich. 674, 121 N. W. 825; *Stever v. Torrent*, 99 Mich. 68, 57 N. W. 1087; *Rogers Locomotive & C. Works v. Helm*, 154 U. S. 610, 22 L. ed. 562, 14 Sup. Ct. 1177; *McMillan v. Wright*, 56 Wash. 114, 105 Pac. 176.

⁵⁰ *Maloy v. Boyett*, 53 Fla. 956, 43 So. 243; *Ross v. Ross*, 148 Iowa 729, 127 N. W. 1034; *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274.

⁵¹ *Barrett v. Geisinger*, 148 Ill. 98, 35 N. E. 354; *Long v. Long*, 118 Ill. 638, 9 N. E. 247.

⁵² *Rives v. Lamar*, 94 Ga. 186, 21 S. E. 294.

⁵³ *Hart v. Clark*, 54 Ala. 490; *Sullivan v. McLenans*, 2 Iowa 437, 65 Am. Dec. 780; *Eveleth v. Wilson*, 15 Maine 109; *Peterson v. Grover*, 20 Maine 363; *Hunt v. Rousmanier's Admrs.*, 8 Wheat. (U. S.) 174, 5 L. ed. 589; *Cooper v. Toppin*, 4 Wis. 362.

⁵⁴ *Durden v. Cleveland*, 4 Ala. 225; *Mobberly v. Mobberly*, 60 Md. 376; *Griswold v. Simmons*, 50 Miss. 137; *Hall v. Guthrie*, 10 Mo. 621; *White v. Buloid*, 2 Paige (N. Y.) 164. Contra, *Scales v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.), 35 S. W. 205.

⁵⁵ *Vaughan v. Calloway*, 94 Ark. 621, 126 S. W. 1067; *Hagan v. Taylor*, 110 Va. 9, 65 S. E. 487.

the contract of sale or is resisting a suit to rescind the same, he has the burden of proving that he can make a good title to the land.⁵⁶ Also, where the defendant is relying on the defense of fraud or misrepresentation in obtaining the contract, the burden is said to be on him to establish it.⁵⁷ Likewise, the burden of proof has been said to rest with one who alleges a mistake as to the subject-matter, or that the burden was hard, unequal and oppressive.⁵⁸ While parol evidence will not be admissible to vary or contradict the terms of a written contract, it will be heard for the purpose of putting the court in possession of all the facts and circumstances surrounding the contract to the end that it may ascertain whether there was any element of fraud, mistake or unfair advantage taken by the party seeking the aid of the court.⁵⁹

§ 2358. Weight and sufficiency of evidence.—Where the evidence in a suit for specific performance discloses but a vague and uncertain contract a court of equity will not exercise its extraordinary powers to enforce it, but will leave the party to his legal remedy.⁶⁰ The terms of the contract must be definitely alleged and established as alleged by clear and satisfactory proof.⁶¹ Also, the existence of the contract must be clearly and satisfactorily proved.⁶² The evidence of the contract must be precise,⁶³ unequivocal,⁶⁴ unambiguous,⁶⁵ and free from suspicion.⁶⁶

⁵⁶ *Topp v. White*, 59 Tenn. (12 Heisk.) 165; *Upton v. Maurice* (Tex. Civ. App.), 34 S. W. 642.

⁵⁷ *Park v. Johnson*, 4 Allen (Mass.) 259.

⁵⁸ *Western R. Corp. v. Babcock*, 6 Metc. (Mass.) 346.

⁵⁹ *Rudisill v. Whitener*, 149 N. Car. 439, 63 S. E. 101.

⁶⁰ *Taylor v. Williams*, 45 Mo. 80; *Strange v. Crowley*, 91 Mo. 287, 2 S. W. 421; *Colson v. Thompson*, 2 Wheat. (U. S.) 336, 4 L. ed. 253.

⁶¹ *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454; *Pressed Steel Car Co. v. Hansen*, 128 Fed. 444, affd. 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; *Allen v. Webb*, 64 Ill. 342; *Dunn v. McGovern*, 116 Iowa 663, 88 N. W. 938; *Perean v. Frederick*, 17 Nebr. 117,

22 N. W. 235; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297.

⁶² *Deeds v. Stephens*, 10 Idaho 332, 79 Pac. 77; *Long v. Duncan*, 10 Kans. 294; *Smith v. Crandall*, 20 Md. 482; *Hopkins v. Roberts*, 54 Md. 312; *Taylor v. Von Schraeder*, 107 Mo. 206, 16 S. W. 675; *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. 886; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424.

⁶³ *Sands v. Sands*, 112 Ill. 225.

⁶⁴ *Langston v. Bates*, 84 Ill. 524, 25 Am. Rep. 466.

⁶⁵ *Barrett v. Geisinger*, 148 Ill. 98, 35 N. E. 354.

⁶⁶ *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

§ 2359. **Relief awarded.**—While a judgment in a court of law always relates to the condition of facts as they exist at the commencement of the action, such is not the rule in equity, as here the relief administered is such as the nature of the case and the facts justify at the close of the litigation.⁶⁷ Having properly acquired jurisdiction the court will proceed to do complete justice by adjudicating all matters involved,⁶⁸ but only where the contract is of a class which might be specifically enforced were it not for intervening facts.⁶⁹ In case of a suit for specific performance of a contract to convey real estate, where the vendor is unable to convey the title called for by the contract, the purchaser may usually elect to take what the vendor can give him, and hold the vendor answerable in damages as to the rest.⁷⁰ Such damages may be awarded in lieu of specific performance only when the case is one of equitable interposition, such as would entitle complainant to specific performance but for intervening facts,⁷¹ and even though no equitable cause of action is stated, provided an answer was interposed.⁷² Relief by way of damages may be awarded under prayer for general relief.⁷³ It has been held that a court of equity may enforce the performance of a contract to deliver a policy of insurance, and, having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain

⁶⁷ *Pennsylvania Co. v. Bond*, 99 Ill. App. 535, affd. 202 Ill. 95, 66 N. E. 941; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545, 138 Am. St. 942; *Hunholz v. Helz*, 141 Wis. 222, 124 N. W. 257.

⁶⁸ *Webb v. Jones* (Ala.), 50 So. 887; *Peale v. Marian Coal Co.*, 172 Fed. 639; *Chantland v. Sherman*, 148 Iowa 352, 125 N. W. 871; *Hathaway v. Hathaway*, 161 Mich. 13, 125 N. W. 683; *Svanda v. Svanda*, 86 Nebr. 203, 125 N. W. 585; *Spier v. Schappel*, 86 Nebr. 335, 125 N. W. 609; *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703; *Durham v. Breathwit*, 57 Tex. Civ. App. 38, 121 S. W. 890.

⁶⁹ *Perrin v. Smith*, 135 App. Div. (N. Y.) 127, 119 N. Y. S. 990.

⁷⁰ *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244; *Corbett v. Schulte*, 119 Mich. 249, 77 N. W. 947; *Bryant Timber Co. v. Wilson*, 151 N. Car. 154, 65 S. E. 932, 134 Am. St. 982.

⁷¹ *Switzer v. Comrs. &c. of the U. S.*, 134 App. Div. (N. Y.) 487, 119 N. Y. S. 383; *Clark v. West*, 137 App. Div. (N. Y.) 23, 122 N. Y. S. 380.

⁷² *Perrin v. Smith*, 135 App. Div. (N. Y.) 127, 119 N. Y. S. 990.

⁷³ *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961; *Huey v. Starr*, 79 Kans. 781, 101 Pac. 1075, 104 Pac. 1135.

it for the purpose of decreeing payment of the policy.⁷⁴ In decreeing specific performance, the court may reform the agreement so as to do justice as far as the circumstances will permit, and refuse specific enforcement unless the plaintiff will comply with such modification.⁷⁵

§ 2360. **Decree.**—When a decree is based on a certain contract, and requires its specific enforcement, it must require the performance of the contract by the plaintiff as well as the defendant.⁷⁶ So, the contract merges with the decree which should leave defendant no alternative but to perform.⁷⁷ Performance may also be decreed in the alternative.⁷⁸ It has been held that the facts constituting an estoppel of defendant must be found, as a general finding that the defendant is estopped is insufficient.⁷⁹ Also, there must be a sufficient finding as to misrepresentations, in order to furnish a basis for an inference of fraud.⁸⁰ In some jurisdictions a decree may be entered for specific performance which will operate as a conveyance.⁸¹ It has also been held that the decree of specific performance may operate in rem when the property to be conveyed is within the jurisdiction of the court, even though the defendant is a non-resident.⁸²

⁷⁴ *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Hebert v. Mutual Life Ins. Co.*, 8 Sawy. (U. S.) 198, 12 Fed. 807; *Taylor v. Merchants' Fire Ins. Co.*, 50 U. S. (9. How.) 390, 13 L. ed. 187.

⁷⁵ *Mitchell v. Nicholson*, 8 Yerg. (Tenn.) 194; *Mechanics' Bank v. Lynn*, 1 Pet. (U. S.) 376, 7 L. ed. 185.

⁷⁶ *Thompson v. Burns*, 15 Idaho 572, 99 Pac. 111; *Stevenson v. Jackson*, 40 Mich. 702; *Binns v. Mount*, 28 N. J. Eq. 24.

⁷⁷ *Thompson v. Burns*, 15 Idaho

572, 99 Pac. 111; *Broemsen v. Agnic* (W. Va.), 73 S. E. 253.

⁷⁸ *Prichard v. Mulhall*, 140 Iowa 1, 118 N. W. 43; *Jersey City v. Jersey City Water Supply Co.*, 76 N. J. Eq. 607, 76 Atl. 3.

⁷⁹ *Fritz v. Mills*, 12 Cal. App. 113, 106 Pac. 725.

⁸⁰ *Evener Mfg. Co. v. Frink*, 108 Minn. 532, 122 N. W. 160.

⁸¹ *Otto v. Young*, 227 Mo. 193, 127 S. W. 9; *Ready v. Schmith*, 52 Ore. 196, 95 Pac. 817.

⁸² *Wait v. Kern River Min., Mill. & Devel. Co.*, 157 Cal. 16, 106 Pac. 98.

CHAPTER LII.

REFORMATION.

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§ 2365. Nature of remedy.—The jurisdiction of a court of chancery to correct mistakes in contracts and agreements, so as to make them express the actual intent of the parties, is one of the ancient and well-established heads of the jurisdiction of that court.¹ Reformation will not be decreed that does not conform to the intention of both parties, for mutuality is essential and the court can not by reformation make a new contract;² nor where reformation would be entirely futile, and the effect of the instrument

¹ *Bieler v. Dreher*, 129 Ala. 384, 30 So. 22; *Webb v. Nease*, 66 Ark. 155, 49 S. W. 1081; *Murphy v. Rooney*, 45 Cal. 78; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Henklemann v. Peterson*, 154 Ill. 419, 40 N. E. 359; *Citizen's Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259;

Lewiston v. Gagne, 89 Maine 395, 36 Atl. 629, 56 Am. St. 432; *Miller v. St. Louis & K. C. R. Co.*, 162 Mo. 424, 63 S. W. 85; *Beall v. Martin*, 48 Nebr. 479, 67 N. W. 433.
² *Stewart v. Gordon*, 60 Ohio St. 170, 53 N. E. 797.

would remain the same as before reformation.³ Where, by a mistake or oversight in the execution of an agreement, as an omission therefrom of a seal where one is necessary, if by the terms used in the instrument it purports on its face to be a sealed instrument, it will ordinarily of itself furnish the testimony showing the oversight or mistake, and a court of chancery will correct it.⁴ The reformation of an instrument does not establish and effectuate rights, nor adjudge the effect thereof, but rather declares the status which the parties intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted. The question, ordinarily, is not what the instrument was intended to mean, or how it was intended to operate, but what it was intended to be.⁵ And equity will not reform instruments which express the intention of the parties at the time they are made, based on the knowledge then possessed by them, although their intentions would have been different if they had been better informed.⁶

§ 2366. Grounds for reformation.—Relief by way of reformation of an instrument will be decreed when the instrument does not correctly set forth the true intent of the parties by reason of some fraud, accident or mistake in the execution thereof. By means of this form of relief, equity

³ *Gardner v. Knight*, 124 Ala. 273, 27 So. 298.

⁴ *Love v. Sierra Nevada Lake Water & Mining Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Allen v. Elder*, 67 Ga. 674, 2 Am. St. 63; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359; *Michel v. Tinsley*, 69 Mo. 442; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224, revd. 20 Johns. (N. Y.) 659; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956, 3 Sup. Ct. 252; *Colchester v. Culver*, 29 Vt. 111; *Probate Court v. May*, 52 Vt. 182. But there is a class of cases in which, when the terms used by the parties result in a contract different from the one really entered into by reason of omission, ignorance

or misapprehension, courts of equity have reformed the instrument so as to effectuate the intention of the parties, especially where failure to do so would injure one party and give the other an unconscionable advantage. *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Spaulding Mfg. Co. v. Godbold*, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282, and note, 135 Am. St. 168; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963. See ante, vol. 1, § 113.

⁵ *Parker v. Parker*, 88 Ala. 362, 6 So. 740, 16 Am. St. 52.

⁶ *Wise v. Brooks*, 69 Miss. 891, 13 So. 836. See also, *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28.

can enforce the oral contract which the parties, through mistake in the expression, have not correctly reduced to writing.⁷ It is held that a court of law has no jurisdiction to reform written instruments,⁸ even upon evidence that would justify a court of equity in so doing.⁹ But courts of equity have not hesitated to entertain jurisdiction to reform all contracts where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake, or where there has been a mistake on one side and fraud or inequitable conduct on the other.¹⁰ However, mere neglect, carelessness or oversight in the preparation or execution of an instrument is not sufficient to justify reformation.¹¹ Nor will a contract made without fraud or mistake be modified in equity to give either party a better bargain while he retains all the benefits of the original trade.¹²

§ 2367. Mistake as a ground for remedy.—The most common ground for granting reformation of an instrument is that through a mistake it does not correctly state the true intent of the parties.¹³ It has been laid down broadly

⁷ *Newton v. Wooley*, 105 Fed. 541; *Brown v. Meserve*, 91 Fed. 229, 33 C. C. A. 472; *Kentucky Citizens' Building & Loan Assn. v. Lawrence*, 106 Ky. 88, 20 Ky. L. 1700, 49 S. W. 1059; *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024; *Sidney School Furniture Co. v. Warsaw School Dist.*, 130 Pa. St. 76, 18 Atl. 604.

⁸ *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567; *Iverson v. Hutton*, 98 U. S. 79, 25 L. ed. 66.

⁹ *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *Prentice v. Stearns*, 113 U. S. 435, 28 L. ed. 1059, 5 Sup. Ct. 547.

¹⁰ *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121; *Wilson v. Stewart*, 63 Ind. 294; *Sanders v. Wagner*, 32 N. J. Eq. 506; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. 239; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275. See also, vol. 1, § 109.

¹¹ *Gailey v. New Castle Elastic Pulp Plaster Co.*, 34 Pa. Super. Ct. 533. See also, *Kansas City Packing Box Co. v. Spies* (Tex. Civ. App.), 109 S. W. 432.

¹² *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357.

¹³ *Tillis v. Smith*, 108 Ala. 264, 19 So. 374; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Kee v. Davis*, 137 Cal. 456, 70 Pac. 294, 671; *Christensen v. Hollingsworth*, 6 Idaho 87, 53 Pac. 211, 96 Am. St. 256; *Fisher v. Barnett*, 56 Ill. App. 649; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Smith v. Watson*, 88 Iowa 73, 55 N. W. 68; *Rice v. Hall*, 19 Ky. L. 814, 42 S. W. 99; *Lewiston v. Gagne*, 89 Maine 395, 36 Atl. 629, 56 Am. St. 432; *Perkins v. Canine*, 113 Mich. 72, 71 N. W. 457; *Smith v. Jordan*, 13 Gil. (Minn.) 246, 97 Am. Dec. 232; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Miller v. St. Louis & K. C. R. Co.*, 162 Mo. 424, 63 S. W. 85; *Pinkham v. Pinkham*, 60

that where parties, in reducing an instrument to writing, fail by mutual mistake to embody their intention in the instrument, because they do not understand either the meaning of the words used or their legal effect, equity will grant relief by reforming the instrument, and it matters not whether such mistake be called one of fact or of law.¹⁴ But when it is sought to reform an instrument on the ground of mistake it must usually appear that the alleged mistake is as to a fact and not a pure question of law, and such fact must not only not be known to the party, but must be such as he is not chargeable with negligence in not knowing.¹⁵ A court of equity will regard as done whatever the parties really intended, and which in good conscience should have been done.¹⁶ Where the parties to a deed intended that a fee simple should be conveyed, but the word "heirs" was omitted, so that only a life estate was conveyed, a reformation of the deed will be decreed, although the omission arose from a mistake of law made by the scrivener.¹⁷

§ 2368. Mistake of fact.—Where certain facts are assumed by both parties to a contract as its basis, and it subsequently appears that such facts did not exist, the so-

Nebr. 600, 83 N. W. 837, *affd.* 61 Nebr. 336, 85 N. W. 285; *Darmour v. Chapman*, 2 App. Div. (N. Y.) 112, 73 N. Y. St. 255, 37 N. Y. S. 674; *Merchant v. Pielke*, 9 N. Dak. 182, 82 N. W. 878; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *American Freehold Land Mortg. Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 34 L. ed. 408; *Marks v. Taylor*, 23 Utah 152, 63 Pac. 897; *Lockwood v. White*, 65 Vt. 466, 26 Atl. 639; *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751; *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

¹⁴ *Lockwood v. Geier*, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245, *affd.* 98 Minn. 317, 109 N. W. 245; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Kyle v. Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. 866. But see *Lane v. Holmes*, 55

Minn. 379, 57 N. W. 132, 43 Am. St. 508; *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958.

¹⁵ *Graham v. Berryman*, 19 N. J. Eq. 29, *revd.* 19 N. J. Eq. 574, 21 N. J. Eq. 370; *Burgin v. Giberson*, 26 N. J. Eq. 72; *Banfield v. Banfield*, 24 Ore. 571, 34 Pac. 659. See also, vol. 1, § 113. As elsewhere shown, mistakes as to the subject-matter or the like may be such as to prevent the minds of the parties from really meeting and the result may be that there is in reality no contract. Vol. 1, § 101, *et seq.*

¹⁶ *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75; *Valentine v. Richardt*, 126 N. Y. 272, 27 N. E. 255.

¹⁷ *Brock v. O'Dell*, 44 S. Car. 22, 21 S. E. 976; *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 1, 7 L. ed. 27.

called contract is inoperative, and may be avoided by an action at law,¹⁸ or rescinded by a suit in equity,¹⁹ or sometimes corrected in equity, where the decree will effectuate the intention of the parties.²⁰ A clerical error made by the scrivener in drawing up the instrument may be corrected by a decree in equity.²¹ It is a well recognized rule that a court of equity has power to reform an instrument conveying, leasing or mortgaging a certain tract of land which through a mistake of the parties has been erroneously described in such instrument.²² However, where the mistake of the parties goes to the identity of the property itself, reformation will be denied, since there was no meeting of the minds of the parties.²³

§ 2369. Mistake of law.—A mistake of law is where a person knows the facts of the case, but is ignorant of the legal consequences.²⁴ The general rule is well settled that

¹⁸ *Fink v. Smith*, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750; *Ketcham v. Catlin*, 21 Vt. 191.

¹⁹ *Daniel v. Mitchell*, 1 Story (U. S.) 172; *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 621. See also, vol. 1, § 101, et seq.

²⁰ *Harrell v. DeNormandie*, 26 Tex. 120.

²¹ *Murphy v. Rooney*, 45 Cal. 78; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Stricker v. Tinkham*, 35 Ga. 176, 89 Am. Dec. 280; *Christensen v. Hollingsworth*, 6 Idaho 87, 53 Pac. 211, 96 Am. St. 256; *Sanner v. Smith*, 51 Ill. App. 671; *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Hebler v. Brown*, 18 Misc. (N. Y.) 395, 41 N. Y. S. 441; *Schotte v. Meredith*, 197 Pa. 496, 47 Atl. 844; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470.

²² *Fields v. Clayton*, 117 Ala. 538, 23 So. 530, 67 Am. St. 189; *Stinson v. Ray*, 79 Ark. 592, 96 S. W. 141; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Blakeman v. Blakeman*, 39 Conn. 320; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. 63; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; *Merchants' &c. Assn. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008; *Her-*

ring v. Peaslee, 92 Iowa 391, 60 N. W. 650; *Wilson v. Jasper*, 90 Ky. 211, 12 Ky. L. 80, 13 S. W. 885; *Perry v. Knight*, 85 Maine 184, 27 Atl. 96; *Penn v. Rodriguez*, 115 La. 174, 38 So. 955; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Johnson v. Wilson*, 111 Mich. 114, 69 N. W. 149; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156.

²³ *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; *Morris v. Kettle*, 56 N. J. Eq. 826, 34 Atl. 376, affd. 42 Atl. 1117; *Stewart v. Gordon*, 60 Ohio St. 170, 53 N. E. 797. See also, vol. 1, § 101, et seq. In other words, there must be a contract to reform. *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259, and cases cited. *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264. So, the parties must be capable of contracting and the contract must not be illegal and void. *Brazoria v. Youngstown Bridge Co.*, 80 Fed. 10, 25 C. C. A. 306; *Kreiger v. De Mass*, 41 Ind. App. 252, 83 N. E. 734; *Powell v. Morisey*, 98 N. Car. 426, 4 S. E. 185, 2 Am. St. 343; note in 28 L. R. A. (N. S.) 864-880.

²⁴ *Mowatt v. Wright*, 1 Wend.

when parties enter into contracts, and especially contracts in writing, they must be governed by the terms of such contracts as made, according to their true intent and meaning, and must submit to the legal consequences arising from them.²⁵ The mere fact that one or more of the parties may have mistaken the legal consequences of the language used, or misconceived its efficiency, is generally immaterial, but if, by reason of fraud, accident or mistake, the contract is different from what the parties intended to have it, a court of equity may have jurisdiction to reform it.²⁶ The parties to a written contract may know the very words which they insert in the instrument, but do not intend that they shall have the legal effect which they actually have. This form of mistake is, of course, due to ignorance or mistake of law. If the parties made a prior valid oral contract which,—they having attempted to reduce it to writing,—differs from the written contract, equity will reform the writing so as to make it conform to the real intention of the parties. But if there has been no prior valid oral contract differing from the written contract, one party can not have the contract reformed so as to make it express his intention, since this would be to substitute his intention for the contract between the two parties thereto.²⁷ As a

(N. Y.) 355, 19 Am. Dec. 508. See also, *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705.

²⁵ *Trapp v. Moore*, 21 Ala. 693; *Dixon v. Clayville*, 44 Md. 573; *Middleton v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191.

²⁶ *Hinton v. Citizens' Mut. Ins. Co.*, 63 Ala. 488; *Roundy v. Kent*, 75 Iowa 662, 37 N. W. 146; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *In re Grubb's Appeal*, 90 Pa. St. 228; *Baltzer v. Raleigh &c. R. Co.*, 115 U. S. 634, 29 L. ed. 505, 6 Sup. Ct. 216; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

²⁷ *Tyson v. Chestnut*, 100 Ala. 571, 13 So. 763; *Herskey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; *Loftus v. Fischer*, 106 Cal.

616, 39 Pac. 1064; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Travelers' Ins. Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390; *Hackemack v. Wiebrock*, 172 Ill. 98, 49 N. E. 984; *Marshall v. Wrestrope*, 98 Iowa 324, 67 N. W. 257; *Bellande's Succession*, 42 La. Ann. 241, 7 So. 535; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. 530; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458; *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38, 5 Am. St. 816; *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561; *Mullin v. Eaton (N. H.)*, 19 Atl. 371; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Berry v. American Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. 548; *King v. Holbrook*, 38 Ore. 452, 63 Pac. 651; *Cochran v. Pew*, 159 Pa. St.

general rule, an instrument will not be reformed by reason of plaintiff's mistake as to its legal effect where he can read it and has the opportunity to read it.²⁸ There is some confusion and apparent conflict among the authorities as to when, if ever, reformation may be had where there is a mistake of law, but the true rule seems to be that there is distinction between a mistake of law as to the legal effect of the contract actually made and a mistake of law in reducing it to writing whereby it does not carry out or effectuate the intention of the parties by reason of the use or omission of terms giving the instrument a meaning and legal effect not intended by the parties; and in the former case the contract will seldom, if ever, be reformed for a pure mistake of law,²⁹ while in the latter equity will usually grant relief.³⁰ So, relief may be granted where the mistake of law is combined with the mistake of fact or peculiar equitable features calling for the interposition of the court. And it has been held that where a married woman fails to join her husband in a deed, through the ill advice of a notary—to the effect that it is not necessary to carry out

184, 28 Atl. 219; *Snell v. Atlantic Fire &c. Ins. Co.*, 98 U. S. 85, 25 L. ed. 52; *Deseret National Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140.

²⁸ *Rochester &c. Land Co. v. Davis*, 79 Hun (N. Y.) 69, 29 N. Y. S. 1148.

²⁹ *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Steinfeld v. Zeckendorf*, 10 Ariz. 221, 86 Pac. 7, revd. 11 Ariz. 192, 89 Pac. 496; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918; *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591; *Toops v. Snyder*, 70 Ind. 554; *Taylor v. Butterick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. 530; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Ackerman v. Begrish* (N. J. Eq.), 50 Atl. 673; *Garnar v. Bird*, 57 Barb. (N. Y.) 277; *Champlin*

v. Laytin, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; *Mitchell v. Holman*, 30 Ore. 280, 47 Pac. 616; *Cochran v. Pew*, 159 Pa. St. 184, 28 Atl. 219; *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94; *Andrees v. Blazzard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354.

³⁰ *Richmond v. Ogden St. R. Co.*, 44 Ore. 48, 74 Pac. 333. See also, *Orr v. Echols*, 119 Ala. 340, 24 So. 357; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836, 134 Am. St. 60; *Woodbury Sav. Bank &c. Assn. v. Charles Oak Fire &c. Ins. Co.*, 31 Conn. 517; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Williams v. Hamilton*, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475, and note; *Conner v. Baxter*, 124 Iowa 219, 99 N. W. 726; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Wisconsin Marine &c. Bank v. Mann*, 100 Wis. 596, 76 N. W. 777.

the purpose of the parties—the deed may be reformed.³¹ A mistake as to the laws of another state or country is regarded as a mistake of fact against which relief will be granted in a proper case.³² So, likewise, is a mistake of parties as to their antecedent legal right of ownership or interest in the property or thing conveyed or contracted about.³³

§ 2370. Mutuality of mistake.—Equity has jurisdiction to reform an instrument only for the purpose of having it express the understanding and agreement of the parties. Hence, it is well settled, as a general rule, that the mistake must be mutual.³⁴ Where the parties have omitted from the drafted contract a part of their prior oral agreement in the belief that it can be enforced as a separate agreement, no reformation of the written contract will be allowed.³⁵ A written contract can not be reformed so as to express certain stipulations which were not assented to by the parties, even though one of the parties intended to have such stipulations made a part of the contract.³⁶ Thus, it has

³¹ *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785, and elaborate note on the entire subject of mistake of law as to effect of terms of instrument; *Jordan v. Stevens*, 51 Maine 78, 81 Am. Dec. 556; *McLeod v. Free*, 96 Mich. 57, 55 N. W. 685; *Lane v. Holmes*, 55 Minn. 379, 57 N. W. 132, 43 Am. St. 508; *Snell v. Atlantic Fire & C. Insurance Co.*, 98 U. S. 85, 25 L. ed. 52. See also, *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, 39 Am. St. 838.

³² *M'Cormick v. Garnett*, 5 De-G., M. & G. 278; *Rosenbaum v. United States Credit System Co.*, 64 N. J. L. 34, 44 Atl. 966, revd. 65 N. J. L. 255, 48 Atl. 237, 53 L. R. A. 499; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

³³ *Bingham v. Bingham*, 1 Ves. 126; *Bearn, Prince de v. Winans*, 111 Md. 434, 74 Atl. 626; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. 400. See also, vol. 1, § 114, and other authorities there cited; *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607;

Renard v. Clink, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458.

³⁴ *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58; *New York L. Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *Wilson v. Wyoming & C. Inv. Co.*, 129 Iowa 16, 105 N. W. 338; *C. H. Young Co. v. Springer*, 113 Minn. 382, 129 N. W. 773; *First Nat. Bank v. Hartford F. Ins. Co. (N. Mex.)*, 127 Pac. 1115; *Baynes v. Harris (N. Car.)*, 76 S. E. 230, and other cases cited in subsequent notes to this section.

³⁵ *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354; *Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148; *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535; *Mead v. Norfolk & C. R. Co.*, 89 Va. 296, 15 S. E. 497; *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245, 66 N. W. 196.

³⁶ *Tyson v. Chestnut*, 100 Ala. 571, 13 So. 763; *McGuigan v.*

been held that the mere fact that the plaintiff thought that a certain conveyance of four acres along a section line included a certain area along such line affords no ground for reformation.³⁷ Nor will reformation be decreed because one party, believing that the area of a lot offered for sale is less than it really is, sells it for less than it is in fact worth.³⁸ But reformation may be decreed where a mistake in the contract exists on the part of one of the parties and the other party is aware of his mistake and guilty of inequitable conduct, or where one party by his conduct or representations has led the other party into the mistake.³⁹

§ 2371. Mistake and fraud.—The general rule is well settled that to justify a court of equity in reforming a contract on the ground of mistake it must clearly appear that the mistake was mutual, or that it was a mistake on the part of the plaintiff accompanied by fraud on the part of the defendant, or by such acts on the part of the defendant as would clearly be inequitable between the parties.⁴⁰ Cases of the latter class are usually put upon the ground that a party may thus be prevented from taking advantage of his own wrong, and upon the principle that the party who led the other into the mistake or took advantage of the

Gaines, 71 Ark. 614, 77 S. W. 52; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Williams v. Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475; Buckley v. Frankfort, 19 Ky. L. 1167, 44 S. W. 139; Byrne v. Gunning, 75 Md. 30, 23 Atl. 1; Whitworth v. Lowell, 178 Mass. 43, 59 N. E. 760; Green v. Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. 577; Harbeck v. Peepin, 145 N. Y. 70, 39 N. E. 722; Mitchell v. Holman, 30 Ore. 280, 47 Pac. 616; Kropp v. Kropp, 97 Wis. 137, 72 N. W. 381.

³⁷ Clark v. Mossman, 58 Nebr. 87, 78 N. W. 399.

³⁸ Chute v. Quincy, 156 Mass. 189, 30 N. E. 550.

³⁹ Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881; Wilson v. Moriarity, 88 Cal. 207, 26 Pac. 85; Deischer v. Price, 148 Ill. 383, 36 N. E. 105;

Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114; Williams v. Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475; Crookston Imp. Co. v. Marshall, 57 Minn. 333, 59 N. W. 294, 47 Am. St. 612; Husted v. Van Ness, 158 N. Y. 104, 52 N. E. 645; Fotheringham v. Lockhart (S. Dak.), 138 N. W. 804; Kyle v. Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. 866. See also, Trenton Terra Cotta Co. v. Clay Shingle Co., 80 Fed. 46.

⁴⁰ Hawkins v. Hawkins, 50 Cal. 558; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259; Martin v. Christensen, 60 Minn. 491, 62 N. W. 1127; Kleinsorge v. Rohse, 25 Ore. 51, 34 Pac. 874; Archer v. California Lumber Co., 24 Ore. 341, 33 Pac. 526; Clack v. Hadley (Tenn. Ch.) 64 S. W. 403; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520.

mistake is estopped to deny that the contract which he induced the adversary party to think he was making is not in force as it would have been had the mistake not been made.⁴¹ Mere ignorance of the law will not ordinarily relieve a party from the performance of his written contract where he executed the same with full knowledge of all the facts, yet, where, on account of misplaced confidence, and because of some artifice or deception fraudulently practiced upon him by the other party, a material part of the contract was omitted from the writing, or he was otherwise so misled, equity will decree a reformation.⁴²

§ 2372. Fraud as a ground for remedy.—It has been held that while fraud may be a ground for rescission, it is not a ground for reformation,⁴³ but the better rule seems to be that fraud may be a ground for reformation,⁴⁴ especially if by reason thereof the real contract is not reduced to writing.⁴⁵ Thus, where the person signing a contract is illiterate and physically at a disadvantage, and the contract signed by him was unlike the contract agreed upon, he may maintain an equitable petition to have the writing reformed on the ground of fraud.⁴⁶ In short, a court of equity will usually reform a written instrument not only in cases of mutual mistake, but also when, by the fraud of

⁴¹ *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *McCormick & Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939; *McCormick v. Ratcliffe* (Tenn. Ch. App.), 64 S. W. 332; *Graham v. Guinn* (Tenn. Ch. App.), 43 S. W. 749; *James v. Cutler*, 54 Wis. 172, 10 N. W. 147.

⁴² *Hand v. Cox*, 164 Ala. 348, 57 So. 519; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Liverpool & London & Globe Ins. Co. v. Morris*, 79 Ga. 666, 5 S. E. 125; *Weeke v. Wortmann*, 84 Nebr. 217, 120 N. W. 933; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

⁴³ *Norris v. Colorado Turkey Honestone Co.*, 22 Colo. 162, 43 Pac. 1024.

⁴⁴ *Prater v. Bennett*, 98 Ga. 413, 25 S. E. 510; *Smith v. Jordan*, 13

Minn. 246, 97 Am. Dec. 232; *Miller v. St. Louis & Co. R. Co.*, 162 Mo. 424, 63 S. W. 85; *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *Moreland v. Atchison*, 19 Tex. 303; *Conn v. Hagan*, 93 Tex. 334, 55 S. W. 323.

⁴⁵ *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Granite Marble Co. v. Abbot*, 142 Mo. 279, 124 N. W. 264.

⁴⁶ *Donnelly v. Cuthbert Oil Co.*, 131 Ga. 694, 63 S. E. 257; *Gore v. Malsby*, 110 Ga. 893, 36 S. E. 315; *Georgia Medicine Co. v. Hyman*, 117 Ga. 851, 45 S. E. 238; *Phenix Jellico Coal Co. v. Grant*, 136 Ky. 751, 125 S. W. 165. See also, *Kyle v. Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. 866.

one of the parties thereto, the language used in it is materially different from that agreed upon.⁴⁷

§ 2373. **Matters subject to reformation.**—Courts of equity have jurisdiction to reform practically every kind of written instrument executed with contractual intent.⁴⁸ Thus, there may be a reformation of a deed of conveyance,⁴⁹ a deed of trust,⁵⁰ a contract of sale,⁵¹ a note and mortgage,⁵² a lease,⁵³ an insurance policy,⁵⁴ an official or indemnity bond,⁵⁵ a notary's certificate to an instrument,⁵⁶ or a contract of employment.⁵⁷ But courts of equity, ordinarily, at

⁴⁷ *Hand v. Cox*, 164 Ala. 348, 51 So. 519; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Efta v. Swanson*, 109 Minn. 94, 123 N. W. 56; *Mikesell v. Wehrle*, 37 Pa. Super. Ct. 231; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

⁴⁸ *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Wyche v. Greene*, 11 Ga. 159; *Allen v. Kitchen*, 16 Idaho 133, 100 Pac. 1052; *Prescott v. Hixon*, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. 291; *Conner v. Baxter*, 124 Iowa 219, 99 N. W. 726; *John T. Stewart Estate v. Falkenberg*, 82 Kans. 576, 109 Pac. 170; *Simpson Plumbing & Heating Co. v. Gesehke*, 75 N. J. Eq. 394, 72 Atl. 90; *Burgin v. Giberson*, 26 N. J. Eq. 72; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752; note in 28 L. R. A. (N. S.) 785.

⁴⁹ *Chaffin v. Hull*, 49 Fed. 524, affd. 54 Fed. 437, 4 C. C. A. 414; *Deischer v. Price*, 148 Ill. 383, 36 N. E. 105; *Breit v. Yeaton*, 101 Ill. 242; *Easter v. Severin*, 78 Ind. 540; *Taylor v. Deverell*, 43 Kans. 469, 23 Pac. 628; *Kendall v. Crawford*, 25 Ky. L. 1224, 77 S. W. 364; *Coppes v. Keystone Paint & Filler Co.*, 36 Pa. Super. Ct. 38; *Elliott v. Lackett*, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. 375. See as to relief from deed prepared by grantee which does not protect grantor's rights, *Weinhard v. Summerville*, 46 Wash. 127, 89 Pac. 490, 13 L. R. A. (N. S.) 1089 and note.

⁵⁰ *Craig v. Pendleton*, 89 Ark. 259, 116 S. W. 209.

⁵¹ *Thomas v. Winkler* (Iowa), 120 N. W. 680; *Ragsdale v. Turner*, 141 Iowa 604, 120 N. W. 109.

⁵² *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637; *Western Loan & Savings Co. v. Thibodeau*, 159 Fed. 370, 86 C. C. A. 370; *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267. See also, as to negotiable instruments, *German Nat. Bank v. Louisville Butchers' Hide & C. Co.*, 97 Ky. 34, 16 Ky. L. 881, 29 S. W. 882; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. 501; note in 28 L. R. A. (N. S.) 830. As to reformation of mortgage after foreclosure, see *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559, 39 L. R. A. (N. S.) 90.

⁵³ *Chelsea Nat. Bank v. Smith*, 74 N. J. Eq. 275, 69 Atl. 533.

⁵⁴ *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 So. 799, 138 Am. St. 171; *Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380; *Sykes v. Life Ins. Co.*, 148 N. Car. 13, 61 S. E. 610.

⁵⁵ *Board of School Inspectors of Peoria v. Tyng*, 135 Ill. App. 571; *Foley v. Hamilton*, 189 Iowa 686, 57 N. W. 439; *Aetna Indemnity Co. v. Baltimore & C. R. Co.*, 112 Md. 389, 76 Atl. 251, 136 Am. St. 389; *Bindseil v. Federal Union Surety Co.*, 130 App. Div. (N. Y.) 775, 115 N. Y. S. 447.

⁵⁶ *Booth Mercantile Co. v. Murphy*, 14 Idaho 212, 93 Pac. 777.

⁵⁷ *Blair v. Kingman Imp. Co.*, 82 Nebr. 344, 117 N. W. 773.

least, have no power to add to or reform a will on the ground of mistake.⁵⁸

§ 2374. **Defective execution.**—In case an instrument is drawn and executed with the intention of carrying into execution an oral agreement previously entered into, but by mistake of the draughtsman, either as to fact or law, it violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement.⁵⁹ But on the other hand, a court of equity will not reform an instrument by inserting in it a clause which the parties deliberately agreed to leave out.⁶⁰ Nor will a mistake in the execution of a writing be corrected in equity unless it appears that the writing does not contain the intention of the parties thereto at the time it was made.⁶¹ However, courts of equity have not hesitated to entertain jurisdiction to reform all deeds or contracts where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake.⁶² Thus, an omitted seal from a contract required to be under seal may be ordered placed on the instrument

⁵⁸ *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669; *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574; *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893, 55 Am. St. 527; *Goode v. Goode*, 22 Mo. 518, 66 Am. Dec. 630. But see *Box v. Barrett*, 14 R. 3 Eq. 244, 15 Wkly. Rep. 217; *Wood v. White*, 32 Maine 340, 52 Am. Dec. 654; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128.

⁵⁹ *Larkins v. Biddle*, 21 Ala. 252; *Butterfield v. McNamara*, 54 Conn. 94, 6 Atl. 188; *Chicago & A. R. Co. v. Green*, 114 Fed. 676; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Courtright v. Courtright*, 63 Iowa 356, 19 N. W. 255; *Lear v. Prather*, 89 Ky. 501, 11 Ky. L. 699, 12 S. W. 946; *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38, 5 Am. St. 816; *Truesdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Pitcher v. Hennessey*, 48 N. Y. 415; *Korne-*

gay v. Everett, 99 N. Car. 30, 5 S. E. 418; *Clayton v. Freet*, 10 Ohio St. 544; *Brock v. Odell*, 44 S. Car. 22, 21 S. E. 976; *Snell v. Atlantic Fire & Co. Insurance Co.*, 98 U. S. 85, 25 L. ed. 52; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. 972, 999; *McKenzie v. McKenzie*, 52 Vt. 271; *Wisconsin Bank v. Mann*, 100 Wis. 596, 76 N. W. 777.

⁶⁰ *Clark v. Hart*, 57 Ala. 390; *Hicks v. Coody*, 49 Ark. 425, 5 S. W. 714; *Stafford v. Staunton*, 88 Ga. 298, 14 S. E. 479; *Lee v. Kirby*, 104 Mass. 420; *Mead v. Norfolk R. Co.*, 89 Va. 296, 15 S. E. 497; *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245, 66 N. W. 196.

⁶¹ *Jarrell v. Jarrell*, 27 W. Va. 743.

⁶² *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121; *Wilson v. Stewart*, 63 Ind. 294; *Sanders v. Wagner*, 32 N. J. Eq. 506.

by a court of equity if it has been omitted by mistake.⁶³ Also, equity will insert an easement which has been omitted by the mistake of the parties, or correct an easement imperfectly conveyed.⁶⁴ Likewise, a deed may be reformed so as to include an exception of a certain lease,⁶⁵ or to except therefrom omitted reservations of timber,⁶⁶ of coal,⁶⁷ or of growing crops.⁶⁸ Also, the omission of a clause providing for a vendor's lien may be reformed.⁶⁹

§ 2375. Defective description.—Where parties have contracted for the sale, lease or mortgage of a certain tract of land, and by mutual mistake such land is erroneously described in the written contract of conveyance, equity will reform the instrument.⁷⁰ So, where the instrument purports to convey a tract entirely different from that intended

⁶³ *Allen v. Elder*, 76 Ga. 674, 2 Am. St. 63; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *Lebanon Sav. Bank v. Hallenbeck*, 29 Minn. 322, 13 N. W. 145; *Conover's Admr. v. Brown's Exrs.*, 49 N. J. Eq. 156, 23 Atl. 507, revd. 50 N. J. Eq. 753, 26 Atl. 915, 21 L. R. A. 321, 35 Am. St. 789; *Chase v. Peck*, 21 N. Y. 581; *Bullock v. Whipp*, 15 R. I. 195, 2 Atl. 309; *Probate Court v. May*, 52 Vt. 182.

⁶⁴ *Blakeman v. Blakeman*, 39 Conn. 320; *Schautz v. Keener*, 87 Ind. 258; *Howard v. Britton*, 67 N. H. 484, 41 Atl. 269; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644.

⁶⁵ *Jones v. New England Mortg. Sec. Co.*, 38 Wash. 637, 80 Pac. 796.

⁶⁶ *Smith v. Wakeman*, 114 Mich. 611, 72 N. W. 599.

⁶⁷ *Cook v. Liston*, 192 Pa. St. 19, 43 Atl. 389.

⁶⁸ *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709.

⁶⁹ *Worley v. Tuggle*, 4 Bush (Ky.) 168.

⁷⁰ *Green v. Dickson*, 119 Ala. 346, 24 So. 422, 72 Am. St. 920; *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081; *Blakeman v. Blakeman*, 39

Conn. 320; *Manogue v. Bryant*, 15 App. D. C. 245; *Hill v. Kuhlman*, 87 Fed. 498, 31 C. C. A. 87; *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; *Merchants' &c. Assn. v. Scanlan*, 144 Ind. 11, 42 N. E. 1008; *Herring v. Peaslee*, 92 Iowa 391, 60 N. W. 650; *Burton Land &c. Co. v. Handy*, 54 Kans. 13, 37 Pac. 108; *Wilson v. Jasper*, 90 Ky. 211, 12 Ky. L. 80, 13 S. W. 885; *Perry v. Knight*, 85 Maine 184, 27 Atl. 96; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820; *Layman v. Minneapolis Realty Co.*, 60 Minn. 136, 62 N. W. 113; *Brinson v. Berry* (Miss.), 7 So. 322; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *Sellwood v. Henneman*, 36 Ore. 575, 60 Pac. 12; *Elder v. First Nat. Bank*, 91 Tex. 423, 44 S. W. 62; *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. 179; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Ingles v. Merriman*, 96 Wis. 400, 71 N. W. 368. So where property is undescribed in an insurance policy by mutual mistake. *Holden v. Law Union &c. Ins. Co.* (Ore.), 127 Pac. 547.

by the parties, the mistake is one of fact, which equity will reform, unless it were caused by unconscionable negligence.⁷¹ The mistake may occur by omitting lands which were to have been included in the deed of conveyance;⁷² or by including lands which were not to be conveyed.⁷³ Other mistakes in the description of the property are such as misnaming the quarter section,⁷⁴ inserting an erroneous number of the lot,⁷⁵ block⁷⁶ or street number,⁷⁷ or designating the wrong point to be taken as a corner.⁷⁸

§ 2376. Ratification—Delay and acquiescence.—The right to reformation may be lost by a ratification of the mistake, but the fact that the mistake was unknown until shortly before suit was filed may relieve the plaintiff from the charge that he has ratified or acquiesced in it.⁷⁹ The law imposes upon parties in their dealings with each other the duty of exercising proper vigilance, and to apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them.⁸⁰ And where a party, upon obtaining knowledge of the facts entitling him to equitable relief, neglects to take the necessary steps to enforce such relief he may be held in law to have elected to abide by and af-

⁷¹ *Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909.

⁷² *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Smith v. Schweigener*, 129 Ind. 363, 28 N. E. 696; *Brinson v. Berry* (Miss.), 7 So. 322; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. 239; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156.

⁷³ *Thompson v. Ladd*, 169 Ill. 73, 48 N. E. 174; *Jordan v. Walters* (Iowa), 80 N. W. 530; *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67; *Stites v. Wiedner*, 35 Ohio St. 555; *Elder v. First Nat. Bank*, 91 Tex. 423, 44 S. W. 62; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094.

⁷⁴ *Epperson v. Epperson*, 161 Mo.

577, 61 S. W. 853; *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939.

⁷⁵ *Skerrett v. Presbyterian Society*, 41 Ohio St. 606; *Avery v. Hutton*, 23 Tex. Civ. App. 353, 56 S. W. 210.

⁷⁶ *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081.

⁷⁷ *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431.

⁷⁸ *Moye v. Lane*, 11 Ky. L. 296, 12 S. W. 154; *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820.

⁷⁹ *Detweiler v. Swartley*, 74 Kans. 855, 86 Pac. 141; *Urich v. Watts*, 69 N. J. Eq. 604, 66 Atl. 432.

⁸⁰ *Mamlock v. Fairbanks*, 46 Wis. 415, 1 N. W. 167, 32 Am. Rep. 716; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14.

firm the transaction as embodied in the written instrument delivered to him.⁸¹ Ratification or acquiescence after becoming aware of the mistake may thus bar relief by way of reformation.⁸² Taking inconsistent steps, or receiving benefits under the instrument after knowledge of the mistake generally has this effect.⁸³

§ 2377. Negligence of complaining party — Waiver. — Courts of equity will relieve against mistakes, and correct and reform instruments; but when it is sought to reform deeds or other written instruments, the mistake must be clearly proved. It has been held that it must also, generally, appear that the alleged mistake is as to a fact not only not known to the party, but which he could not, by reasonable diligence, have ascertained.⁸⁴ And the rule is generally applied that where a party accepts a written instrument in consummation of a prior oral agreement entered into, it is his duty to know its contents, unless there be fraud or mistake of such a nature that he could not reasonably have informed himself when put upon inquiry.⁸⁵ A party may also waive the mistake, or his right to reformation, either expressly or impliedly.⁸⁶ But continued possession of a lessee after the time when, according to a provi-

⁸¹ *Van Beck v. Milbrath*, 118 Wis. 42, 94 N. W. 657; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246, 89 N. W. 538, 67 L. R. A. 705.

⁸² *Snell v. Atlantic Fire & Co.*, 98 U. S. 85, 25 L. ed. 52.

⁸³ *Sibert v. McAvoy*, 15 Ill. 106; *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731; *Wittbecker v. Walters*, 69 Tex. 470, 6 S. W. 788; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811. See also, *Druiff v. Parker*, L. R. 5 Eq. 131. But compare *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121; *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. (U. S.) 494, 22 L. ed. 398.

⁸⁴ *Graham v. Berryman*, 19 N. J. Eq. 29, revd. 19 N. J. Eq. 574, 21

N. J. Eq. 370; *Burgin v. Giberson*, 26 N. J. Eq. 72; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Banfield v. Banfield*, 24 Ore. 571, 34 Pac. 659; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798. But see *Monroe v. Skelton*, 36 Ind. 302; *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943; *Bolden v. Wood*, 96 Md. 332, 53 Atl. 911.

⁸⁵ *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705. But see, *Holden v. Law Union & Ins. Co. (Ore.)*, 127 Pac. 547.

⁸⁶ *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Rindskopf v. Do-man*, 28 Ohio St. 516. See also, *Hough v. Smith*, 132 Ala. 204, 31 So. 500.

sion of the oral agreement, left out by mistake of the scrivener, repairs were to have been made, in expectation that they would be made, has been held not to amount to a waiver of the agreement in that respect.⁸⁷ So, a defendant in a suit for reformation does not waive his objection to a ruling of the court allowing a submission of the question of reformation by subsequently addressing the jury on that question.⁸⁸

§ 2378. Conditions precedent—Demand—Restoration or offer.—Where the only relief sought is the reformation of a contract, a previous demand for a correction of the mistake must generally be shown;⁸⁹ but where, in addition to the reformation, a recovery is asked, it is held that no prior demand is necessary.⁹⁰ And a demand is generally excused where the facts show that it would have been a vain and fruitless formality. Thus, it is not necessary for plaintiff to request defendant to correct a mistake in a deed sought to be reformed when the defendant had instituted a suit to eject plaintiff's tenant, thus showing that a demand would have been fruitless.⁹¹ Nor is it necessary to show an offer to place the defendant in statu quo, where, by mistake or fraud, the deed sought to be reformed covered a larger tract than intended by the parties, and no consideration was paid for such excess.⁹² Equity does not require a defrauded party to surrender to the perpetrator of the fraud the substance of the controversy in order to have the instrument reformed, but requires only that the concession shall extend

⁸⁷ *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. 106.

⁸⁸ *Skiba v. Gustin*, 161 Mich. 358, 126 N. W. 464.

⁸⁹ *Popijoy v. Miller*, 133 Ind. 19, 32 N. E. 713; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Sparta School Tp. of Dearborn County v. Mendell*, 138 Ind. 188, 37 N. E. 604. See also, *Bishop v. Brown*, 51 Vt. 330.

⁹⁰ *Miller v. Louisville &c. R. Co.*, 83 Ala. 274, 4 So. 842, 3 Am. St. 722; *Weathers v. Hill*, 92 Ala. 492,

9 So. 412; *Axtel v. Chase*, 83 Ind. 546; *Lucas v. Labertue*, 88 Ind. 277; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901. See also, *Hornick v. Union Pac. R. Co.*, 85 Kans. 568, 118 Pac. 60. This would seem to be so where fraud is alleged as the ground.

⁹¹ *Jones v. McNealy*, 139 Ala. 378, 35 So. 1022, 101 Am. St. 38; *Harold v. Weaver*, 72 Ala. 373.

⁹² *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567.

to placing the adversary party in the position that he would have occupied if the instrument had been written in conformity to the agreement.⁹³ A court of equity will not, however, grant a reformation of a deed and a mortgage for the purchase-money, in which the scrivener, by mistake, described other lands than those intended to be sold, unless the vendor is able to make such title to the land actually sold as he represented himself to have at the time the contract of sale was made.⁹⁴ And a court of equity will not ordinarily rescind or reform a contract for mistake unless the parties can be put back in statu quo.⁹⁵

§ 2379. Objections to relief—Laches and negligence—Adequate remedy at law.—A court of equity may refuse reformation where it appears that the plaintiff has been guilty of laches in the premises,⁹⁶ or where it appears that he was guilty of negligence in the transaction, especially if detrimental to the other party or innocent third persons.⁹⁷

⁹³ *Conn v. Hagan*, 93 Tex. 334, 55 S. W. 323. He who seeks equity, however, should do equity, and it has been held that the party seeking reformation for mistake should offer to do what he ought to do on his part toward a correction. *Boyce v. Watson*, 20 Ga. 517; *Mastin v. Halley*, 61 Mo. 196; *Ames v. New Jersey Franklinite Co.*, 12 N. J. Eq. 66, 72 Am. Dec. 385.

⁹⁴ *Adams v. Reed*, 11 Utah 480, 40 Pac. 720, *affd.* 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. 179. See also, *Hoppough v. Struble*, 60 N. Y. 430; *Morisey v. Swinson*, 104 N. Car. 555, 10 S. E. 754; *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3.

⁹⁵ *Cottrell v. Citizen's Sav. Bank*, 53 Minn. 201, 54 N. W. 1111; *Crosier v. Acer*, 7 Paige (N. Y.) 137; *Fink v. Farmers' Bank*, 178 Pa. St. 154, 35 Atl. 636, 56 Am. St. 746; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Kinney v. Consolidated Virginia Min. Co.*, 4 Sawy. (U. S.) 382, Fed. Cas. No. 7827.

⁹⁶ *Long v. Gilbert*, 133 Ga. 691, 66 S. E. 894; *Fisher v. Barnett*, 56 Ill. App. 649; *Citizens' Nat. Bank*

v. Judy, 146 Ind. 322, 43 N. E. 259; *Hurto v. Grant*, 90 Iowa 414, 57 N. W. 89; *Aetna Indemnity Co. v. Baltimore & C. R. Co.*, 112 Md. 389, 76 Atl. 251, 136 Am. St. 389; *Davidson v. Mayhew*, 169 Mo. 258, 68 S. W. 1031; *Kunz v. Mason*, 7 N. J. Eq. 616, 73 Atl. 869. See also, *Hough v. Smith*, 132 Ala. 204, 21 So. 500; *Sharp v. Behr*, 117 Fed. 864; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *White v. Campbell*, 80 Va. 180. But see *Schantz v. Keener*, 87 Ind. 258; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. 400; *Metropolitan Lumber Co. v. Lake Superior & C. Iron Co.*, 101 Mich. 577, 60 N. W. 278; *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1009; *Andrews v. Gillespie*, 47 N. Y. 487; *Griswold v. Hazard*, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. 972, 999.

⁹⁷ *Wood v. Patterson*, 4 Md. Ch. 335; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Miller v. St. Louis & C. R. Co.*, 162 Mo. 424, 63 S. W. 85; *Mitchell v. Holman*, 30 Ore. 280, 47 Pac. 616; *Diman v. Providence W. & B. R. Co.*, 5 R. I. 130; *Persinger's Admr. v. Chapman*, 93

Reformation will also be denied where it appears that the plaintiff has a complete and adequate remedy at law.⁹⁸ Thus, where compensatory damages may be recovered in an action at law, there is no occasion for the interference of equity.⁹⁹ The reformation of a deed to correct an alleged misdescription therein will be denied, where the true construction of the description gives plaintiff all the land to which he claims title.¹ And a lease will not be reformed in equity, so as to make it conform to another lease, where both leases have the same legal effect, as judicially construed.² Upon the ground that a court of equity will not do a vain and useless thing, reformation will not be given of a void mortgage, since, if the void mortgage were corrected, it would still be inoperative.³ Likewise, reformation will not be granted where the instrument sought to be reformed is illegal or contrary to good morals.⁴

§ 2380. Persons entitled to reformation.—Only a person who is prejudiced by a mistake in the instrument sought to be reformed is entitled to equitable relief.⁵ As a general rule, equity will not decree reformation of an instrument at the instance of a mere volunteer who is not a party to the instrument,⁶ but while this is true as a general proposition, if a voluntary grantee derive his title from a common source and the real intent of the common grantor is in dispute, such intent being ascertained, equity will en-

Va. 349, 25 S. E. 5. But see Colorado Invest. Loan Co. v. Beuchat, 48 Colo. 494, 111 Pac. 61; Pope v. Hooper, 84 Fed. 927, affd. 90 Fed. 451, 33 C. C. A. 595; Morrison v. Collier, 79 Ind. 417; Story v. Gammell, 68 Nebr. 709, 94 N. W. 982.

⁹⁸ Western Assur. Co. v. Ward, 75 Fed. 338, 21 C. C. A. 378; Ragsdale v. Turner, 141 Iowa 604, 120 N. W. 109; Blanchard v. Kenton, 4 Bibb. (Ky.) 451; Jordan v. Stevens, 51 Maine 78, 81 Am. Dec. 556.

⁹⁹ Phillips v. Port Townsend Lodge, 8 Wash. St. 529, 36 Pac. 476.

¹ Gardner v. Knight, 124 Ala. 273, 27 So. 298; Harm v. Voss (Iowa), 82 N. W. 753; British &c.

Mortgage Co. v. Long, 113 N. Car. 123, 18 S. E. 165.

² Liggett v. Shira, 159 Pa. St. 350, 28 Atl. 218.

³ McCrary v. Williams, 127 Ala. 251, 28 So. 695. See also, Powell v. Morisey, 98 N. Car. 426, 4 S. E. 185, 2 Am. St. 343; Langmede v. Weaver, 65 Ohio St. 17, 60 N. E. 992.

⁴ Phillips v. Thorp, 10 Ore. 494.

⁵ Miller v. Morris, 123 Ala. 164, 27 So. 401; Conner v. Wells, 91 Ind. 197; Norris v. Laberee, 58 Maine 260; Mlnazek v. Libera, 78 Minn. 151, 80 N. W. 866.

⁶ Gould v. Glass, 120 Ga. 50, 47 S. E. 505; Miles v. Miles, 84 Miss. 624, 37 So. 112.

force it by decreeing reformation.⁷ The grantee in a deed, upon proper showing, may obtain reformation thereof;⁸ and it has been held that the last grantee or any intermediate grantee in the series of conveyances may have a mistake in the series corrected.⁹ Likewise, the grantor in a deed, also, is entitled to have a mistake in the instrument corrected.¹⁰ Where a party to a contract is entitled to have the instrument reformed on the ground of fraud or mistake, and he assigns such contract to another who shares in the mistake, such assignee may obtain reformation.¹¹ So, a partner may have reformation of a firm contract where he can show that he has an interest in such partnership.¹²

§ 2381. Persons against whom relief granted.—In cases of mistake in written contracts equity may interfere, not only as between the original parties, but those claiming under them in privity, such as personal representatives, heirs, assignees and the like.¹³ Thus, the grantor in a deed may have a mistake therein corrected against the heirs at law of the grantee.¹⁴ So, it has been held that an action for reformation of a deed and damages for breach of covenant may be brought against a remote grantor.¹⁵ But to entitle the plaintiff to such relief as against persons other than a party to the original contract, such other party

⁷ *Miles v. Miles*, 84 Miss. 624, 37 So. 112.

⁸ *Bieler v. Dreher*, 129 Ala. 384, 30 So. 22.

⁹ *Tillis v. Smith*, 108 Ala. 264, 19 So. 374; *Blackburn v. Randolph*, 33 Ark. 119; *Greeley v. De Cottes*, 24 Fla. 475, 5 So. 239; *Parker v. Starr*, 21 Nebr. 680, 33 N. W. 424; *May v. Adams*, 58 Vt. 74, 3 Atl. 187.

¹⁰ *Dulo v. Miller*, 112 Ala. 687, 20 So. 981; *Savage v. McCorkle*, 17 Ore. 42, 21 Pac. 444. See also, *Burnell v. Morris*, 106 Ala. 349, 18 So. 82; *Turner v. Kelly*, 70 Ala. 85.

¹¹ *Bentley v. Smith*, 41 N. Y. 342, 1 Abb. Dec. 126. And the mortgagor may have the mortgage reformed for mistake in an action

by the assignee of the mortgage to foreclose it. *Andrews v. Gillespie*, 47 N. Y. 487.

¹² *Mlnazek v. Libera*, 78 Minn. 151, 80 N. W. 866.

¹³ *Allen v. Elder*, 76 Ga. 674, 2 Am. St. 63; *Morris v. Stern*, 80 Ind. 227; *Massey v. Lindeni*, 98 Minn. 133, 107 N. W. 146; *Hutsell v. Crewse*, 138 Mo. 1, 39 S. W. 449; *First Nat. Bank v. Bacon*, 113 App. Div. (N. Y.) 612, affd. 189 N. Y. 533, 82 N. E. 1126, 98 N. Y. S. 717; *Scheuer v. Chloupek*, 130 Wis. 72, 109 N. W. 1035; *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, 39 Am. St. 838.

¹⁴ *Savage v. McCorkle*, 17 Ore. 42, 21 Pac. 444.

¹⁵ *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273.

must usually have actual or constructive notice of the facts relative to the mistake.¹⁶ Reformation has often been granted as against purchasers chargeable with notice.¹⁷ However, reformation will not be granted where intervening rights of bona fide purchasers for value will be prejudiced,¹⁸ and it has been held that this protection will be extended to the grantee of a bona fide purchaser, even though he had notice of the mistake.¹⁹ A court of equity will grant reformation of instruments as against sureties as well as against principals.²⁰

§ 2382. Reformation as against persons not in being.—

As shown in the last preceding section, reformation may be had in a proper case even where one of the original parties to the contract has died. But the further question may arise as to whether it can be had as against one yet unborn or so as to cut off the rights or estate of one not thus in esse. It is held in a recent case that a deed giving a life estate, with remainder to the children of the life tenant, and to her brothers and sisters, can not, after a conveyance by such brothers of their interests by warranty deed to the life tenant before the birth of any children, be reformed so as to vest a fee in the first taker,

¹⁶ *San Jose Ranch Co. v. San Jose Land & Water Co.*, 132 Cal. 582, 64 Pac. 1097; *Way v. Roth*, 159 Ill. 162, 42 N. E. 321; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696; *Burner v. Higman & Skinner Co.*, 133 Iowa 315, 110 N. W. 580; *Brown v. Gwin*, 197 Mo. 499, 95 S. W. 208; *Carpenter Paper Co. v. Wilcox*, 50 Nebr. 659, 70 N. W. 228; *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722; *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000.

¹⁷ *Carpenter Paper Co. v. Wilcox*, 50 Nebr. 659, 70 N. W. 228; *Strang v. Beach*, 11 Ohio St. 238, 78 Am. Dec. 308; *May v. Adams*, 58 Vt. 74, 3 Atl. 187. See also, *Walls v. State*, 140 Ind. 16, 38 N. E. 177; *Marine Sav. Bank v. Norton*, 160 Mich. 614, 125 N. W. 754 (against bona fide creditors of grantor).

¹⁸ *Macon v. Dasher*, 90 Ga. 195, 16 S. E. 75; *Harms v. Coryell*,

177 Ill. 496, 53 N. E. 87; *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114; *Sentell v. Randolph*, 52 La. Ann. 52, 26 So. 797; *Dunham v. W. Steele Packing & Provision Co.*, 100 Mich. 75, 58 N. W. 627; *Cottrell v. Citizens' Sav. Bank*, 53 Minn. 201, 54 N. W. 1111; *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470.

¹⁹ *American Mortg. Co. v. O'Harra*, 56 Fed. 278, 5 C. C. A. 502; *Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973.

²⁰ *Olmsted v. Olmsted*, 38 Conn. 309; *Keith v. Henkleman*, 68 Ill. App. 623, affd. 173 Ill. 137, 50 N. E. 692; *State v. Frank's Admr.*, 51 Mo. 98; *Smith v. Allen*, 1 N. J. Eq. 43; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. 181; *Sikes v. Truitt*, 57 N. Car. 361; *Meininger v. State*, 50 Ohio St. 394.

since there is no one to represent the interests of the unborn children.²¹ And there are similar decisions in somewhat analogous cases.²²

§ 2383. Form of remedy.—The reformation of contracts is entirely within the jurisdiction of equity.²³ But in a proper case, a court of equity will, in the same proceeding, reform a contract and specifically enforce the same.²⁴ However, reformation, being an equitable remedy, can not be granted in an action at law in the absence of statute, but it is held that a stay should be granted to enable the issue to be tried in equity.²⁵ Many courts now, however, have both legal and equitable jurisdiction by statute, and where a court has both legal and equitable jurisdiction, a contract may be reformed and enforced in the same action.²⁶ It has likewise been held that a mortgage may be reformed and foreclosed in the same action.²⁷ The right to reformation may also be asserted by way of defense as well as by direct proceeding.²⁸

§ 2384. Jurisdiction of court.—The power to reform written instruments and to correct mistakes in contracts is

²¹ Downey v. Seib, 185 N. Y. 427, 78 N. E. 66, 8 L. R. A. (N. S.) 49.

²² Chaffin v. Hull, 49 Fed. 524, affd. 54 Fed. 437, 4 C. C. A. 414; Breit v. Yeaton, 101 Ill. 242. But see Kendall v. Crawford, 25 Ky. L. 1224, 77 S. W. 364.

²³ Miller v. Mutual Reserve Fund Life Assn., 113 Ill. App. 481; Eagle Fire Ins. Co. v. Spry Lumber Co., 138 Ill. App. 609; Rubenstein v. Radt, 133 App. Div. (N. Y.) 57, 117 N. Y. S. 893; Tautphoeus v. Harbor & Suburban Bldg. & Sav. Assn., 104 App. Div. (N. Y.) 451, 93 N. Y. S. 916, revd. 185 N. Y. 308, 78 N. E. 69.

²⁴ Huber Mfg. Co. v. Claudel, 71 Kans. 441, 80 Pac. 960; Painter v. Fletcher, 81 Kans. 195, 105 Pac. 500; O'Keefe v. Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428; Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022, 135 Am. St. 531; Riggs Land Co. v. Motley, 24 S. Dak. 499, 124 N. W. 438. As to re-

scission, see note in 28 L. R. A. (N. S.) 900.

²⁵ Martin v. Smith, 102 Maine 27, 65 Atl. 257; Winnipiseogee Paper Co. v. Eaton, 64 N. H. 234, 9 Atl. 221.

²⁶ Messer v. Hibernia Sav. & Loan Soc., 149 Cal. 122, 84 Pac. 835; Chapin v. Ross, 2 Cal. App. 433, 84 Pac. 53; Huber Mfg. Co. v. Claudel, 71 Kans. 441, 80 Pac. 960; Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273; Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 N. E. 449; Floars v. Aetna Life Ins. Co., 144 N. Car. 232, 56 S. E. 915, 11 L. R. A. (N. S.) 357n; Aetna Ins. Co. v. Brannon, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548.

²⁷ Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081; Christensen v. Hollingsworth, 6 Idaho 87, 53 Pac. 211, 96 Am. St. 256.

²⁸ Moore v. Moore, 151 N. Car. 555, 66 S. E. 598.

one of the ancient and well-established heads of the jurisdiction of courts of equity.²⁹ But by statute in some jurisdictions the power to reform instruments is conferred upon courts of law.³⁰ Under the mixed system of jurisprudence prevailing in some states, which permits the interposition of equitable defenses in actions at common law, reformation of an instrument may be had in an action at common law.³¹ A federal court, however, has no jurisdiction to reform a written contract in an action at law.³² But the court of claims of the District of Columbia has jurisdiction to reform a contract for public work in the District of Columbia in order to determine the amount due the contractor under the contract.³³

§ 2385. Limitation and laches.—The statute of limitations does not begin to run against a suit for reformation on the ground of mistake, ordinarily at least, until the mistake has been discovered.³⁴ The rule which governs the running of the statute of limitations in cases where equitable relief is sought on the ground of mistake is substantially the same as that applicable in cases of fraud.³⁵ As between the original parties to a contract, no rights of third parties having intervened, mere lapse of time, short of the statute of limitations, does not ordinarily deprive a party of the right of reformation,³⁶ and it has been held that one in possession of land as against one not in possession is not affected by the statute of limitations, however long his delay.³⁷ But a

²⁹ *Simpson v. Montgomery*, 25 Ark. 365, 99 Am. Dec. 228; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359.

³⁰ *American Assn. v. Williams*, 166 Fed. 17.

³¹ *Highlands v. Philadelphia & R. Co.*, 209 Pa. 286, 58 Atl. 560.

³² *York City School Dist. v. Aetna Indemnity Co.*, 131 Fed. 131.

³³ *District of Columbia v. Barnes*, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. 401.

³⁴ *Garst v. Brutsche*, 129 Iowa 501, 105 N. W. 452; *Bottorff v. Lewis*, 121 Iowa 27, 95 N. W. 262; *Gould v. Emerson*, 160 Mass. 438,

35 N. E. 1065, 39 Am. St. 501; *Emerson v. Navarro*, 31 Tex. 334, 98 Am. Dec. 534; *Stearns v. Page*, 7 How. (U. S.) 819, 12 L. ed. 928; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644 (not until assertion of adverse claim).

³⁵ *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51; *American Mining Co. v. Basin & Bay State Min. Co.*, 39 Mont. 476, 104 Pac. 525.

³⁶ *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112; *Radebaugh v. Scanlan* (Ind. App.), 82 N. E. 544.

³⁷ *Hill v. Clark* (Ky.), 106 S. W. 805.

court of equity will not grant relief by reformation to persons who have been guilty of laches, negligence or inequitable conduct,³⁸ especially when a change in the situation might injuriously affect the rights or status of innocent third parties,³⁹ and, as already shown in another section, lapse of time is often important and may, under particular circumstances, bar relief. The law will not undertake the care of persons who will not, with the ability, means and opportunity at hand, take care of themselves.⁴⁰ But numerous cases have held that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly.⁴¹

§ 2386. Parties to suit.—An instrument can not be reformed unless all the necessary parties are before the court.⁴² It is a general rule that all parties affected by the reformation are necessary parties.⁴³ This rule is inapplicable where other persons who may be interested are not within the jurisdiction of the court, but the court may de-

³⁸ *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Moore v. Crump*, 84 Miss. 612, 37 So. 109.

³⁹ *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705; *Slack v. Craft* (N. J.), 57 Atl. 1014; *Williamson v. Carpenter*, 205 Pa. 164, 54 Atl. 718; *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072.

⁴⁰ *Hawkins v. Hawkins*, 50 Cal. 558; *Commissioners of Funded Debt of San Jose v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *McKinney v. Herrick*, 66 Iowa 414, 23 N. W. 767; *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *In re Weller's Appeal*, 103 Pa. 594.

⁴¹ *Travelli v. Bowman*, 150 Cal. 587, 89 Pac. 347; *Los Angeles & R. Co. v. New Liverpool Salt Co.*, 150 Cal. 21, 87 Pac. 1029; *Taylor v. Glen Falls Ins. Co.*, 44 Fla. 273, 32 So. 887; *Snyder v. Ives*, 42 Iowa 157; *Story v. Gammell*, 68 Nebr. 709, 94 N. W. 982; *Albany City*

Sav. Inst. v. Burdick, 87 N. Y. 40; *Andrews v. Gillespie*, 47 N. Y. 487; *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *San Antonio Nat. Bank v. McLane*, 96 Tex. 48, 70 S. W. 201; *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311; *Lloyd v. Phillips*, 123 Wis. 627, 101 N. W. 1092.

⁴² *Moore v. Moore*, 151 N. Car. 555, 66 S. E. 598; *Bernheim v. Talbot*, 54 Ore. 30, 100 Pac. 1107; *Riggs Land Co. v. Motley*, 24 S. Dak. 499, 124 N. W. 438.

⁴³ *Oliver v. Clifton*, 59 Ark. 187, 26 S. W. 817; *Walters v. Mitchell*, 6 Cal. App. 410, 92 Pac. 315; *Gregory v. Copeland* (Ky.), 107 S. W. 768; *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449; *Farmers' & Mechanics' Bank v. Detroit*, 12 Mich. 445; *Busby v. Littlefield*, 31 N. H. 193; *Hagan v. McDermott*, 134 Wis. 490, 115 N. W. 138. See also, *Davis v. Rogers*, 33 Maine 222; *Gates v. Union Naval Stores Co.*, 92 Miss. 227, 45 So. 979.

cree reformation as to the parties before it.⁴⁴ In a suit to reform a deed the grantor in the deed, or, if he be dead, his heirs and those claiming under him, are necessary parties.⁴⁵ The grantee named in a deed who has paid the purchase-money may have it reformed on proof of mistake in the original agreement for the sale of the land, although he took no part in making the agreement.⁴⁶ A sheriff is a proper party plaintiff in a suit to reform a deed given by him under a mortgage foreclosure where by mistake a wrong description of the land has been inserted in the deed.⁴⁷ In an action to reform a mortgage, grantees of the mortgage who have parted with all their interest are not necessary parties, where the action is not for a personal judgment.⁴⁸ In a suit to correct the description in a trust deed and to foreclose the same, the holder of a second trust deed on the same property, containing the same errors, is entitled to be made a party to the suit and to have the same relief as to his deed.⁴⁹

§ 2387. Process and appearance.—The same rules in regard to process and appearance which govern equitable proceedings generally govern in suits in equity for reformation of contracts. The process is a writ commanding the officer to whom it is directed to summon the defendant to appear and answer the bill or complaint.⁵⁰ As a rule, chancery practice does not prescribe the form of the process, but it is held to be sufficient if it informs the defendant that a suit has been instituted against him, and a copy of the complaint exhibited is furnished to him at the time of service.⁵¹ Any irregularity in the process or service thereof is waived by a general appearance to the action,⁵²

⁴⁴ *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449.

⁴⁵ *Indian River Mfg. Co. v. Wooten*, 48 Fla. 271, 278, 37 So. 731.

⁴⁶ *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000.

⁴⁷ *Dodson v. Lomax*, 113 Mo. 555, 21 S. W. 25.

⁴⁸ *Lockwood v. White*, 65 Vt. 466, 26 Atl. 639.

⁴⁹ *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550.

⁵⁰ *Geiser Mfg. Co. v. Chewning*, 52 W. Va. 523, 44 S. E. 193.

⁵¹ *Levert v. Redwood*, 9 Port. (Ala.) 79.

⁵² *Cullum v. Batre's Exrx.*, 2 Ala. 415; *Standley v. Arnou*, 13 Fla. 361; *Miller v. Wilkins*, 79 Ga. 675, 4 S. E. 261; *Merrill v. Houghton*, 51 N. H. 61.

but the defendant may appear specially for the purpose of raising the question of jurisdiction.⁵³ As a rule, service may be had by reading the writ to the defendant personally or by leaving a copy at his last usual place of residence, but by the rules of practice of courts of equity of the United States, service of a defendant by leaving a copy of the process at his residence, it not appearing that it was left with any person, is held not to be a valid service.⁵⁴ Service of process may be had on nonresident defendants by publication for the time and in the manner prescribed by statute or the rules of chancery practice.⁵⁵

§ 2388. **Bill, complaint or petition.**—In a suit to reform a written contract, the complaint should distinctly set forth the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and show that it did not arise from the gross negligence of the plaintiff.⁵⁶ And a failure to allege such matters renders the complaint insufficient and demurrable.⁵⁷ But a complaint in an action to reform a deed has been held sufficient, in the absence of a demurrer, where it alleges that, to make the deed conform to the intent of the parties, the description should be amended, although it fails to allege that it was the intent of the grantee to purchase, and of the grantor to convey, the land thus described, or that the mistake was mutual, or that there was any contract between the parties to the deed.⁵⁸ A party has no standing in a court of equity to ask for the reforma-

⁵³ Merrill v. Houghton, 51 N. H. 61.

⁵⁴ Day v. Phelps, Fed. Cas. No. 3689, revd. 22 Wall. (U. S.) 60, 22 L. ed. 764.

⁵⁵ Beavers v. Davis, 19 Ala. 82.

⁵⁶ Durham v. Fire &c. Ins. Co., 22 Fed. 468, 10 Sawy. (U. S.) 526; Fly v. Brooks, 64 Ind. 50; Walls v. Mallott, 140 Ind. 16, 38 N. E. 177; Comstock v. Coon, 135 Ind. 640, 35 N. E. 909; Taylor v. Deverell, 43 Kans. 469, 23 Pac. 628; Lewis v. Lewis, 5 Ore. 169; Hyland v.

Hyland, 19 Ore. 51, 23 Pac. 811; Osborn v. Ketchum, 25 Ore. 352, 35 Pac. 972; Anderson v. Jarrett, 43 W. Va. 246, 27 S. E. 248.

⁵⁷ Norris v. Colorado &c. Honeystone Co., 22 Colo. 162, 43 Pac. 1024; Brintnall v. Briggs, 87 Iowa 538, 54 N. W. 531; Ramsey v. Smith, 32 N. J. Eq. 28; Rowe v. Horton, 65 Tex. 89.

⁵⁸ Osborn v. Ketchum, 25 Ore. 352, 35 Pac. 972; Hyland v. Hyland, 19 Ore. 51, 23 Pac. 811.

tion of a deed unless he shows an interest in the property to which the deed relates.⁵⁹ Mere suggestions of facts are not sufficient to warrant a decree of reformation;⁶⁰ the averments should be made directly and with particularity,⁶¹ care being exercised to allege that the parties agreed to the terms of the contract sought to be established,⁶² and to show that the decree sought will be effectual.⁶³ A pleading may be sufficient though reformation is asked for as alternative relief.⁶⁴ A contract may be reformed either under a prayer for general relief or under a specific prayer for reformation.⁶⁵

§ 2389. Cross-bill, cross-complaint or counterclaim. —

Reformation may, on proper showing, be decreed on a cross-complaint⁶⁶ or counterclaim.⁶⁷ The cross-complaint may be filed by the defendant against the plaintiff, or against other defendants, or against both, and must relate to matters in question in the original complaint,⁶⁸ and it must be so framed that they may be heard together, and one decree cover both.⁶⁹ The cross-complaint can not set up other and distinct matter from that which is the subject of litigation in the original complaint.⁷⁰ But this rule

⁵⁹ *Moore v. Tate*, 102 Ala. 320, 14 So. 635.

⁶⁰ *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550; *Sweet v. Marsh*, 133 App. Div. (N. Y.) 315, 117 N. Y. S. 930; *Reynolds v. Craft*, 38 Pa. Super. Ct. 46.

⁶¹ *Lucas v. Boyd*, 158 Ala. 338, 47 So. 1017; *Horne v. J. C. Turner Cypress Lumber Co.*, 55 Fla. 690, 45 So. 1016.

⁶² *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344.

⁶³ *Gilbert v. Auster*, 135 Wis. 581, 116 N. W. 177.

⁶⁴ *Drake v. Pueblo Nat. Bank*, 44 Colo. 49, 96 Pac. 999; *Bowers v. New York Life Ins. Co.*, 68 Fed. 785; *Jones v. Levy*, 92 Miss. 551, 46 So. 825.

⁶⁵ *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151; *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498.

⁶⁶ *Orr v. Echols*, 119 Ala. 340, 24

So. 357; *Smelser v. Pugh*, 29 Ind. App. 614, 64 N. E. 943.

⁶⁷ *Jackson v. McCalla*, 133 Ga. 749, 66 S. E. 918; *Fowle v. Pitt*, 183 Mass. 351, 67 N. E. 343.

⁶⁸ *Doremus v. Patterson*, 70 N. J. Eq. 296, 62 Atl. 3, affd. 71 N. J. Eq. 789, 71 Atl. 1134; *Ayres v. Carver*, 58 U. S. (17 How.) 591, 15 L. ed. 179.

⁶⁹ *McDougald v. Dougherty*, 14 Ga. 674.

⁷⁰ *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Pindall v. Trevor*, 30 Ark. 249; *Lund v. Skanes Enskilda Bank*, 96 Ill. 181; *Wight v. Downing*, 90 Ill. App. 1; *Hackley v. Mack*, 60 Mich. 591, 27 N. W. 871; *Gilmer v. Felhour*, 45 Miss. 627; *Kirkpatrick v. Corning*, 39 N. J. Eq. 136, affd. 40 N. J. Eq. 343; *Hildebrand v. Beasley*, 7 Heisk. (Tenn.) 121; *Ayres v. Carver*, 58 U. S. (17 How.) 591, 15 L. ed. 179.

does not preclude the introduction by cross-complaint of new facts bearing on the subject-matter of the original complaint.⁷¹ Any affirmative relief defendant deems himself entitled to must be set up and prayed in a cross-complaint.⁷² An answer and a cross-complaint should be separate pleadings, although it has been held that they may be filed under one cover.⁷³

§ 2390. Plea or answer.—It has been held that reformation may be sought by way of answer, asking affirmative relief to perfect a defense.⁷⁴ As a general rule, where the statute of limitations is relied on as a defense it must be pleaded.⁷⁵ Also, the defense of laches should be pleaded in the answer.⁷⁶ Where the defendant sets up a written contract in his answer, it has been held proper pleading for the plaintiff in reply thereto to allege mistake in such contract and pray for reformation.⁷⁷ In a suit to cancel a note and mortgage for alleged breach of warranty in a deed, the defendant may properly seek reformation of the deed and mortgage in one paragraph of his counterclaim or cross-complaint and cancellation in another paragraph of the same pleading.⁷⁸

§ 2391. Demurrer.—The office of a demurrer is to raise the question as to whether the facts stated will entitle a party seeking equitable relief to a decree.⁷⁹ And if it is a

⁷¹ Price v. Stratton, 45 Fla. 535, 33 So. 644; Powers v. Hibbard, 114 Mich. 533, 72 N. W. 339; Griffin v. Griffin, 112 Mich. 87, 70 N. W. 423.

⁷² Hendrix v. Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. 27; Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 60 C. C. A. 588; Nelson v. Lowndes County, 93 Fed. 538, 35 C. C. A. 419; Commercial Bank v. Sandford, 103 Fed. 98; Parrott v. Crawford, 5 Ind. Ter. 103, 82 S. W. 688; Briggs v. Kaufman, 2 Mich. N. P. 160; Parsons v. Smith, 46 W. Va. 728, 34 S. E. 922.

⁷³ United Cigarette Mach. Co. v. Wright, 132 Fed. 195.

⁷⁴ Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

⁷⁵ Pierce v. McClellan, 93 Ill. 245; Swinebroad v. Wood, 29 Ky. L. 1202, 97 S. W. 25; Cavanaugh v. Britt, 90 Ky. 273, 13 S. W. 922, 12 Ky. L. 204; Woods v. James, 87 Ky. 511, 10 Ky. L. 531, 9 S. W. 513.

⁷⁶ Harris v. Cornell, 80 Ill. 54.

⁷⁷ Courtney v. Blackwell, 150 Mo. 245, 51 S. W. 668; Turner v. Wabash R. Co., 114 Mo. 539, 90 S. W. 391.

⁷⁸ Johnson v. Sherwood, 34 Ind. App. 490, 73 N. E. 180.

⁷⁹ Johnson v. Roberts, 102 Ill. 655.

general demurrer, it admits the truth of all the facts stated in the pleading to which it is addressed.⁸⁰ Where the complaint shows want of jurisdiction on its face the objection is properly raised by demurrer thereto.⁸¹ Also laches, as shown on the face of the complaint, may be properly objected to by demurrer.⁸² Likewise, the want of proper parties, appearing on the face of the complaint, may be taken advantage of by demurrer.⁸³ But a demurrer for want of proper parties must point out the necessary parties, either by name or in some other manner, so as to enable plaintiff to amend by joining the proper parties.⁸⁴ Where a complaint to reform an insurance policy shows on its face that the agent of the insurer with whom the contract was made had no authority to make the contract in the form in which it was sought to be enforced, the objection may be raised by demurrer.⁸⁵ As a general rule, where the statute of limitations is relied on as a defense it must be pleaded, as a demurrer will not be sufficient to raise the question.⁸⁶

§ 2392. Issue, proof and variance.—In a suit to reform a written contract the proof must show substantially as alleged in the pleadings that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties.⁸⁷ It is a fundamental rule of equity practice that there must be no material variance between the al-

⁸⁰ *Anderson v. Walton*, 35 Ga. 202; *Myers v. Wright*, 33 Ill. 284; *Baker v. Atkins*, 62 Maine 205; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67.

⁸¹ *Kendick v. Whitfield*, 20 Ga. 379; *Emerson v. Western Union R. Co.*, 75 Ill. 176; *Smith v. Morehead*, 59 N. Car. 360; *In re Maguire's Appeal*, 102 Pa. St. 120.

⁸² *Scruggs v. Decatur Mineral & Land Co.*, 86 Ala. 173, 5 So. 440; *Sublette v. Tinney*, 9 Cal. 423; *Ilett v. Collins*, 103 Ill. 74; *Lansdale v. Smith*, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. 350.

⁸³ *Deniston v. Hoagland*, 67 Ill. 265; *Ellicott v. Ellicott*, 2 Md. Ch.

468; *Harding v. Cobb*, 47 Miss. 599; *Little v. Buie*, 58 N. Car. 10; *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469.

⁸⁴ *Chambers v. Wright*, 52 Ala. 444; *Dwight v. Central Vermont R. Co.*, 9 Fed. 785, 20 Blatchf. (U. S.) 200; *Parker v. Cochran*, 97 Ga. 249, 22 S. E. 961; *Caldwell v. Blackwood*, 54 N. Car. 274.

⁸⁵ *Vardeman v. Penn. Mut. Life Ins. Co.*, 125 Ga. 117, 54 S. E. 66.

⁸⁶ *Swinebroad v. Wood*, 29 Ky. L. 1202, 97 S. W. 25.

⁸⁷ *Conner v. Baxter*, 124 Iowa 219, 99 N. W. 726; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705.

legations of the pleadings and the proof offered in support thereof.⁸⁸ And in case a material averment in a complaint is neither admitted nor denied by the answer, proof must be made in support of it.⁸⁹ Evidence will not be admitted relative to matter not alleged in the complaint or answer.⁹⁰ Where it is sought to reform a written contract, the instrument must be proved either by its introduction in evidence or otherwise, and in case there is no evidence of its contents there is a failure of proof.⁹¹ To entitle a party to the decree of a court of equity reforming a written instrument, on the ground of mistake, he must show a plain mistake, clearly made out by satisfactory proofs.⁹²

§ 2393. Presumption and burden of proof.—In an action to reform an instrument for mistake, if the mistake is not admitted, the presumption is that the contract, as executed, contains the agreement of the parties, and to overcome this presumption the mistake must be proved by satisfactory evidence.⁹³ And the burden is upon the plaintiff to establish his contention by, at least, a clear preponderance of the evidence.⁹⁴ Indeed, a higher degree of proof is usually required in a suit to reform a written contract in equity than in ordinary civil actions, and a party seeking

⁸⁸ *Moore v. Sayre*, 4 Ill. App. 248; *Goodrich v. Fogarty*, 130 Iowa 223, 106 N. W. 616.

⁸⁹ *Smith v. Ewing*, 23 Fed. 741; *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937; *Lunn v. Johnson*, 38 N. Car. 70. But see as to what is not a fatal variance, *Cordes v. Coates*, 78 Wis. 641, 47 N. W. 949.

⁹⁰ *Trapnall v. Burton*, 24 Ark. 371; *Maher v. Bull*, 44 Ill. 97; *Peelman v. Peelman*, 4 Ind. 612; *Moores v. Moores*, 16 N. J. Eq. 275; *Shur v. Statler*, 2 Ohio Dec. 70.

⁹¹ *Webb v. Hammond*, 31 Ind. App. 613, 68 N. E. 916.

⁹² *Nevius v. Dunlap*, 33 N. Y. 676; *Lyman v. United Insurance Co.*, 2 Johns. Ch. (N. Y.) 630. But see *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923.

⁹³ *Kilgore v. Redmill*, 121 Ala.

485, 25 So. 766; *Miller v. Uhlman*, 198 Fed. 233; *Duke v. Stuart*, 45 Misc. (N. Y.) 120, 91 N. Y. S. 885, affd. 105 App. Div. (N. Y.) 376, 94 N. Y. S. 235; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902.

⁹⁴ *Ezell v. Humphrey*, 90 Ark. 24, 117 S. W. 758; *Miller v. Stuart*, 107 Md. 23, 68 Atl. 273; *Parker v. Vanhoozer*, 142 Mo. 621, 44 S. W. 728; *Griffin v. Miller*, 188 Mo. 327, 87 S. W. 455; *Duke v. Stuart*, 45 Misc. (N. Y.) 120, 91 N. Y. S. 885, affd. 105 App. Div. (N. Y.) 376, 94 N. Y. S. 235; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. 863; *Percy v. First Nat. Bank*, 110 Va. 129, 65 S. E. 475; *Bibb v. American Coal & Iron Co.*, 109 Va. 261, 64 S. E. 32; *Heffron v. Fogel*, 40 Wash. 698, 82 Pac. 1003.

such relief has the burden of establishing his case by full, clear and satisfactory evidence,⁹⁵ and some courts have held that a mistake must be established beyond reasonable controversy,⁹⁶ whether it be due to mutual mistake or to unilateral mistake induced by fraud.⁹⁷

§ 2394. Weight and sufficiency of evidence.—Before a court of equity will decree a reformation of a contract which has been reduced to writing, the evidence of mistake and of the alleged modification must be clear and convincing.⁹⁸ In the preceding section we stated that the party seeking the reformation has the burden of overcoming the presumption that the instrument embodies the final agreement of the parties, and it is held that he can accomplish this only by clear and convincing evidence.⁹⁹ Most cases hold that to permit reformation the evidence must be much clearer and more than a mere preponderance,¹ but in other

⁹⁵ *Berry v. Sowell*, 72 Ala. 14; *Moore v. Tate*, 114 Ala. 582, 21 So. 820; *Tiller v. Wilson*, 79 Ark. 256, 96 S. W. 380; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Rexroat v. Vaughn*, 181 Ill. 167, 54 N. E. 917; *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; *Whitt v. Whitt*, 145 Ky. 367, 140 S. W. 570; *Story v. Gammell*, 68 Nebr. 709, 94 N. W. 982; *Stein v. Phillips*, 47 Ore. 545, 84 Pac. 793; *Dorris v. Morrisdale Coal Co.*, 215 Pa. 638, 64 Atl. 855; note in 28 L. R. A. (N. S.) 917, 918, citing many additional cases.

⁹⁶ *Page v. Whatley*, 102 Ala. 473, 50 So. 116; *Hand v. Cox*, 164 Ala. 348, 51 So. 519; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836, 134 Am. St. 60; *Wilson-Ward Co. v. Farmers' Union Gin. Co.*, 94 Ark. 200, 126 S. W. 847; *Andrews v. Andrews*, 81 Maine 337, 17 Atl. 166; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Fuller v. Knapp*, 82 Vt. 166, 72 Atl. 688; *Fairbanks v. Harvey*, 83 Vt. 283, 75 Atl. 268.

⁹⁷ *Fairbanks v. Harvey*, 83 Vt. 283, 75 Atl. 268.

⁹⁸ *Wilson v. Morris*, 4 Colo. App.

242, 36 Pac. 248; *Gray v. Merchants' Ins. Co.*, 113 Ill. App. 537; *Griffith v. York (Ky.)*, 153 S. W. 31; *Tucker v. Madden*, 44 Maine 206; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 950; *Wilson v. Deen*, 74 N. Y. 531; *Sawyer v. Sawyer*, 106 Tenn. 597, 61 S. W. 1022; *Phillips v. Port Townsend Lodge*, 8 Wash. St. 529, 36 Pac. 476; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798.

⁹⁹ *Page v. Whatley*, 102 Ala. 473, 50 So. 116; *White v. Henderson-Boyd Lumber Co.*, 165 Ala. 218, 51 So. 764; *Ezell v. Humphrey*, 90 Ark. 24, 117 S. W. 758; *Wilson-Ward Co. v. Farmers' Union Gin. Co.*, 94 Ark. 200, 126 S. W. 847; *Loukowski v. Pryor*, 46 Colo. 584, 106 Pac. 7; *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550; *Prior v. Davis*, 58 Fla. 510, 50 So. 535; *Mahoning Coal Co. v. Dowling (Ky.)*, 124 S. W. 370; *Gray v. Jenkins*, 151 N. Car. 80, 65 S. E. 644; *Percy v. First Nat. Bank*, 110 Va. 129, 65 S. E. 475; *Perkins v. Herring*, 110 Va. 822, 67 S. E. 515.

¹ *Hough v. Smith*, 132 Ala. 204,

cases it is intimated that a preponderance of the evidence is sufficient.² The so-called parol evidence rule generally has no application in proceedings to reform a written contract, and extrinsic evidence is admissible, not to vary or explain the terms of the instrument as executed, but to show the intention of the parties to add certain stipulations omitted by mutual mistake.³ Circumstantial evidence may be given as to the manner in which the mistake occurred.⁴

§ 2395. Relief awarded.—The form of granting relief in an action brought to reform a written contract is not material, except that it must conform to the equities in the case.⁵ The court is not limited to one form of remedy, but may decide as to the measure of relief to be granted.⁶ Thus, a court of equity, having acquired jurisdiction to reform an instrument, may order, in its decree, the correction of such instrument, restrict its enforcement by injunction,⁷ or direct the execution of a new instrument to correct the error.⁸ Also, damages for breach of the contract as reformed may be awarded in the same action,⁹ and specific enforcement may be decreed after such reformation.¹⁰ But in a suit for reformation it has been held that a decree for

31 So. 500; *Loukowski v. Pryor*, 46 Colo. 584, 106 Pac. 7; *Sauer v. Nehls*, 121 Iowa 184, 96 N. W. 759; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Mikiska v. Mikaska*, 90 Minn. 258, 95 N. W. 910; *Bartlett v. Brown*, 121 Mo. 353, 25 S. W. 1108; *Allison Brothers' Co. v. Allison*, 144 N. Y. 21, 38 N. E. 956.

² *Salzman v. Machinery Mut. Ins. Assn.*, 142 Iowa 99, 120 N. W. 697.

³ 1 *Elliott Ev.* §§ 594, 595; *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697; *Story v. Gammell*, 68 Nebr. 709, 94 N. W. 982; *First Nat. Bank v. Hartford F. Ins. Co. (N. Mex.)*, 127 Pac. 1115; *Stoll v. Nagel*, 15 Wyo. 86, 86 Pac. 26.

⁴ *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983; *Layman v. Minneapolis Realty Co.*, 60 Minn. 136, 62 N. W. 113.

⁵ *Fairbanks v. Harvey*, 83 Vt. 283, 75 Atl. 268.

⁶ *White v. Glazer (Ky.)*, 106 S. W. 289; *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449.

⁷ *Fairbanks v. Harvey*, 83 Vt. 283, 75 Atl. 268.

⁸ *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964, 32 L. R. A. (N. S.) 284n.

⁹ *West v. Suda*, 69 Conn. 60, 36 Atl. 1015.

¹⁰ *Craig v. Pendleton*, 89 Ark. 259, 116 S. W. 209; *Sykes v. Life Ins. Co.*, 148 N. Car. 13, 61 S. E. 610; *Hughes v. Payne*, 22 S. Dak. 293, 117 N. W. 363. Or even without first directing formal reformation. *Huber Mfg. Co. v. Clandel*, 71 Kans. 441, 80 Pac. 960. See also, *Capital City Bank v. Hilson (Fla.)*, 60 So. 189.

rescission can not be obtained.¹¹ The decree of reformation should set out the details of the reformation so that it will show how the instrument, when corrected, will read.¹²

¹¹ Lucas v. Boyd, 158 Ala. 338, 125 Ill. App. 370. See also, Smith v. Greeley, 14 N. H. 378; Craig v. 47 So. 1017.

¹² Gray v. Merchants' Ins. Co., Kittridge, 23 N. H. 236.

CHAPTER LIII.

RESCISSION AND CANCELATION.

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| <p>§ 2410. Nature and scope of remedy.</p> <p>2411. Exclusive jurisdiction of equity.</p> <p>2412. Grounds for remedy in general.</p> <p>2413. Misrepresentation and fraud as ground.</p> <p>2414. Remedy given for expressions of opinion.</p> <p>2415. Illegality as ground for remedy.</p> <p>2416. Inadequate consideration as ground for rescission.</p> <p>2417. Remedy given for mistake.</p> <p>2418. Remedy where instrument is a cloud on title.</p> <p>2419. Remedy given where instrument negotiable.</p> <p>2420. Remedy given to prevent multiplicity of suits.</p> <p>2421. Remedy given for nonperformance.</p> <p>2422. Remedy where specific performance denied.</p> <p>2423. Remedy against unauthorized contracts.</p> <p>2424. Inadequacy of legal remedy.</p> <p>2425. Inadequacy of legal remedy where instrument void.</p> <p>2426. Inadequacy of legal remedy where instrument obtained by fraud.</p> <p>2427. Inadequacy of legal remedy with respect to other grounds.</p> <p>2428. When a remedy at law exists.</p> <p>2429. Estoppel where contract or deed ratified.</p> <p>2430. Acts amounting to ratification.</p> <p>2431. Effect of laches.</p> <p>2432. Relief where duress is continued.</p> <p>2433. Effect of laches and ratification with knowledge of facts.</p> | <p>§ 2434. Placing defendant in statu quo.</p> <p>2435. Return of consideration received.</p> <p>2436. When restoration must be made.</p> <p>2437. Restoration by different persons.</p> <p>2438. Restoration in case of illegal contract.</p> <p>2439. Maxim "He who comes into equity must come with clean hands."</p> <p>2440. Illustrations and exceptions to maxim.</p> <p>2441. Bona fide purchasers—Relief against.</p> <p>2442. Parties to suit—In general.</p> <p>2443. Plaintiffs in suits to cancel conveyances.</p> <p>2444. Plaintiffs in suits to cancel other instruments.</p> <p>2445. Defendants—In general.</p> <p>2446. Defendants in suits to cancel conveyances.</p> <p>2447. Defendants in suits to cancel other instruments.</p> <p>2448. Complaint or bill.</p> <p>2449. Allegations of bill or complaint.</p> <p>2450. Allegations of bill or complaint—Pleading facts.</p> <p>2451. Allegations of bill or complaint—Placing defendant in statu quo.</p> <p>2452. Demurrer or motion to make more specific.</p> <p>2453. Plea or answer.</p> <p>2454. Counterclaim or cross-bill.</p> <p>2455. Amendments.</p> <p>2456. Variance.</p> <p>2457. Burden of proof in general.</p> <p>2458. Burden of proof in particular cases.</p> <p>2459. Sufficiency of proof.</p> <p>2460. Relief granted in general.</p> <p>2461. Cancellation, rescission, or reconveyance.</p> <p>2462. Alternative, additional or incidental relief.</p> |
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§ 2410. **Nature and scope of remedy.**—Rescission and cancelation, in the sense in which the terms are here used, may be regarded as one and the same remedy; the decree for rescission generally directs the cancelation of an instrument which embodies the evidence of the contract in question, or of the obligation arising therefrom, thereby rendering the decree of the court effectual and complete.¹ So, where rescission as well as cancelation is sought, the latter remedy is a mere auxiliary to effectuate the rescission.² The purpose of this remedy in equity is to procure the cancelation of a contract or conveyance. The same purpose is often accomplished by an action at law. Thus, where an action is brought to recover possession of chattels, or, under some circumstances, for the recovery of real estate, or for the recovery of damages, although no mention is made either in the pleadings or judgment, a contract or conveyance, as the case may be, is virtually canceled.³ In cases where fraud is the ground for rescission, the defrauded party may treat the contract at an end and resort to a court of law for relief, or he may seek the aid of a court of equity to have the contract avoided, and perhaps incidentally to obtain further relief.⁴

§ 2411. **Exclusive jurisdiction of equity.**—While the same facts which are the occasion of the equitable remedy of rescission are usually grounds for an action at law, rescission may properly be classed in the exclusive jurisdic-

¹ *Scruggs v. Driver's Exrs.*, 31 Ala. 274; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Wilson v. Getty*, 57 Pa. St. 266. But, as elsewhere shown, there may also be a rescission by agreement, or the conduct of one party may be such as to justify the other in treating the contract as rescinded without applying to a court. See notes in *Ann. Cas.* 1912A, 1258 (by new contract); 39 L. R. A. (N. S.) 829 (cancelation of insurance policy); ante, vol. 3, ch. 40, on Discharge by Agreement; and ch. 45, on Merger and

Bankruptcy; post, vol. 5, Tit. "Sales."

² *Scruggs v. Driver's Exrs.*, 31 Ala. 274; *Johnson v. United R. Co.*, 227 Mo. 423, 127 S. W. 63; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

³ 1 Pom. Eq. Jur. (3d ed.) § 110; *Gewin v. Shields*, 167 Ala. 593, 52 So. 887; *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 7 Am. St. 663.

⁴ *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 7 Am. St. 663; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

tion of equity, for the reason that equity courts alone can confer the remedy of rescission and cancelation of written contracts.⁵ Equity having once acquired jurisdiction in a suit for rescission, it will retain it to settle the equities between the parties,⁶ and may grant both equitable and legal relief, providing such relief is prayed, and necessary facts are pleaded.⁷ But a court of equity can not grant relief inconsistent with the cause of action pleaded or proven.⁸ In a suit brought for specific performance of a contract, where the prayer is for general relief and the proof is sufficient to warrant a decree of rescission, it may be granted.⁹ And a court of equity will refuse to rescind a contract in many cases where it would also refuse a decree of specific performance,¹⁰ though rescission may be said to be the converse of specific performance¹¹

⁵ Walling v. Thomas, 133 Ala. 426, 31 So. 982; Lewis v. Tobias, 10 Cal. 574; Ferguson v. Fisk, 28 Conn. 501; Union Life Ins. Co. v. Riggs, 123 Fed. 312, revd. 129 Fed. 207, 63 C. C. A. 365; Ridge v. Manker, 132 Fed. 599, 67 C. C. A. 596; Walker v. Hunter, 27 Ga. 336; Fowler Cycle Works v. Fraser, 110 Ill. App. 126; Jones v. Neely, 72 Ill. 449; Fitzmaurice v. Mosier, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. 854; Davis v. Peabody, 170 Mass. 397, 49 N. E. 750; Russo v. Chapin, 197 Mass. 64, 83 N. E. 308; Cogswell v. Mitts, 90 Mich. 353, 51 N. W. 514; Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686; Anable v. McDonald Land & Min. Co., 144 Mo. App. 303, 128 S. W. 38; Snyder v. Crutcher, 137 Mo. App. 121, 118 S. W. 489; Young Lock Nut Co. v. Brownley Mfg. Co. (N. J.), 34 Atl. 947; Davis v. William Rosenzweig Realty Operating Co., 192 N. Y. 128, 84 N. E. 943, 127 Am. St. 890; Becker v. Church, 115 N. Y. 562, 22 N. E. 748; Tillamook County v. Wilson River Road Co., 49 Ore. 309, 89 Pac. 958; Wilson v. Getty, 57 Pa. St. 266; Taylor v. National Bank, 6 S. Dak. 511, 62 N. W. 99; Moore v. Cross (Tex. Civ. App.), 26 S. W. 122, revd. 87 Tex. 557, 29 S. W. 1051; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82; Garrett v. Finch, 107 Va.

25, 57 S. E. 604; Riverside Residence Co. v. Husted, 109 Va. 688, 64 S. E. 958; Bluett v. Wilce, 43 Wash. 492, 86 Pac. 853; Womelsdorf v. O'Connor, 53 W. Va. 314, 44 S. E. 191; Douglas v. Walbridge, 38 Wis. 179; Mahn v. Chicago & M. Elec. R. Co., 140 Wis. 8, 121 N. W. 645.

⁶ Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767; Bollnow v. Roach, 210 Ill. 364, 71 N. E. 454; Albin v. Parmele, 70 Nebr. 746, 99 N. W. 646; Keister v. Cubine, 101 Va. 768, 45 S. E. 285.

⁷ Boddie v. Bush, 136 Ala. 560, 33 So. 826; Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158, 71 Pac. 1121; Gillis v. Arringdale, 135 N. Car. 295, 47 S. E. 429.

⁸ Kerr v. Southwick, 120 Fed. 772, 57 C. A. 136; Butler v. Carvin, 33 Wash. 621, 74 Pac. 813.

⁹ Stephenson v. Stephenson, 24 Ky. L. 1873, 72 S. W. 742; Coffinberry v. Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069.

¹⁰ Redshaw v. Governor & Co. of the Bedford Level, 1 Eden 346; Morse v. Beale, 68 Iowa 463, 27 N. W. 461; Young Lock Nut Co. v. Brownley Mfg. Co. (N. J.), 34 Atl. 947; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721.

¹¹ Smith v. Hughes, 50 Wis. 620, 7 N. W. 653.

§ 2412. **Grounds for remedy in general.**—Some substantial reason must be shown for setting aside a contract before a court of equity will lend its aid to a party seeking the relief.¹² Reformation is the proper remedy where the instrument, by reason of mistake, fails to express the actual agreement of the parties, but when the minds of both parties have failed to meet upon the same matters, so that no agreement at all has been made, or in some instances where the agreement is different, with respect to its subject-matter or terms, from that which was intended, rescission is the proper remedy.¹³ In order for the court to grant relief by way of rescission it must generally appear that the instrument or contract sought to be canceled was procured through fraud, accident, mistake, duress or undue influence;¹⁴ or that the party executing the contract was incompetent;¹⁵ or at least it must be shown that to deny the plaintiff equitable relief he will sustain an injury for which a court of law can not adequately compensate him.¹⁶ Where no injury whatever is caused or threatened to the plaintiff by the existence of the instrument uncanceled and in other hands, a court of equity will not interfere.¹⁷

¹² Scanlan v. Gillan, 5 Cal. 182.

¹³ Hunt v. Rousmaniere, 1 Pet. (U. S.) 1, 7 L. ed. 27; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Williams v. United States, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. 457; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698.

¹⁴ Cornish v. Johns, 74 Ark. 231, 85 S. W. 764; Gatje v. Armstrong, 145 Cal. 370, 78 Pac. 872; Manning v. Berdan, 135 Fed. 159; Tucker v. Osbourn, 101 Md. 613, 61 Atl. 321; Old Dominion Copper Min. & Smelt. Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. 479; Douglass v. Longcor, 138 Mich. 69, 100 N. W. 1004; Sims v. Sims, 101 Mo. App. 407, 74 S. W. 449; Hubbard v. International Mercantile Agency, 68 N. J. Eq. 434, 59 Atl. 24; Wagner v. Fehr, 211 Pa. 435, 60 Atl. 1043; Troxler v. New Era Bldg. Co., 137 N. Car. 51, 49 S. E. 58; Paddock v. Bray, 40 Tex.

Civ. App. 226, 88 S. W. 419; Gray v. Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220.

¹⁵ Parker v. Ballard, 123 Ga. 441, 51 S. E. 465; Logan v. Vanarsdall, 27 Ky. L. 822, 86 S. W. 981; Sterling v. Sterling, 98 App. Div. (N. Y.) 426, 90 N. Y. S. 306.

¹⁶ Stacey v. Walter, 125 Ala. 291, 28 So. 89, 82 Am. St. 235; Davis v. Moorefield, 40 Ga. 185; Gore v. Kramer, 117 Ill. 176, 7 N. E. 504; Benton County v. Morgan, 163 Mo. 661, 64 S. W. 119.

¹⁷ Fitch v. Bunch, 30 Cal. 208; Johnson v. Johnson, 59 Ga. 613; Huff v. Jennings, Morris (Iowa) 454; Morris v. McMillen, 3 A. K. Marsh (Ky.) 565; Jewett v. Davis, 10 Allen (Mass.) 68; Culligan v. Wingerter, 57 Mo. 241; McArthur v. McArthur (N. J.), 19 Atl. 1094; Johnson v. Crane, 40 Barb. (N. Y.) 78.

§ 2413. **Misrepresentation and fraud as ground.**—Fraud, in some form or other, is the most usual ground for invoking the aid of equity to cancel a written instrument, and it is held that a contract may be rescinded for an innocent misrepresentation which was a sufficient inducement thereto,¹⁸ or for a promise made with an intention not to perform it.¹⁹ But fraudulent representations are not, ordinarily, ground for rescission if the means of knowledge respecting the matters falsely represented were equally open to both parties.²⁰ In cases where fraud is charged as the ground for rescission, the prevailing and better rule is that the exercise of equitable jurisdiction is not dependent upon the inadequacy of the legal remedy.²¹ But where the claim of the plaintiff in equity is for the recovery of money damages for the fraud or misrepresentation, and he does not seek rescission or other purely equitable relief, it seems that the courts will generally refuse to exercise jurisdiction, and will remit plaintiff to his action at law.²² Any material misrepresentation as to the location of land, or the like, whether made innocently or with a fraudulent intent, will in general entitle a person acquiring the land and relying on such statements to rescind the transaction and recover the amount paid by him on the purchase-price.²³ And a

¹⁸ *Hodsden v. Hodsden*, 69 Minn. 486, 72 N. W. 562; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39n.

¹⁹ *Baptiste v. Peters*, 51 Ala. 158; *Brooks v. Hamilton*, 15 Gil. (Minn.) 10.

²⁰ *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567; *Dorsey v. Watkins*, 151 Fed. 340.

²¹ *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514; *Brittin v. Crabtree*, 20 Ark. 309; *Patton v. Glatz*, 56 Fed. 367; *Mershon v. Commonwealth Bank*, 6 J. J. Marsh (Ky.) 438; *Clark v. Robinson*, 58 Maine 133; *Baltimore Sugar Refining Co. v. Campbell & Co.*, 83 Md. 36, 34 Atl. 369; *Nathan v. Nathan*, 166 Mass. 294, 44 N. E. 221; *John Hancock Mut. Life Ins. Co. v. Dick*, 114 Mich. 337, 72 N. W. 179, 43

L. R. A. 566; *Garrett v. Mississippi & C. R. Co.*, Freem. Ch. (Miss.) 70; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519.

²² *Youngblood v. Youngblood*, 54 Ala. 486; *Coe v. Turner*, 5 Conn. 86; *Huff v. Ripley*, 58 Ga. 11; *Gore v. Kramer*, 117 Ill. 176, 7 N. E. 504; *Mack v. Frankfort*, 123 Mich. 421, 82 N. W. 209; *Bosley v. National Mach. Co.*, 123 N. Y. 550, 25 N. E. 990; *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. 556.

²³ *Lockwood v. Fitts*, 90 Ala. 150, 7 So. 467; *Cooper v. Merritt*, 30 Ark. 686; *Mitchell v. McDougall*, 62 Ill. 498; *Gardner v. Mann*, 36 Ind. App. 694, 76 N. E. 417; *Selby v. Matson*, 137 Iowa 97, 114 N. W. 609; *Annis v. Ferguson*, 27 Ky. L. 56, 84 S. W. 553; *Schmitz v. Peterson*, 113 La. 134, 36 So. 915;

vendor is also entitled to have a contract canceled in a proper case on account of fraudulent misrepresentations of the purchaser.²⁴ So, where the seller of an agency-right to sell certain articles misrepresented the number of such articles others had sold, and the profits derived therefrom, it was held that this constituted such fraud as would justify a rescission of the contract.²⁵

§ 2414. Remedy given for expressions of opinion.—Fraudulent expressions of opinion are generally insufficient to justify the rescission of a contract executed and acted on by the parties,²⁶ and especially where such opinions were expressed by a third party and were unauthorized.²⁷ An action for rescission for fraud can not ordinarily be predicated upon a promise to do something in the future, although the party promising had no intention of fulfilling the promise at the time it was made.²⁸ And the purchaser of a lot of land from a company is not entitled to rescind

Match v. Hunt, 38 Mich. 1; *Ballard v. Lyons*, 114 Minn. 264, 131 N. W. 320, 38 L. R. A. (N. S.) 301, and note; *Clinkenbeard v. Weatherman*, 157 Mo. 105, 57 S. W. 757; *Ross v. Sumner*, 57 Nebr. 588, 78 N. W. 264; *Silverman v. Minsky*, 109 App. Div. (N. Y.) 1, 95 N. Y. S. 661, *affd.* 186 N. Y. 576, 79 N. E. 1116; *Walsh v. Hall*, 66 N. Car. 233; *Rasmussen v. Reedy*, 14 S. Dak. 15, 84 N. W. 205; *Stevenson v. Cauble*, 55 Tex. Civ. App. 75, 118 S. W. 811; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051; *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805.

²⁴ *Stackpole v. Hancock*, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814; *Mohler v. Carder*, 73 Iowa 582, 35 N. W. 647; *Lofgren v. Peterson*, 54 Minn. 343, 56 N. W. 44; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748n, Am. Cas. 1912A 399 and note; *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201n.

²⁵ *Crooker v. White*, 162 Ala. 476, 50 So. 227.

²⁶ *Lee v. Haile*, 51 Tex. Civ. App. 632, 114 S. W. 403; *Johansson v.*

Stephanson, 154 U. S. 625, 23 L. ed. 1009, 14 Sup. Ct. 1180. See also, *Foster v. Illinois Zinc Co.*, 232 Ill. 349, 83 N. E. 859; *Marshall v. Lewis*, 4 Litt. (Ky.) 140. But there are cases where fraudulent misrepresentations, even as to value or the like, where the other party has no knowledge or equal opportunity of knowledge or is thus prevented from making inquiry may justify rescission or cancellation. *Grindrod v. Wolf*, 38 Kans. 292, 16 Pac. 691; *Morgan v. Dinges*, 23 Nebr. 271, 36 N. W. 544, 8 Am. St. 121; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748n, Am. Cas. 1912A 399, and note. See also, *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883. And see on the general subject, notes in 32 L. R. A. (N. S.) 127, 30 L. R. A. (N. S.) 55, 748; and in 38 L. R. A. (N. S.) 301.

²⁷ *Travis v. Taylor* (Ky.), 118 S. W. 988.

²⁸ *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Bennett v. McIntire*, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; *Caylor v. Roe*, 99 Ind. 1; *Fry v. Day*, 97 Ind. 348.

the sale, or to damages because of the expression by the grantor's agent, at the time of the sale, of his belief that certain improvements would be made on the land controlled by the company, which were in fact not made, where such agent believed his statements to be true, and made no engagement to carry out the purposes expressed.²⁹ But where a railroad company, desiring to run its road through a certain farm, represented to the owner of the farm that it would change the location of its road from that indicated by the preliminary survey so as to run it along a certain slough, and upon the strength of that representation the owner agreed to give a deed of the right of way, and the company built its line according to said survey, and it did not appear that it ever intended to build it along the slough, it was held that the false representations as to the location of the road avoided the contract, and entitled the owner of the land to a decree rescinding the contract.³⁰ So, it has been held in Illinois that where a grantor conveys land, the consideration for which is an agreement by the grantee to support and care for the grantor during life, and the grantee refuses or neglects to comply with the contract, the grantor may, in equity, have a decree rescinding the contract and deed and reinvesting him with the title, on the ground that the contract was fraudulent in its inception.³¹

§ 2415. Illegality as ground for remedy.—As a general rule, a court of equity will not give relief to either party to an illegal executory contract if they are in *pari delicto*.³²

²⁹ *Joseph v. Decatur Land, Imp. & Furnace Co.*, 102 Ala. 346, 14 So. 739.

³⁰ *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920. See also, *Van Buskirk v. Day*, 32 Ill. 260; *Race v. Weston*, 86 Ill. 91; *Wilson v. Haecker*, 85 Ill. 349.

³¹ *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673, 101 Am. St. 243, and other Illinois cases there cited. Deeds have also been set aside in

other cases where there was a failure to perform such a contract. *Patterson v. Patterson*, 81 Iowa 626, 47 N. W. 768; *Lockwood v. Lockwood*, 124 Mich. 627, 83 N. W. 613; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671. See post, § 2421, for citation of other cases on both sides.

³² *Owens v. Van Winkle Gin & Mach. Co.*, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36

But where the party seeking relief was subjected to duress, equity may grant relief.³³ And there are many cases holding illegality, in certain instances, to be a ground for rescission in equity.³⁴ There would seem to be even more reason for refusing rescission and cancelation of an executed contract,³⁵ and a court of equity will not set aside a transfer, voluntarily and freely made, as a part of an illegal transaction.³⁶ Thus, a party can not have a conveyance made by him set aside on the ground that the consideration was in part the dismissal of a criminal prosecution, and therefore illegal, when he himself procured such dismissal, the prosecution being against him, since he can not set up his own illegal act; and where it is sought to set aside a conveyance on the ground that the consideration was illegal, plaintiff must tender back the purchase-money received by him.³⁷ And where a mortgage is given under a contract to stifle a criminal prosecution it can not be foreclosed,³⁸ and, on the other hand, equity will refuse to cancel it.³⁹ Like-

Am. Rep. 147; *Allison v. Hess*, 28 Iowa 388; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Cedar Springs v. Schlick*, 81 Mich. 405, 45 N. W. 994, 8 L. R. A. 851; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Lake v. Lake*, 136 App. Div. (N. Y.) 47, 119 N. Y. S. 686; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Pacific Live Stock Co. v. Gentry*, 38 Ore. 275, 61 Pac. 422, 65 Pac. 597; *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. 777; *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508.

³³*James v. Roberts*, 18 Ohio 548. See also, *Booker v. Wingo*, 29 S. Car. 116, 7 S. E. 49. In *Burton v. McMillan*, 52 Fla. 469, 42 So. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. 220, it is held, after a review of many authorities as to the effect of the doctrine "in pari delicto," that a wife may avoid a deed of her separate property induced and obtained from her by threats of imprisonment of her husband while she was sick.

³⁴*Chalmers Chemical Co. v. Chadeloid Chemical Co.*, 175 Fed. 995; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Dickson v. Valentine*, 57 N. Y. Super. Ct. 128, 24 N. Y. St. 957, 6 N. Y. S. 540; *Place v. Conklin*, 23 Misc. (N. Y.) 40, 51 N. Y. S. 407, affd. 34 App. Div. (N. Y.) 191, 54 N. Y. S. 532; *Roberts v. Pennsylvania L. & T. Co.* 39 Pa. Super. Ct. 358; *Porter v. Jones*, 6 Cold. (Tenn.) 313.

³⁵See *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112.

³⁶*Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260; *McAllen v. Hodge*, 94 Minn. 237, 102 N. W. 707; *Roy v. Harney Peak & C. Mfg. Co.*, 21 S. Dak. 140, 110 N. W. 106; *Anderson v. Anderson*, 122 Wis. 480, 100 N. W. 829.

³⁷*Teague v. Williams*, 6 Tex. Civ. App. 468, 25 S. W. 1048; *Glenn v. Mathews*, 44 Tex. 400; *Robertson v. Marsh*, 42 Tex. 149.

³⁸*Raguet v. Roll*, 7 Ohio (1st pt.) 76.

³⁹*Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551.

wise, if a note is given on such a consideration, equity will not cancel it,⁴⁰ especially if it is overdue.⁴¹

§ 2416. Inadequate consideration as ground for rescission.—A court of equity will not decree cancelation of a contract on the ground of inadequacy of consideration alone, but if the inadequacy be so great as to furnish of itself convincing evidence of fraud, the relief may be granted.⁴² Equity will rescind a contract for the purchase of land for representations by the seller's agents that there was a demand for lots on the land, that a railroad company was about to remove its shops to that point, and that a syndicate of prominent men had been formed to secure the land, and had offered more than the contract-price for the land, where it appeared that the representations were false, and were known to be false by the makers; that the purchasers believed the representations were true, and that the purchase-price was twice the value of the land.⁴³ While mere inadequacy of consideration is not, in itself, ground for cancelation,⁴⁴ yet, if coupled with a fiduciary relationship between the parties, it may furnish the requisite presumption or basis of fraud or undue influence.⁴⁵ Thus, inadequacy of consideration may be considered in connection with other facts in determining the question as to whether an actual fraud has been committed upon the rights of a person, or whether conduct or acts of parties have been of such a nature and character as are calculated to operate

⁴⁰ *Paige v. Hieronymus*, 192 Ill. 546, 61 N. E. 832; *Worcester v. Eaton*, 11 Mass. 368; *Malone v. Fidelity & Casualty Co.*, 71 Mo. App. 1.

⁴¹ *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124.

⁴² *Barry v. St. Joseph's Hospital*, 116 Cal. XVI, 48 Pac. 68; *Smith v. McCourt*, 8 Colo. App. 146, 45 Pac. 239; *Wiest v. Garman*, 3 Del. Ch. 422; *Morton v. Morris*, 72 Fed. 392, 18 C. C. A. 611; *Stephens v. Orman*, 10 Fla. 9; *Goodwin v. White*, 59 Md. 503; *Schields v. Hickey*, 26 Mo. App. 194; *Dunn v.*

Chambers, 4 Barb. (N. Y.) 376; *Potter v. Everett*, 42 N. Car. 152; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17.

⁴³ *Sutton v. Morgan*, 158 Pa. St. 204, 27 Atl. 894, 38 Am. St. 841.

⁴⁴ *Matteson v. Johnston*, 124 N. Y. S. 185. See also, note 42 in this section, and ante, vol. 1, § 158.

⁴⁵ *Storthz v. Williams*, 86 Ark. 460, 111 S. W. 804; *Mays v. Pelly* (Ky.), 125 S. W. 713; *Bellamy v. Andrews*, 151 N. Car. 256, 65 S. E. 963. See also, ante vol. 1, §§ 74, 158.

as a fraud upon those who are induced to act by reason of such conduct.⁴⁶

§ 2417. Remedy given for mistake.—As a general rule, a mistake of law, pure and simple, is not sufficient ground for rescission in equity. However, if such mistake is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, and undue advantage thereby, equity will interpose its aid.⁴⁷ Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved, especially if the mistake was encouraged or induced by representations of such other party.⁴⁸ All the cases which deny the remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other.⁴⁹ In case of mistake, either mutual or unilateral, whereby the minds of the parties did not meet as to all the essential elements of the transaction, so that no real contract was made by them, equity may interpose to rescind and cancel the apparent contract as written.⁵⁰ And this relief may be

⁴⁶ *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238; *Derby v. Donahoe*, 208 Mo. 684, 106 S. W. 632; *Sbarbero v. Miller*, 72 N. J. Eq. 248, 65 Atl. 472.

⁴⁷ *Salinas v. Stillman*, 66 Fed. 677, 14 C. C. A. 50; *Jordan v. Stevens*, 51 Maine 78, 81 Am. Dec. 556; *West v. West*, 9 Tex. Civ. App. 475, 29 S. W. 242; *Ramey v. Allison*, 64 Tex. 697; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481.

⁴⁸ *Titus v. Rochester German Ins. Co.*, 97 Ky. 567, 17 Ky. L. 385, 31 S. W. 127, 28 L. R. A. 478, 53 Am. St. 426; *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605, 10 Ky. L. 806, 9 S. W. 497.

⁴⁹ *Silliman v. Wing*, 7 Hill (N. Y.) 159; *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Vanderbeck v. Rochester*, 122 N. Y. 285, 25 N. E. 408.

⁵⁰ *Scruggs v. Driver's Exrs.*, 31

Ala. 274; *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 28 Am. St. 91; *Callender v. Colegrove*, 17 Conn. 1; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 395; *Kelty v. McPeake*, 143 Iowa 567, 121 N. W. 529; *In re Morgan's Estate*, 125 Iowa 247, 101 N. W. 127; *Dille v. White*, 132 Iowa 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510n; *Dayton v. Stewart*, 99 Md. 643, 59 Atl. 281; *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654; *Allen v. Luckett*, 94 Miss. 868, 48 So. 186, 136 Am. St. 605; *Beason v. Coleman*, 92 Miss. 622, 46 So. 49; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Benesch v. Travelers' Ins. Co.*, 14 N. Dak. 39, 103 N. W. 405; *In re Whelen's Appeal*, 70 Pa. St. 410; *Shaw v. O'Neill*, 45 Wash. 98, 88 Pac. 111. See *Stevenson v. Cauble*, 55 Tex. Civ. App. 75, 118 S. W. 811,

granted, in a proper case, although the apparent contract has been fully performed by the parties thereto.⁵¹ A mistake by one party relative to the substance of the contract, such mistake being induced by false representations of the other party, or if not so induced, being participated in by the other, is ground for rescission in equity.⁵² But, ordinarily, the power to decree rescission for a unilateral mistake should not be exercised against a person who has in no way induced or contributed to the mistake and will gain no undue advantage thereby.⁵³

§ 2418. Remedy where instrument is a cloud on title.—

The mere fact that an instrument is void is no reason why it should not be canceled, in a proper case.⁵⁴ Thus, where the instrument creates a cloud upon plaintiff's title, and the instrument is apparently valid upon its face, his remedy at law is usually inadequate.⁵⁵ It is generally held that the plaintiff must be in possession at the time of instituting a suit to obtain cancelation of an instrument creating a cloud upon his title before a court of equity will interpose relief.⁵⁶

holding that the right to rescind is not waived by failure to make investigation proposed by vendor's agent. *Tryon v. Lyon*, 133 App. Div. (N. Y.) 798, 118 N. Y. S. 5; *Hurd v. Hall*, 12 Wis. 112.

⁵¹ *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Glassell v. Thomas*, 3 Leigh (Va.) 113.

⁵² *Macfarland v. Mead*, 34 App. D. C. 268; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *Schmitz v. Peterson*, 113 La. 134, 36 So. 915.

⁵³ *Bibber v. Carville*, 101 Maine 59, 63 Atl. 303, 115 Am. St. 303. See also, *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564.

⁵⁴ *Gewin v. Shields*, 167 Ala. 593, 52 So. 887; *Moore v. Munn*, 69 Ill. 591; *Hardy v. Brier*, 91 Ind. 91; *Rich v. Braxton*, 158 U. S. 375, 39 L. ed. 1022, 16 Sup. Ct. 1006; *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251.

⁵⁵ *McKinney v. McCullar*, 95 Ark. 1043, 128 S. W. 1043; *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981; *Solis v. Williams*, 205 Mass. 350,

91 N. E. 148; *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 127 S. W. 72; *Williams v. Dunn*, 151 N. Car. 107, 65 S. E. 754; *Gans v. Drum*, 24 Pa. Co. Ct. 481; *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481, Fed. Cas. No. 2133; *De Camp v. Carnahan*, 26 W. Va. 839. In *Rector & of St. Stephen's Church v. Rector &c. of Church of Transfiguration*, 201 N. Y. 1, 94 N. E. 191, Ann. Cas. 1912A, 760, it was held that a court of equity has jurisdiction to cancel a restrictive covenant in a deed where it was apparently valid, though in fact invalid, and constituted a cloud on plaintiff's title.

⁵⁶ *Arnett v. Bailey*, 60 Ala. 435; *Polk v. Pendleton*, 31 Md. 118; *Buck Mountain Coal Co. v. Conrad*, 6 Phila. (Pa.) 11; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596. See also, *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 So. 578; *Scott v. Micek*, 86 Nebr. 421, 125 N. W. 615, refusing cancellation where plaintiff failed to establish title.

But there are cases holding that it is not necessary, before bringing such suit, that the legal owner should establish his title, and obtain possession of the land by ejectment at law.⁵⁷ A complaint by the owner of real estate to cancel numerous tax deeds, held by different persons under a sale made by the commissioner of school lands in one proceeding to forfeit the lands for taxes, may be maintained as a complaint to remove a cloud from the title.⁵⁸

§ 2419. Remedy given where instrument negotiable.—Where suit is brought to cancel a negotiable instrument on the ground of fraud, mistake, and the like, the instrument not having yet matured, a court of equity will readily assume jurisdiction to cancel the same, for the reason that the negotiation of the instrument to a bona fide purchaser may lose plaintiff the benefit of his defense.⁵⁹ But in such case it has been held that it must be shown that a transfer is actually threatened; mere possibility of negotiation is insufficient.⁶⁰ Cancellation will generally be refused where such instrument is overdue, and to the enforcement of which at law there is a valid defense, since the defense can not be rendered unavailable by any negotiation of the instrument.⁶¹ But in case other grounds exist calling for equitable intervention, the relief will be given, notwithstanding the instrument is overdue.⁶² It is not always necessary that the entire instrument be canceled. Thus, where

⁵⁷ *Bushnell v. Hartford*, 4 Johns. Ch. (N. Y.) 301; *Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481, Fed. Cas. No. 2133; *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251; *De Camp v. Carnahan*, 26 W. Va. 839.

⁵⁸ *Ulman v. Jaeger*, 67 Fed. 980. But see where instrument is void on its face, *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. 537.

⁵⁹ *Breathwit v. Rogers*, 32 Ark. 758; *Hairalson v. Carson*, 111 Ga. 57, 36 S. E. 319; *Maclean v. Fitzsimons*, 80 Mich. 336, 45 N. W. 145; *Cass County v. Green*, 66 Mo. 498; *Paterson v. Baker*, 51 N. J. Eq. 49,

26 Atl. 324; *White v. Clarke*, 5 Cranch C. C. (U. S.) 102, Fed. Cas. No. 17540, affd. 12 Pet. (U. S.) 178, 9 L. ed. 1046; *Scott v. Menasha*, 84 Wis. 73, 54 N. W. 263. See also, *Troxel v. Thomas*, 155 Ind. 519, 58 N. E. 725.

⁶⁰ *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578, 64 Pac. 8. ⁶¹ *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Black v. Miller*, 173 Ill. 489, 50 N. E. 1009; *Geer v. Kissam*, 3 Edw. Ch. (N. Y.) 129; *Quebec Bank v. Weyand*, 30 Ohio St. 126.

⁶² *Ferguson v. Fisk*, 28 Conn. 501; *Fuller v. Percival*, 126 Mass. 381; *Glastenbury v. McDonald's Admr.*, 44 Vt. 450.

it appears that the plaintiff's liability rests only on an endorsement, this part alone may be canceled.⁶³ Equity will not take jurisdiction to cancel a note of which no one can become a holder free of original defenses.⁶⁴ Nor will equity take jurisdiction, as a rule, because fraud is alleged, if an adequate legal defense is available whenever the alleged fraudulent claim may be sued upon.⁶⁵

§ 2420. Remedy given to prevent multiplicity of suits.—Where numerous persons are threatening to bring suit against the same individual on claims depending on the same questions of fact or law, injunction is the remedy most frequently used to prevent a multiplicity of suits, but by the preponderance of authority, rescission in equity may be invoked, in a proper case, to accomplish that purpose.⁶⁶ Thus, a complaint by the owner of real estate to cancel numerous tax deeds, held by different persons under a sale made by the commissioner of school lands in one proceeding to forfeit the lands for taxes, may be maintained as a complaint to remove cloud from title, and on the ground of avoiding a multiplicity of suits, where all the parties claim under a common source of title.⁶⁷ But a court of equity will exercise its jurisdiction only in cases where the legal remedies are inadequate and can not meet the ends of justice as effectively as those afforded by equity.⁶⁸ Thus, equity, to avoid a multiplicity of suits, will not exercise jurisdiction of a suit to recover the several amounts due on a contract whereby the defendants, in consideration of the

⁶³ *Maclean v. Fitzsimons*, 80 Mich. 336, 45 N. W. 145.

⁶⁴ *Vannatta v. Lindley*, 198 Ill. 40, 64 N. E. 735, 92 Am. St. 270; *Miller v. Rouse*, 8 Gil. (Minn.) 97; *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296; *Erickson v. First Nat. Bank*, 44 Nebr. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. 753.

⁶⁵ *Vannatta v. Lindley*, 198 Ill. 40, 64 N. E. 735, 92 Am. St. 270; *Mack v. Frankfort*, 123 Mich. 421, 82 N. W. 209; *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570.

⁶⁶ *Scott v. McFarland*, 70 Fed. 280; *Louisville, N. A. & C. R. Co. v. Ohio Valley Imp. & C. Co.*, 57 Fed. 42; *Ulman v. Iaeger*, 67 Fed. 980; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397. See also, *Rodgers v. Stern*, 112 Ga. 624, 37 S. E. 877.

⁶⁷ *Ulman v. Iaeger*, 67 Fed. 980.

⁶⁸ *Louisville, N. A. & C. R. Co. v. Ohio Valley Imp. & Contract Co.*, 57 Fed. 42; *Fellows v. Spaulding*, 141 Mass. 89, 6 N. E. 548.

assignment of the plaintiffs' several interests in an option on a mine, were to refund to each plaintiff the amount already advanced by him to develop the mine.⁶⁹

§ 2421. **Remedy given for nonperformance.**—It has been held that a court of equity has jurisdiction to decree rescission of a contract where there has been a failure to perform its conditions,⁷⁰ but the weight of authority would seem to support the opposite view at least in ordinary cases.⁷¹ Thus, it has been held that a court of equity will deny rescission of a conveyance in consideration of support for life, where the grantee has failed to fulfil his contract,⁷² but many other cases hold that where such failure amounts to the breach of a condition subsequent the deed may be canceled.⁷³ This is said by some courts to be on the theory that there was fraud in the inception of the contract, and does not apply when failure to perform is by the grantee's heirs.⁷⁴ When this ground is relied upon for rescission of

⁶⁹ VanAuken v. Dammeier, 27 Ore. 150, 40 Pac. 89. See also, Kuhl v. Pierce County, 44 Nebr. 584, 62 N. W. 1066; Oglesby's Sureties v. State, 73 Tex. 658, 11 S. W. 873.

⁷⁰ Cumby v. Cumby, 240 Ill. 235, 88 N. E. 549; Fabrice v. Von der Brelie, 190 Ill. 460, 60 N. E. 835; Winfield v. Winfield Water Co., 51 Kans. 70, 32 Pac. 663; Kentucky River Nav. Co. v. Commonwealth, 13 Bush (Ky.) 435; Thomas v. Sweet, 111 Ky. 467, 23 Ky. L. 1599, 63 S. W. 787, 65 S. W. 827; Grand Haven v. Grand Haven Water Works Co., 99 Mich. 106, 57 N. W. 1075; Light, Heat & Water Co. v. Jackson, 73 Miss. 598, 19 So. 771; Haydon v. St. Louis & S. F. R. Co., 222 Mo. 126, 121 S. W. 15; Callanan v. Keesville &c. R. Co., 131 App. Div. (N. Y.) 306, 115 N. Y. S. 779; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Farmers' Loan & Trust Co. v. Galesburg, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. 316; Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091.

⁷¹ Shaw v. Horner, 7 Colo. App. 83, 42 Pac. 689; Blake v. Pine Mountain Iron &c. Co., 76 Fed.

624, 22 C. C. A. 430; Harrington v. Rutherford, 38 Fla. 321, 21 So. 283; Field v. Holbrook, 13 N. Y. Super. Ct. 597.

⁷² Gardner v. Knight, 124 Ala. 273, 27 So. 298; Brand v. Power, 110 Ga. 522, 36 S. E. 53; Powers v. Powers, 19 Ky. L. 266, 39 S. W. 825; Anderson v. Gaines, 156 Mo. 664, 57 S. W. 726; Murray v. King, 42 N. Car. 19.

⁷³ Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673, 101 Am. St. 243; McDowell v. McDowell, 24 Ky. L. 2270, 73 S. W. 1022; Candill v. Lemaster, 26 Ky. L. 1010, 82 S. W. 1009; Grant v. Bell, 26 R. I. 288, 58 Atl. 951; Teague v. Teague, 22 Tex. Civ. App. 443, 54 S. W. 632; Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156.

⁷⁴ Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673, 101 Am. St. 243; Gillen v. Gillen, 238 Ill. 218, 87 N. E. 388; Spangler v. Yarrowborough, 23 Okla. 806, 101 Pac. 1107, 138 Am. St. 856. A statement of the different modes of giving relief for failure to perform the agreement to support, in several different

the conveyance, it has been held that the plaintiff must plead a re-entry or demand for possession, and demand for performance, or plead facts showing that a demand for performance would have been unavailing.⁷⁵ Again, where the purchaser of goods notifies the sellers and their agent that he will not pay any more drafts according to the terms of sale unless he is given a certain guaranty as to the quality of the goods, not provided for in the contract of sale, the sellers may rescind the contract.⁷⁶ But equity will not interfere to cancel a contract where the failure to perform within a stipulated time has been waived by the plaintiff.⁷⁷ So, also, where plaintiff conveys the land on which he is living to his daughter-in-law in consideration of support for life, and leaves the premises without fault on her part, the conveyance will not be set aside, the grantee being ready to perform.⁷⁸

§ 2422. Remedy where specific performance denied.—

It has been decided in one case that the fact that a deed was based upon a consideration that could not be specifically enforced was sufficient ground for its rescission at the suit of the grantor;⁷⁹ but this decision has been severely criticised, and the better rule seems to be that the fact that the consideration is such that specific performance can not be decreed to one party is not of itself a sufficient ground for rescinding the contract at the suit of the other party.⁸⁰ Yet it has been asserted that "if a case is made out which will justify

jurisdictions, with reference to the decisions, will be found in the opinion in *Abbott v. Sanders*, 80 Vt. 179, 66 Atl. 1032, 13 L. R. A. (N. S.) 725n, 130 Am. St. 974.

⁷⁵ *Tomlinson v. Tomlinson*, 162 Ind. 530, 70 N. E. 881.

⁷⁶ *King v. Faist*, 161 Mass. 449, 37 N. E. 456. And see also, *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Ballou v. Billings*, 136 Mass. 307.

⁷⁷ *Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373; *Hensley v. Hensley*, 17 Ky. L. 122, 30 S. W. 613.

⁷⁸ *Scott v. Scott*, 89 Wis. 93, 61 N. W. 286.

⁷⁹ *Grimmer v. Carlton*, 93 Cal. 189, 28 Pac. 1043, 27 Am. St. 171.

⁸⁰ *Beck v. Simmons*, 7 Ala. 71; *Young Lock Nut Co. v. Brownley Mfg. Co.* (N. J.), 34 Atl. 947; *Watkins v. Collins*, 11 Ohio 31; *Jackson v. Ashton*, 11 Pet. (U. S.) 229, 9 L. ed. 698; *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721. But see, *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677. And see also, ante § 2411.

the court in declaring a contract at an end, it will, in general, be ordered to be delivered up to be canceled."⁸¹

§ 2423. Remedy against unauthorized contracts.—As a rule, contracts and conveyances made or delivered without authority may be set aside.⁸² Thus, where a contract made through agents was not the one they were authorized to make, nor the one the principal supposed had been made, the principal was entitled to have it canceled.⁸³ So, the absence of the agent's authority to make the contract has been held sufficient ground for the cancellation of the contract at the suit of the principal.⁸⁴ But, of course, these statements are to be taken in connection with the general rules of agency and are not intended as affirming that there may be a rescission or cancellation as against innocent third persons in certain cases where the agent has been held out as having authority.⁸⁵

§ 2424. Inadequacy of legal remedy.—As a general rule—subject to some exceptions, as in case of fraud—a court of equity will not exercise jurisdiction to rescind or cancel an instrument when there is a complete and adequate remedy at law by way of action or defense.⁸⁶ Thus, equity will

⁸¹ *Wilson v. Getty*, 57 Pa. St. 266.

⁸² *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *Gunning v. Sorg*, 214 Ill. 616, 73 N. E. 870; *Spacy v. Ritter*, 214 Ill. 266, 73 N. E. 447; *Peters v. Berkemeier*, 184 Mo. 393, 83 S. W. 747; *Newman v. Newman* (Tex. Civ. App.), 86 S. W. 635.

⁸³ *Board of Trade v. De Bruyn*, 138 Mich. 187, 101 N. W. 262.

⁸⁴ *Meridian Waterworks Co. v. Marks* (Miss.), 16 So. 357; *Field v. Holbrook*, 13 N. Y. Super. Ct. 597, holding that equity has jurisdiction to cancel an instrument "when the plaintiff alleges that the instrument, which he prays may be surrendered or canceled, is void upon grounds of which a court of equity alone can take cognizance."

⁸⁵ See *Conklin v. Benson*, 159

Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537 and note.

⁸⁶ *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 So. 578; *Treadwell v. Torbert*, 133 Ala. 504, 32 So. 126; *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196; *Lewis v. Tobias*, 10 Cal. 574; *Lawlor v. Merritt*, 81 Conn. 715, 72 Atl. 143; *Yeatman v. Bradford*, 44 Fed. 536; *Mutual Life Ins. Co. v. Pearson*, 114 Fed. 395; *Sunset Tel. & T. Co. v. Williams*, 162 Fed. 301, 89 C. C. A. 281; *Sapp v. Williamson*, 128 Ga. 743, 58 S. E. 447; *Miller v. Kettenbach*, 18 Idaho 253, 109 Pac. 505; *Shaeffer v. Sleade*, 7 Blackf. (Ind.) 178; *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa 341, 120 N. W. 963; *Morse v. Beale*, 68 Iowa 463, 27 N. W. 461; *Howerton v. Kansas Natural Gas Co.*, 82 Kans. 367, 108 Pac. 813, 34

not ordinarily take jurisdiction to cancel a policy of insurance after the death of the insured, since the remedy at law is in such case usually adequate.⁸⁷ But the remedy at law is not adequate within the meaning of this rule unless it is as prompt, complete, certain and efficient to attain the ends of justice as the remedy in equity.⁸⁸ Where the plaintiff has a defense to the enforcement of the obligation which is plain and palpable, and within his command at any time, equity will not decree cancellation.⁸⁹ But a party is not bound to resort to the legal remedy if that remedy is not as practicable and efficient to the ends of justice and its prompt administration, both in respect to the final relief and the mode of obtaining it, as the equitable remedy. In such a case equity may be invoked.⁹⁰ The principle is elementary that equity, having once acquired jurisdiction, will retain it to give such full relief as will finally dispose of the controversy.⁹¹

§ 2425. Inadequacy of legal remedy where instrument void.—As a general rule, a court of equity will not cancel an instrument whose invalidity is apparent upon its face,⁹²

L. R. A. (N. S.) 46n; *Russo v. Chapin*, 197 Mass. 64, 83 N. E. 308; *Beaton v. Inland Tp.*, 149 Mich. 558, 113 N. W. 361; *Haydon v. St. Louis & S. F. R. Co.*, 222 Mo. 126, 121 S. W. 15; *Davison v. Davison*, 71 N. H. 180, 51 Atl. 905; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Gilkeson v. Thompson*, 210 Pa. 355, 59 Atl. 1114; *Appeal of Travis*, 5 Sad. (Pa.) 525, 8 Atl. 601.

⁸⁷ *Griesa v. Mut. Life Ins. Co.*, 169 Fed. 509, 94 C. C. A. 635; *Des Moines Life Ins. Co. v. Seifert*, 112 Ill. App. 277, affd. 210 Ill. 157, 71 N. E. 349; *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa 341, 120 N. W. 963.

⁸⁸ *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22; *Slingerland v. Slingerland*, 109 Minn. 407, 124 N. W. 19; *Schoenfeld v. Winter*, 76 N. J. Eq. 511, 74 Atl. 975; *Ryan v. Nuce*, 67 W. Va. 75, 68 S. E. 110; *Mann v. Chicago & M. Elec. R. Co.*, 140 Wis. 8, 121 N. W. 645.

⁸⁹ *Reeves v. McCracken*, 69 N. J. Eq. 203, 60 Atl. 332, affd. 69 Atl. 247.

⁹⁰ *Thatcher v. Humble*, 67 Ind. 444; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. 594; *Lewis v. Cocks*, 23 Wall. (U. S.) 466, 23 L. ed. 70.

⁹¹ *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 99; *In re Axtell's Petition*, 95 Mich. 244, 54 N. W. 889; *Chase v. Boughton*, 93 Mich. 285, 54 N. W. 44.

⁹² *Oakland v. Carpentier*, 21 Cal. 642; *O'Connell v. Noonan*, 1 App. D. C. 332; *Briggs v. Johnson*, 71 Maine 235; *Benton County v. Morgan*, 163 Mo. 661, 64 S. W. 119; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Field v. Holbrook*, 14 How. Pr. (N. Y.) 103; *Peirsoll v. Elliott*, 31 U. S. (6 Pet.) 95, 8 L. ed. 332; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, 51 N. W. 1082.

but the rule has been severely criticised by some decisions holding to the contrary.⁹³ Thus, it has been held that a void or voidable deed may be canceled in equity to remove a cloud from the title to real estate whether the character of the deed complained of appears from its face or otherwise.⁹⁴ And the fact that an instrument is void does not necessarily oust equity of its jurisdiction for cancelation.⁹⁵ But where a complaint to cancel a deed alleges facts showing the deed to be absolutely void, thereby showing that plaintiff has an adequate remedy at law, it has been held that equity will deny relief.⁹⁶ If the instrument is absolutely void it needs no aid from equity to avoid it, and if it also appears void on its face it would seem to convict itself so that it would not even cast a cloud on the title to land nor in any way injure the complaining party, who may treat it as void without any help from a court of equity. This is, in substance, the reasoning of most of the courts that refuse to decree rescission and cancelation in such cases.

§ 2426. Inadequacy of legal remedy where instrument obtained by fraud.—It may be stated, as a general rule, that equity will assume jurisdiction to cancel instruments obtained by fraud regardless of whether there is an adequate remedy at law.⁹⁷ Where the plaintiff in equity seeks

⁹³ *Hays v. Hays*, 2 Ind. 28; *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *Linnell v. Battey*, 17 R. I. 241, 21 Atl. 606; *Almony v. Hicks*, 3 Head (Tenn.) 39; *Day Land & Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Simpson v. Edmiston*, 23 W. Va. 675.

⁹⁴ *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *Porter v. Jones*, 6 Cold. (Tenn.) 313; *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94.

⁹⁵ *McCracken v. McBee*, 96 Ark. 251, 131 S. W. 450; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423. See also, *Smith v. Pearson*, 24 Ala. 355; *Breathwit v. Rogers*, 32 Ark. 758; *Moore v. Munn*, 69 Ill. 591; *Hardy v. Brier*, 91 Ind. 91;

Gray v. Coan, 23 Iowa 344; *Singery v. Attorney-General*, 2 Harr. & J. (Md.) 487; *Sessions v. Jones*, 6 How. (Miss.) 123; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Rich v. Braxton*, 158 U. S. 375, 39 L. ed. 1022, 16 Sup. Ct. 1006; *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251.

⁹⁶ *Boddie v. Bush*, 136 Ala. 560, 33 So. 826; *Dougherty v. Powe*, 127 Ala. 577, 30 So. 524.

⁹⁷ *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514; *Brittin v. Crabtree*, 20 Ark. 309; *Mershon v. Commonwealth Bank*, 6 J. J. Marsh. (Ky.) 438; *Clark v. Robinson*, 58 Maine 133; *Baltimore Sugar Refining Co. v. Campbell & Co.*, 83 Md. 36, 34 Atl. 369; *Nathan v. Nathan*, 166

cancellation of an instrument on the ground of fraud, the fact that he also demands a recovery of money is not sufficient ground for refusing equitable relief, since rescission is the principal matter of relief and the recovery of money merely incidental, though a necessary consequence.⁹⁸ It is a well established principle of equity, that in all cases of fraud relating to contracts, if the defrauded party is entitled to any equitable relief, and it becomes necessary for him to establish the fraud in order to obtain such equitable relief, the court will grant him full and complete relief, notwithstanding his remedy at law is complete as to a part of the relief to which he is entitled.⁹⁹ Having once assumed jurisdiction for the purpose of granting purely equitable relief, a court of equity may proceed to do complete justice between the parties even to the extent of giving damages for the fraud, though this relief is purely legal.¹

§ 2427. Inadequacy of legal remedy with respect to other grounds.—By the weight of authority, a suit in equity will not be sustained, ordinarily at least, to cancel an instrument to which a defense may be made in an action at law thereon.² But if some substantial reason can be shown why the defense at law would be insufficient, equity will

Mass. 294, 44 N. E. 221; John Hancock Mut. Life Ins. Co. v. Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; Cogswell v. Mitts, 90 Mich. 353, 51 N. W. 514; Garrett v. Mississippi & A. R. Co., Freem. Ch. (Miss.) 70; Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519; Ranney v. Warren, 13 Hun (N. Y.) 11. See also, Patton v. Glatz, 56 Fed. 367.

⁹⁸ Waddell v. Lanier, 62 Ala. 347; Jones v. Neely, 72 Ill. 449; Shaffer v. Sleade, 7 Blackf. (Ind.) 178; Hosleton v. Dickenson, 51 Iowa 244; Caldwell v. Caldwell, 1 J. J. Marsh. (Ky.) 53; Taymon v. Mitchell, 1 Md. Ch. 496; Davis v. Peabody, 170 Mass. 397, 49 N. E. 750; Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141; Bosley v. National Mach. Co., 123 N. Y. 550,

25 N. E. 990; Smith v. Griswold, 6 Ore. 440; Moore v. Cross (Tex. Civ. App.), 26 S. W. 122, revd. 87 Tex. 557, 29 S. W. 1051; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. 340.

⁹⁹ Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125; Ferson v. Sanger, 2 Ware (U. S.) (Dav. 252) 256, Fed. Cas. No. 4751.

¹ Betts v. Gunn, 31 Ala. 219; Shaeffer v. Sleade, 7 Blackf. (Ind.) 178; Carroll v. Rice, Walk. Ch. (Mich.) 373; Holland v. Anderson, 38 Mo. 55.

² Converse Bridge Co. v. Geneva County, 168 Ala. 432, 53 So. 196; Miller v. Kettenbach, 18 Idaho 253, 109 Pac. 505; Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Grand Chute v. Winegar, 15 Wall. (U. S.) 373, 21 L. ed. 174.

grant relief in a proper case.³ There is much diversity of opinion among the authorities as to what circumstances will render the defense in an action upon the instrument an adequate protection. Some courts hold that fraud in obtaining the instrument is such a circumstance as to warrant equitable interference.⁴ Also, it is held that relief may be granted in a proper case where it is shown that by reason of probable loss of testimony by lapse of time, or through some other circumstance peculiar to the particular case, the defense is not an adequate and sufficient protection to plaintiff's rights.⁵

§ 2428. When a remedy at law exists.—The rule is well established that the grantee in possession under a warranty deed can not have relief in equity on the mere ground of defective title, but must resort to an action at law on the covenants in his deed;⁶ but where there has been fraud on the part of the vendor, the vendee may obtain a decree in equity rescinding the sale.⁷ Also, where the grantor in a

³ *Dickinson v. Garthwaite*, 34 Ala. 638; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Trammell v. Marks*, 44 Ga. 166; *Howerton v. Kansas Natural Gas Co.*, 82 Kans. 367, 108 Pac. 813, 34 L. R. A. (N. S.) 46n; *Turnbull v. Crick*, 63 Minn. 91, 65 N. W. 135; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Quebec Bank v. Weyand*, 30 Ohio St. 126.

⁴ *Caldwell v. Caldwell*, 1 J. J. Marsh. (Ky.) 53; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Fuller v. Percival*, 126 Mass. 381; *Cogswell v. Mitts*, 90 Mich. 353, 51 N. W. 514.

⁵ *Morse Arms Mfg. Co. v. Winchester Repeating Arms Co.*, 33 Fed. 170, 24 Blatchf. (U. S.) 496. See also, *Dickinson v. Garthwaite*, 34 Ala. 638; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Hairlson v. Carson*, 111 Ga. 57, 36 S. E. 319; *Ada County v. Bullen Bridge Co.*, 51 Idaho 79, 188, 47 Pac. 818, 36 L. R. A. 367, 95 Am. St. 180; *Black v. Miller*, 173 Ill. 489, 50 N. E. 1009; *Burlington v. Cross*, 15 Kans. 74; *Loggie v. Chandler*, 95 Maine 220,

49 Atl. 1059; *Gale v. Nickerson*, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Trimble v. Minnesota Thresher Mfg. Co.*, 10 Okla. 578, 64 Pac. 8; *Andrews v. Emery*, 24 Pa. Co. Ct. 210; *Bank of Belhows Falls v. Rutland & Burlington R. Co.*, 28 Vt. 470.

⁶ *Parker v. Parker*, 93 Ala. 80, 9 So. 426; *Peay v. Wright*, 22 Ark. 198; *Beebe v. Swartwout*, 3 Gilm. (Ill.) 162; *Upshaw v. Debow*, 7 Bush (Ky.) 442; *Miller v. Miller*, 47 Minn. 546, 50 N. W. 612; *Hart v. Hannibal & c. R. Co.*, 65 Mo. 509; *Ryerson v. Willis*, 81 N. Y. 277; *Stipe v. Stipe*, 2 Head (Tenn.) 169; *Reuter v. Lawe*, 86 Wis. 106, 56 N. W. 472.

⁷ *Lindsey v. Veasy*, 62 Ala. 421; *Perry v. Boyd*, 126 Ala. 162, 28 So. 711, 85 Am. St. 17; *Yeates v. Pryor*, 11 Ark. 58; *Sherwood v. Salmon*, 5 Day (Conn.) 439, 5 Am. Dec. 167; *Breeding v. Flannery*, 12 Ky. L. 609, 14 S. W. 907; *English v. Benedict*, 25 Miss. 167; *Wright v. Deniston*, 9 Misc. (N. Y.) 79, 59 N. Y. St. 549, 29 N. Y. S. 718.

deed with covenant of warranty has no title and is insolvent, it has been held that the grantee, though he has not been evicted, may sue in equity to rescind the sale.⁸ So, there are cases in which a vendor has been held entitled to a decree of cancelation where the vendee has misrepresented the state of the title.⁹ Where fraud is exercised in obtaining a contract of subscription for shares of stock, the proper remedy for the defrauded party is equitable rescission, since damages in an action of deceit would not be an adequate remedy, for the reason that the plaintiff would still be a stockholder, and subject as such to certain liabilities imposed by law.¹⁰

§ 2429. **Estoppel where contract or deed ratified.**—The doctrine of estoppel is often interposed in suits in equity for the cancelation of instruments.¹¹ Where a party, knowing the facts entitling him to rescission, afterward, without fraud or duress, ratifies the same, he has no claim for relief.¹² And in order to thus defeat the remedy of rescission, it is not necessary that there be an express ratification of the contract, for ratification may be implied by conduct amounting to ratification after knowledge of the facts

⁸ *Matthews v. Crowder*, 111 Tenn. 737, 69 S. W. 779; *Williams v. Stone*, 6 Wyo. 405, 45 Pac. 1070.

⁹ *Smith v. Woodson*, 29 Ky. L. 316, 92 S. W. 980; *Hogan v. Wixted*, 138 Mass. 270; *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201n.

¹⁰ *Benton v. Ward*, 47 Fed. 253; *Negley v. Hagerstown Mfg. & Co.*, 86 Md. 692, 39 Atl. 506; *Bosley v. National Mach. Co.*, 123 N. Y. 550, 25 N. E. 990, affg. 6 N. Y. 4, 15 Daly (N. Y.) 267, 25 N. Y. St. 575; *Higgins v. Crouse*, 63 Hun (N. Y.) 134, 44 N. Y. St. 151, 17 N. Y. S. 696.

¹¹ *Cooley v. Wilson*, 42 Iowa 425; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735.

¹² *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468; *Lockwood v. Fitts*, 90 Ala. 150, 7 So. 467; *Yates v. Pryor*, 11 Ark. 58; *Olivas v. De Olivas*, 61 Cal. 382; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Thompson v. Thompson*, 132 Ind.

288, 31 N. E. 529; *Blackman v. Wright*, 96 Iowa 541, 65 N. W. 843, affd. 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. 333; *Bell v. Keepers*, 39 Kans. 105, 17 Pac. 785; *Northrup v. Mollett*, 18 Ky. L. 89, 35 S. W. 268, 36 S. W. 555; *Meyers v. Henderson*, 49 La. Ann. 1547, 16 So. 729; *Kerby v. Kerby*, 57 Md. 345; *Childs v. Stoddard*, 130 Mass. 110; *DeArmand v. Phillips*, Walk. Ch. (Mich.) 186; *Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134; *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583, 6 So. 467; *Thiemann v. Heinze*, 120 Mo. 630, 25 S. W. 533; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; *Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369; *Allen v. Wilmington & W. R. Co.*, 106 N. Car. 515, 11 S. E. 576; *Johnson v. Lellyett*, 12 Heisk. (Tenn.) 723; *Tom v. Wollhoefer*, 61 Tex. 277; *Dickinson v. Farley*, 84 Va. 240, 4 S. E. 375; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

which entitle him to rescind.¹³ Thus, where, after the execution of a deed to his wife, and her subsequent death, the grantor, as guardian of his children, treated the land as theirs and asked lawyers if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so, it was held that, even if the deed was obtained by undue influence, there was a ratification of it.¹⁴

§ 2430. Acts amounting to ratification.—Any acts of recognition of the contract, or any transactions with the defendant relating to the subject-matter thereof, with knowledge of the facts, and inconsistent with an intention to rescind, will, in general, have the effect of affirming the transaction.¹⁵ Thus, a failure on the part of the vendee of land to repudiate the sale at the time the fraudulent vendor demanded the purchase-money has been held to amount to a ratification of the transaction;¹⁶ also his payment of the purchase-money after knowledge of the fraud is held to be a ratification of the sale.¹⁷ And the receipt of the purchase-money on the part of the vendor after discovery of the fraud is held to amount to his acquiescence in the fraud.¹⁸ It has also been held that the giving of an exten-

¹³ Lockwood v. Fitts, 90 Ala. 150, 7 So. 467; Bryan-Brown Shoe Co. v. Block, 52 Ark. 458, 12 S. W. 1073; Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827; Martinez v. Moll, 46 Fed. 724; Green v. Jackson, 66 Ga. 250; Wolf v. Dietzsch, 75 Ill. 205; Evans v. Montgomery, 50 Iowa 325; Gale Sulky Harrow Mfg. Co. v. Moore, 46 Kans. 324, 26 Pac. 703; Edwards v. Handley, Hard. (Ky.) 602, 3 Am. Dec. 745; Brinley v. Tibbets, 7 Greenl. (Maine) 70; Allen v. Webb, 24 N. H. 278; Bach v. Tuck, 126 N. Y. 53, 26 N. E. 1019; Morgan v. McKee, 77 Pa. St. 228.

¹⁴ Balue v. Taylor, 136 Ind. 368, 36 N. E. 269; Shaw v. Barnhart, 17 Ind. 183; Ellis v. Ellis, 5 Tex. Civ. App. 46, 23 S. W. 996.

¹⁵ Harrison v. Deramus, 33 Ala. 463; Day v. Ft. Scott Inv. & Imp. Co., 153 Ill. 293, 38 N. E. 567; Scarce v. Indiana & I. C. R. Co.,

17 Ind. 193; Blackman v. Wright, 96 Iowa 541, 65 N. W. 843, affd. 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. 333; Knaggs v. Mastin, 9 Kans. 532; Foley v. Crow, 37 Md. 51; Paine v. Harrison, 38 Minn. 346, 37 N. W. 588; Georgia Pac. R. Co. v. Brooks, 66 Miss. 583, 6 So. 467; Treacy v. Hecker, 51 How. Pr. (N. Y.) 69; Tom v. Wollhoefer, 61 Tex. 277.

¹⁶ Parsons v. McKinley, 56 Minn. 464, 57 N. W. 1134.

¹⁷ Howle v. North Birmingham Land Co., 95 Ala. 389, 11 So. 15; Bell v. Keepers, 39 Kans. 105, 17 Pac. 785; Lacey's Heirs v. McMilen, 9 B. Mon. (Ky.) 523; Ayres v. Mitchell, 3 Sm. & M. (Miss.) 683; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. 899; Johnson v. Lellyett, 12 Heisk. (Tenn.) 723.

¹⁸ Litchfield v. Browne, 70 Fed. 141, 17 C. C. A. 28; Oaks v. Harrison, 24 Iowa 179.

sion of time to a defendant who has failed to perform his contract,¹⁹ or the voluntary dismissal of a suit brought to set aside the instrument, will amount to a ratification of the transaction.²⁰ Another common instance of conduct amounting to ratification is the continued possession and use of the property by the party after discovering facts entitling him to rescission.²¹

§ 2431. Effect of laches.—A person can not be deprived of his remedy in equity on the ground of laches, unless it appears that he had, or ought to have had, knowledge of his rights. But upon discovery of the grounds entitling him to rescission, he must act with reasonable promptness to avoid the imputation of acquiescence.²² As one can not acquiesce in the performance of an act of which he is ignorant, so one can not be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge must not be the result of his own culpable negligence.²³ It has been held that a suit in equity for cancellation must be brought within a reasonable time after discovery of the facts entitling the plaintiff to such relief.²⁴ If the delay is unreasonable, and the adversary party has

¹⁹ *Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373.

²⁰ *Kerby v. Kerby*, 57 Md. 345.

²¹ *Garrett v. Lynch*, 45 Ala. 204; *Gatling v. Newell*, 9 Ind. 572; *Montgomery v. Gibbs*, 40 Iowa 652; *Thiemann v. Heinze*, 120 Mo. 630, 25 S. W. 533; *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. 899; *Temple Nat. Bank v. Warner* (Tex. Civ. App.), 31 S. W. 239.

²² *Newman v. Newman* (Ky.), 124 S. W. 828; *Johnstone v. Burhans*, 68 Misc. (N. Y.) 484, 124 N. Y. S. 465; *Wagg v. Herbert*, 215 U. S. 546; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798. See also, *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022; *Gatling v. Newell*, 9 Ind. 572; *Wade v. Pettibone*, 11 Ohio 57, 37 Am. Dec. 408; *Grewing v. Minneapolis Threshing*

Mach. Co., 12 S. Dak. 127, 8 N. W. 176.

²³ *United States v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501; *McCall v. McCall*, 159 Mich. 144, 123 N. W. 550; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907, affd. 53 N. J. Eq. 695, 35 Atl. 1130; *State v. Warner Val. Stock Co.*, 56 Ore. 283, 106 Pac. 780.

²⁴ *Byan v. Hobbs*, 72 Ark. 635, 83 S. W. 341; *Dickson v. Sentell*, 83 Ark. 385, 104 S. W. 148; *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593; *Mutual Life Ins. Co. of New York v. Griesa*, 156 Fed. 398; *Ferns v. Chapman*, 211 Ill. 597, 71 N. E. 1106; *Murphy v. First Nat. Bank*, 95 Iowa 325, 63 N. W. 702; *Ripple v. Kuehne*, 100 Md. 672, 60 Atl. 464; *Horn v. Beatty*, 85 Miss. 504, 37 So. 833.

changed his position so that he can not be placed in statu quo, rescission will be denied.²⁵ But an alteration in position not affecting substantial rights does not of itself prevent rescission.²⁶ A number of opinions of eminent jurists would seem to excuse any delay less than the period of the statute of limitations which has not operated to the prejudice of the defendant.²⁷ But relief by way of cancellation has been given regardless of unexplained delay on the plaintiff's part, amounting in some instances to several years.²⁸ Usually, laches of a grantor will not bar a suit by his heir to set aside a conveyance.²⁹

§ 2432. Relief where duress is continued.—The rule is well settled that one who would avoid his contract on the ground of duress must bring his action within a reasonable time;³⁰ but where the undue influence is continuing, the conduct of the plaintiff can not be construed against him as a confirmation or as acquiescence of the transaction.³¹ Thus, where a wife, under the coercion of her husband, conveyed her lands to another, it was held that the fact that she said or did nothing about the matter for a period of three years, during which time she lived with her husband as a dutiful wife, did not amount to a ratification.³² Likewise, laches

²⁵ Connecticut Mut. Life Ins. Co. v. Stewart, 95 Ind. 588; Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004; Grymes v. Sanders, 93 U. S. 55, 23 L. ed. 798.

²⁶ Culbertson v. Blanchard, 79 Tex. 486, 15 S. W. 700.

²⁷ Treadwell v. Torbert, 122 Ala. 297, 25 So. 216; Chase v. Chase, 20 R. I. 202, 37 Atl. 804.

²⁸ Treadwell v. Torbert, 122 Ala. 297, 25 So. 216; Sears v. Hicklin, 13 Colo. 143, 21 Pac. 1022; Carbine v. McCoy, 85 Ga. 185, 11 S. E. 651; Ross v. Payson, 160 Ill. 349, 43 N. E. 399; O'Connor v. O'Connor, 100 Iowa 476, 69 N. W. 676; Canton v. McGraw, 67 Md. 583, 11 Atl. 287; Merriam v. Boston, C. & F. R. Co., 117 Mass. 241; Tabor v. Michigan Mut. L. Ins. Co., 44

Mich. 324, 6 N. W. 830; Bonner v. Bynum, 72 Miss. 442, 18 So. 82; Newman v. Newman, 152 Mo. 398, 54 S. W. 19; Du Pont v. Du Bos, 52 S. Car. 244, 29 S. E. 665; Grewing v. Minneapolis Threshing-Mach. Co., 12 S. Dak. 127, 80 N. W. 176.

²⁹ Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

³⁰ Bryan v. Hobbs, 72 Ark. 635, 83 S. W. 341; Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106; Horn v. Beatty, 85 Miss. 504, 37 So. 833. See also, ante, vol. 1, §161.

³¹ Thompson v. Lee, 31 Ala. 292; McClure v. Lewis, 72 Mo. 314.

³² Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529.

can not be imputed to a person under continuing duress because of his delay in proceeding to set aside the transaction.³³

§ 2433. Effect of laches and ratification with knowledge of facts.—Delay for an unreasonable time after discovery of the ground for rescission may, without positive acts of ratification, amount to a waiver of the right to rescind.³⁴ But no act of a party will, ordinarily, impute ratification of a fraudulent transaction, unless it is done with full knowledge of the fraud,³⁵ and while he is free from its influence.³⁶ The fact that one is ignorant of his rights, such ignorance not being due to his own negligence,³⁷ as where his ignorance of his rights is due to the fraud of the adversary party,³⁸ or where his right of action grows out of the fraud of the adversary party and his delay is due to the fact that he has not discovered such fraud, prevents delay from defeating his right to equitable relief.³⁹

§ 2434. Placing defendant in statu quo.—To obtain rescission of a contract for fraud, whether such relief is

³³ *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; *Bradshaw v. Yates*, 67 Mo. 221. See also, ante, vol. 1, § 161.

³⁴ *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702; *Benton v. Ward*, 59 Fed. 411; *Mortimer v. McMullen*, 202 Ill. 413, 67 N. E. 20; *Day v. Ft. Scott Inv. & Imp. Co.*, 153 Ill. 293, 38 N. E. 567; *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970; *American Bldg. & Loan Assn. v. Rainbolt*, 48 Nebr. 434, 67 N. W. 493; *Norfolk & c. Hosiery Co. v. Arnold*, 49 N. J. Eq. 390, 23 Atl. 514; *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. 290; *Mahaffey v. Ferguson*, 156 Pa. St. 156, 27 Atl. 21; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798. But delay will not ordinarily be a bar when the defendant has not been misled or injured and no equities have intervened. *Curtis v. Armagast (Iowa)*, 138 N. W. 996.

³⁵ *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468; *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Wager v. Reid*, 3 Thomps. & C. (N. Y.) 332; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420; *Broddus v. McCall*, 3 Call (Va.) 546.

³⁶ *McLean v. Clark*, 47 Ga. 24; *Montgomery v. Pickering*, 116 Mass. 227.

³⁷ *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. 214; *Whaley v. Eliot's Heirs*, 1 A. K. Marsh. (Ky.) 343, 10 Am. Dec. 737; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869.

³⁸ *Reavis v. Reavis*, 103 Fed. 813.

³⁹ *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *Horner v. Perry*, 112 Fed. 906; *Wilson v. Augur*, 176 Ill. 561, 52 N. E. 289; *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395; *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. 939.

sought informally or by formal decree in equity, the adversary party must usually be placed in statu quo by the party seeking relief.⁴⁰ And if, upon the discovery of fraud, the defrauded party fails to offer to return whatever of value he has received under the contract, he affirms the contract.⁴¹ But where, by the acts of the adversary party, complete restoration is rendered impossible, rescission will not thereby be defeated;⁴² however, where rescission is sought on other grounds than fraud, a failure to restore the statu quo will, ordinarily, defeat the remedy.⁴³ If the property received by the person defrauded is worthless,⁴⁴ or if its value is trifling,⁴⁵ he need not offer to return it in order to rescind. The party seeking rescission need not restore something not received by him under the contract in question,⁴⁶ nor something which he did receive under some other contract which he is not seeking to rescind.⁴⁷

⁴⁰ *Vandervelden v. Chicago &c. R. Co.*, 61 Fed. 54; *Petty v. Brunswick & W. R.*, 109 Ga. 666, 35 S. E. 82; *Western & A. R. Co. v. Burke*, 97 Ga. 560, 25 S. E. 498; *Mortimer v. McMullen*, 202 Ill. 413, 67 N. E. 20; *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Starke v. Dicks*, 2 Ind. App. 125, 28 N. E. 214; *Swayne v. Waldo*, 73 Iowa 749, 33 N. W. 78, 5 Am. St. 712; *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119; *Loveridge v. Coles*, 72 Minn. 57, 74 N. W. 1109; *Och v. Missouri, K. & T. R. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Tootle v. First Nat. Bank*, 34 Nebr. 863, 52 N. W. 396; *Kley v. Healy*, 149 N. Y. 346, 44 N. E. 150; *Railroad Co. v. Steinfield*, 42 Ohio St. 449; *Johnson v. Parshley*, 59 Ore. 447, 117 Pac. 661; *Johnson v. Burnside*, 3 S. Dak. 230, 52 N. W. 1057; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584. But see as to wholly executory contract, *Roberts v. James* (N. J.), 85 Atl. 244.

⁴¹ *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Haase v. Mitchell*, 58 Ind. 213; *Shaw v. Barnhart*, 17 Ind. 183; *Gatling v. Newell*, 9 Ind. 572.

⁴² *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 7 Am. St. 663; *Paquin v. Milliken*, 163 Mo. 79, 63 S. W. 417, 1092; *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; *Coffee v. Ruffin*, 4 Cold. (Tenn.) 487.

⁴³ *Bennett v. Owen*, 13 Ark. 177; *Stringer v. Keokuk &c. R. Co.*, 59 Iowa 277, 13 N. W. 308.

⁴⁴ *Freeman v. Reagan*, 26 Ark. 373; *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091; *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Hess v. Young*, 59 Ind. 379; *Adams v. Reed*, 11 Utah 480, 40 Pac. 720, affd. 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. 179; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

⁴⁵ *Pidcock v. Swift*, 51 N. J. Eq. 405, 27 Atl. 470, affd. 53 N. J. Eq. 238, 34 Atl. 1135.

⁴⁶ *Hargadine-McKittrick Dry Goods Co. v. Swofford Bros. Dry Goods Co.*, 65 Kans. 572, 70 Pac. 582.

⁴⁷ *Petty v. Brunswick & W. R.*, 109 Ga. 666, 35 S. E. 82.

§ 2435. **Return of consideration received.**—It is a familiar rule that one who seeks the rescission of a contract on the ground of fraud must, as a condition precedent to bringing the action, restore or offer to restore the consideration received by him.⁴⁸ Thus, in order that a note may be rescinded for fraud, the maker must account for the benefits he has received in the transaction.⁴⁹ But the rule stated above presupposes the idea that there are persons to whom the offer or transfer may be successfully made. Thus, where a father conveyed his farm to a son in consideration of a note for about one-tenth of the farm's value, and his promise to maintain the father during his life, and the note was not paid, and the father was supported while the son lived, but when the son died his heirs refused to carry out the contract for the father's support, it was held that the father was entitled to judgment canceling the contract, and vesting him with title to the farm; and the mere fact that the father failed to tender the note before suit would not defeat his recovery, since no one to whom he could have tendered it could have restored the land.⁵⁰ Restoration of the consideration need not be exact to entitle the plaintiff to a decree of rescission.⁵¹ Where complete restoration of the consideration can not be made by the plaintiff for the reason that he has parted with a portion thereof before discovery of the fraud, it would seem that he may have rescission by returning what he retained with compensation for the remainder;⁵² but some courts

⁴⁸ *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Lake v. Lake*, 136 App. Div. (N. Y.) 47, 119 N. Y. S. 686; *Williams v. Dunn*, 151 N. Car. 107, 65 S. E. 754; *Boelk v. Nolan*, 56 Ore. 229, 107 Pac. 689. See also, *O'Callaghan v. Lowndes*, 66 Fed. 356, 13 C. C. A. 510; *Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456; *Strodder v. Southern Granite Co.*, 94 Ga. 626, 19 S. E. 1022; *Shepherd v. Temple*, 3 N. H. 455.

⁴⁹ *Snow v. Alley*, 144 Mass. 546,

11 N. E. 764, 59 Am. Rep. 119; *Templeton v. Green* (Tex. Civ. App.), 25 S. W. 1073. See also, *Life Assn. of America v. Goode*, 71 Tex. 90, 8 S. W. 639.

⁵⁰ *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787. See also, *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Lindsay v. Glass*, 119 Ind. 301, 21 N. E. 897.

⁵¹ *Gatling v. Newell*, 9 Ind. 572.

⁵² *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449; *Baker v. Ziegler*, 56 Hun (N. Y.) 405, 31 N. Y. St. 466, 10 N. Y. S. 249.

have held the party seeking equitable relief to the strict rule of restitution.⁵³

§ 2436. When restoration must be made.—In a case of informal rescission at law the party seeking relief must, as a condition precedent to maintaining his action, place the adversary party in statu quo, or make tender thereof;⁵⁴ but in a suit for formal rescission in equity it is not a condition precedent to the bringing of a suit that the defendant be first placed in statu quo, and it has often been held sufficient if the plaintiff is ready and willing to so place the defendant, and so offers in his pleadings.⁵⁵ If the consideration received by the plaintiff is surrendered at the trial of the action it is sufficient.⁵⁶ Upon the question as to whether restoration or an offer to restore is a condition precedent to the maintenance of an action to rescind there is much confusion among the cases; and there are many decisions that hold that restoration or an offer to restore the consideration or benefits received under the contract must be made before suit.⁵⁷ Thus, it has been held that a suit to rescind a release of a claim for personal injuries can not, ordinarily, be maintained without tendering back the money paid as a consideration therefor, and keeping the tender good, because in such a case the court can not

⁵³ Strong v. Lord, 107 Ill. 25; Shaeffer v. Sleade, 7 Blackf. (Ind.) 178; Anderson v. McDaniel, 15 Ky. L. 151, 22 S. W. 647; Edwards v. Hanna, 5 J. J. Marsh. (Ky.) 18; Stewart v. Houston &c. R. Co., 62 Tex. 246.

⁵⁴ Mortimer v. McMullen, 202 Ill. 413, 67 N. E. 20; Rigdon v. Walcott, 141 Ill. 649, 31 N. E. 158.

⁵⁵ Higham v. Harris, 108 Ind. 246, 8 N. E. 255; Shuee v. Shuee, 100 Ind. 477; Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004; Maloy v. Berkin, 11 Mont. 138, 27 Pac. 442; Gould v. Cayuga County Bank, 86 N. Y. 75, affg. 21 Hun (N. Y.) 293; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486; Ludington v. Patton, 111 Wis. 208, 86

N. W. 571; Paetz v. Stoppleman, 75 Wis. 510, 44 N. W. 834.

⁵⁶ Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700.

⁵⁷ Davis v. Tarwater, 15 Ark. 286; Buena Vista Fruit &c. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Godding v. Decker, 3 Colo. App. 198, 32 Pac. 832; Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; Edmunds v. Myers, 16 Ill. 207; Burgett v. Teal, 91 Ind. 260; Harkness v. Cleaves, 113 Iowa 140, 84 N. W. 1033; State v. Williams, 39 Kans. 517, 18 Pac. 727; Sneed's Heirs v. Waring, 2 B. Mon. (Ky.) 522; Bryant v. Stothart, 46 La. Ann. 485, 15 So. 76; Hanson v. Field, 41 Miss. 712; Bird's Appeal, 91 Pa. St. 68. See also, Reeves v. Corning, 51 Fed. 774.

protect the interests of the other party without requiring from plaintiff repayment or such an effectual tender.⁵⁸ On the other hand, many well considered cases hold that no offer of restitution before bringing suit is necessary.⁵⁹ Much, perhaps, depends upon the nature and particular circumstances of the case.⁶⁰

§ 2437. Restoration by different persons.—The vendor or grantor of real estate seeking cancelation of a contract of sale must restore the cash payment if any has been made.⁶¹ Also, the mortgagor seeking cancelation of the mortgage given by him must pay to the mortgagee the amount due under the mortgage, with lawful interest.⁶² So,

⁵⁸ *Vandervelden v. Chicago & N. W. R. Co.*, 61 Fed. 54; *Billings v. Aspen &c. Smelting Co.*, 52 Fed. 250, 3 C. C. A. 69; *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486, 7 Sup. Ct. 311. But see, *Marple v. Minneapolis & St. L. R. Co.*, 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912 D, 1082 and note; also ante, vol. 3, ch. 48.

⁵⁹ *Martin v. Martin*, 35 Ala. 560; *Coffee v. Newsom*, 2 Ga. 442; *Wenger v. Bollenbach*, 180 Ill. 222, 54 N. E. 192; *McCorkell v. Karhoff*, 90 Iowa 545, 58 N. W. 913; *Thayer v. Knote*, 59 Kans. 181, 52 Pac. 433; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004; *Jandorf v. Patterson*, 90 Mich. 40, 51 N. W. 352; *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821; *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Day v. Mooney*, 3 Okla. 608, 41 Pac. 142; *Wiley v. Heidell*, 12 Heisk. (Tenn.) 98; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *Odell v. Burnham*, 61 Wis. 562, 21 N. W. 635. See also, *Crocker v. Oakes*, 106 Fed. 760.

⁶⁰ See notes in Ann. Cas. 1912D 1082-1092; and in 9 L. R. A. 608, 610; 30 L. R. A. 44; 1 L. R. A. (N. S.) 379.

⁶¹ *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 4 So. 842, 3 Am. St. 722; *Buckner v. Pacific &c. R. Co.*, 53 Ark. 16, 13 S. W. 332; *Hick v. Thomas*, 90 Cal. 289, 27 Pac. 208,

376; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Jackson v. Lynn*, 94 Iowa 151, 62 N. W. 704, 58 Am. St. 386; *State v. Williams*, 39 Kans. 517, 18 Pac. 727; *Anderson v. McDaniel*, 15 Ky. L. 151, 22 S. W. 647; *Bryant v. Stothart*, 46 La. Ann. 485, 15 So. 76; *Chase v. Hinckley*, 74 Maine 181; *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004; *Place v. Brown*, 37 Mich. 575; *Hanson v. Field*, 41 Miss. 712; *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *Waite v. Vinson*, 14 Mont. 405, 36 Pac. 828; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Wilson v. Lawrence*, 8 Hun (N. Y.) 593; *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77; *Coddington v. Wells*, 59 Tex. 49; *Odell v. Burnham*, 61 Wis. 562, 21 N. W. 635. It is held in *Chambers v. Nyatt* (Tex. Civ. App.), 151 S. W. 864, that an administrator of a deceased grantor who sues to set aside a deed for fraud of the grantee in procuring it need not offer to return taxes paid by the grantee.

⁶² *George v. New England Mortg. Security Co.*, 109 Ala. 548, 20 So. 331; *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Pershing v. Wolfe*, 6 Colo. App. 410, 40 Pac. 856; *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863; *Hormann v. Hartmetz*, 128 Ind. 353, 27

also, the vendee of land who has taken possession thereof under contract or conveyance must surrender possession and must reconvey, or at least be ready to do so, if he has received conveyance.⁶³ One who, acting in good faith and not knowing of the insanity of a party from whom he receives a contract or conveyance, may have the instrument canceled where the parties can be restored to their original position.⁶⁴

§ 2438. Restoration in case of illegal contract.—A person can not have a conveyance made by him set aside on the ground that the consideration was in part the dismissal of a criminal prosecution, and therefore illegal, when he himself procured such dismissal, the prosecution being against him, since he can not thus set up his own illegal act; and in any event where it is sought to set aside a conveyance on the ground that the consideration was illegal, plaintiff must tender back the purchase-money received by him.⁶⁵ In cases where it is sought to set aside mortgages or other securities on the ground of usury the plaintiff will usually be required to repay what is justly due with lawful in-

N. E. 731; Burlington Tp. v. Cross, 15 Kans. 74; Brill v. Rack, 15 Ky. L. 383, 23 S. W. 511; Pugh v. Cantey, 33 La. Ann. 786; Hanold v. Bacon, 36 Mich. 1; Pounds v. Clarke, 70 Miss. 263, 14 So. 22; Miller v. Gunderson, 48 Nebr. 715, 67 N. W. 769; Bissell v. Kellogg, 65 N. Y. 432; Folts v. Ferguson, 77 Tex. 301, 13 S. W. 1037; Kelly v. Kershaw, 5 Utah 295, 14 Pac. 804.

⁶³ Orendorff v. Tallman, 90 Ala. 441, 7 So. 821; Johnson v. Walker, 25 Ark. 196; Buena Vista Fruit & Co. v. Tuohy, 187 Cal. 243, 40 Pac. 386; Godding v. Decker, 3 Colo. App. 198, 32 Pac. 832; Ashmead v. Colby, 26 Conn. 287; Coffee v. Newsom, 2 Ga. 442; Strong v. Lord, 107 Ill. 25; Westhafer v. Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. 330; Mitchell v. Moore, 24 Iowa 394; Jeffers v. Forbes, 28 Kans. 174; Abel v. Cave, 3 B. Mon. (Ky.) 159; Formento v. Robert, 27 La. Ann. 489; Jandorf v.

Patterson, 90 Mich. 40, 51 N. W. 352; Shipp v. Wheelless, 33 Miss. 646; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449; Waters v. Lemmon, 4 Ohio 229; Adams v. Reed, 11 Utah 480, 40 Pac. 720, affd. 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. 179; Nalle v. Virginia Midland R. Co., 88 Va. 948; 14 S. E. 759; Worthington v. Collins' Admr., 39 W. Va. 406, 19 S. E. 527.

⁶⁴ Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694; Ashcraft v. DeArmond, 44 Iowa 229; Gribben v. Maxwell, 34 Kans. 8, 7 Pac. 584; 55 Am. Rep. 233; Rusk v. Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413; McKenzie v. Donnell, 151 Mo. 431, 52 S. W. 214; Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77.

⁶⁵ Teague v. Williams, 6 Tex. Civ. App. 468, 25 S. W. 1048; Hunt v. Turner, 9 Tex. 385, 60 Am. Dec. 167; Robertson v. Marsh, 42 Tex. 149.

terest.⁶⁶ This is in accordance with the maxim, "He who seeks equity must do equity," and the principle applies generally to all cases where it is sought to cancel instruments on the ground of illegality.⁶⁷

§ 2439. **Maxim, "He who comes into equity must come with clean hands."**—A court of chancery will lend its aid only to the worthy. The principle is emphatically expressed in the maxim, "He who comes into equity must come with clean hands." The phraseology of this maxim is given: "Who does iniquity shall not have equity."⁶⁸ The maxim applies to all proceedings in equity, including suits for the cancelation of instruments, where the party seeking equitable relief has been guilty of conduct in violation of the principles of equity jurisprudence with reference to the subject-matter in suit.⁶⁹

§ 2440. **Illustrations and exceptions to maxim.**—The rule is well settled, especially as to executed contracts, that if the parties be in *pari delicto* they will be left where they have placed themselves; they do not come into court with clean hands. Nor does equity, in general, give relief to

⁶⁶ *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, 12 So. 55; *American Freehold Land &c. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464, 30 Am. St. 587.

⁶⁷ *George v. New England Mortg. Security Co.*, 109 Ala. 548, 20 So. 331; *Bowdre v. Carter*, 64 Miss. 221, 1 So. 162; *Mumford v. American Life Ins. &c. Co.*, 4 N. Y. 463. See also, *New Castle Northern R. Co. v. Simpson*, 23 Fed. 214.

⁶⁸ *Bleakley's Appeal*, 66 Pa. St. 187; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547.

⁶⁹ *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670; *Barnes v. Starr*, 64 Conn. 136, 28 Atl. 980; *Paige v. Hieronymus*, 180 Ill. 637, 54 N. E. 583; *Overshiner v. Wisheart*, 59 Ind. 135; *Williams v. Collins*, 67 Iowa 413, 25 N. W. 682; *Harper v. Harper*, 85 Ky. 160, 8 Ky. L. 820, 3 S. W. 5; *Brown v. Reilly*,

72 Md. 489, 20 Atl. 239; *Bryant v. Peck &c. Co.*, 154 Mass. 460, 28 N. E. 678; *Poppe v. Poppe*, 1114 Mich. 649, 72 N. W. 612, 68 Am. St. 503; *O'Conner v. Ward*, 60 Miss. 1025; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; *Brown v. Carpenter*, 57 N. J. Eq. 23, 41 Atl. 562; *Boyd v. DeLaMontagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Blossom v. v. Van Amringe*, 62 N. Car. 133; *Booker v. Wingo*, 29 S. Car. 116, 7 S. E. 49; *Copeland v. Long* (Tenn. Ch.), 41 S. W. 866; *Teague v. Williams*, 6 Tex. Civ. App. 468, 25 S. W. 1048; *Jeffries v. Southwest Virginia Imp. Co.*, 88 Va. 862, 14 S. E. 661; *Rozell v. Vansycle*, 11 Wash. 79, 39 Pac. 270; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520. See also, *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

either party to an illegal executory contract if they are in *pari delicto*.⁷⁰ And where the contract or other transaction sought to be avoided is a fraud upon the rights or interests of third persons, equity will deny the relief.⁷¹ If, however, one party is but an instrument in the hands of another, then it may be that they can not be said to be in *pari delicto*.⁷² The rule that equity will deny relief to either party when they are in *pari delicto* is subject, however, to certain exceptions or qualifications. Thus, where the public interest will be better subserved by giving relief to a plaintiff who is equally guilty with the defendant in some illegal transaction sought to be canceled, the court may grant the relief.⁷³ Also, it has been held that relief by way of equitable cancellation may be given to one of the parties in *pari delicto*, under some circumstances, at least, where the contract is still executory, and his defense to an action at law on the contract would appear to be adequate.⁷⁴ Equity will not cancel a mortgage given under a contract to stifle criminal prosecution.⁷⁵

§ 2441. Bona fide purchasers—Relief against.—Equity will not give relief by cancellation against a bona fide purchaser for value and without knowledge or notice of the ground for cancellation.⁷⁶ Thus, a note, in the hands of a

⁷⁰ *Owens v. Van Winkle Gin Mach. Co.*, 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767n; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Allison v. Hess*, 28 Iowa 388; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Cedar Springs v. Schlich*, 81 Mich. 405, 45 N. W. 994, 8 L. R. A. 851; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Pacific Live Stock Co. v. Gentry*, 38 Ore. 275, 61 Pac. 422, 65 Pac. 597; *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. 777; *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137.

⁷¹ *Barnes v. Starr*, 64 Conn. 136, 28 Atl. 980; *Dunning v. Bathrick*, 41 Ill. 425; *Overshiner v. Wisheart*, 59 Ind. 135; *Wilson v. Watts*, 9 Md. 356; *Bolt v. Rogers*, 3 Paige (N.

Y.) 154; *Jeffries v. Southwest Virginia Imp. Co.*, 88 Va. 862, 14 S. E. 661; *Corrothers v. Harris*, 23 W. Va. 177.

⁷² *Davidson v. Carter*, 55 Iowa 117, 7 N. W. 466; *Williams v. Collins*, 67 Iowa 413, 25 N. W. 682; *Harper v. Harper*, 85 Ky. 160, 8 Ky. L. 820, 3 S. W. 5; *Poston v. Balch*, 69 Mo. 115.

⁷³ *Petillon v. Hipple*, 90 Ill. 420, 32 Am. Rep. 31; *O'Conner v. Ward*, 60 Miss. 1025; *Basket v. Moss*, 115 N. Car. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. 463.

⁷⁴ *Booker v. Wingo*, 29 S. Car. 116, 7 S. E. 49.

⁷⁵ *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551.

⁷⁶ *Henson v. Westcott*, 82 Ill. 224; *Somers v. Pumphrey*, 24 Ind. 231; *Rusk v. Fenton*, 14 Bush (Ky.) 490,

bona fide purchaser for value before maturity can not be canceled in equity for a failure of consideration.⁷⁷ And it has been held that a married woman can not have cancellation of a mortgage or conveyance executed by her of her separate estate on the ground of fraud on the part of her husband, of which the mortgagee was ignorant or innocent.⁷⁸ So, also, a decree of cancellation of a deed for land on the ground of fraud, duress or want of consideration can not be had against a bona fide purchaser for value without notice of the facts constituting the ground for cancellation.⁷⁹

§ 2442. Parties to suit—In general.—All persons interested in the subject-matter and who will be affected by the decree are necessary parties to a suit for rescission or cancellation.⁸⁰ Thus, in a suit to rescind a contract for the sale of land, all parties to the deed should be made parties plaintiff,⁸¹ as a reconveyance will not be decreed in favor of persons not so made parties.⁸² But the above rule is subject to the discretion of the court; and, if a case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court can not reach, as if he be a resident of another state, will not prevent a decree on the merits.⁸³

29 Am. Rep. 413; *Thomas v. Mead*, 8 Mart. (N. S.) (La.) 341, 19 Am. Dec. 187; *Dixon v. Wilmington Sav. & Trust Co.*, 115 N. Car. 274, 20 S. E. 464; *Cook v. Moore*, 39 Tex. 255; *Goree v. Goree*, 22 Tex. Civ. App. 470, 54 S. W. 1036.

⁷⁷ *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611.

⁷⁸ *Paxton v. Marshall*, 18 Fed. 361, aff'd. 124 U. S. 552, 31 L. ed. 518, 8 Sup. Ct. 592. See also, *Vancleave v. Wilson*, 73 Ala. 387; *Pacific Guano Co. v. Anglin*, 82 Ala. 492, 1 So. 852.

⁷⁹ *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. ed. 388; *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209; *National Valley Bank v. Harman*, 75 Va. 604; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470.

⁸⁰ *Gilkeson v. Thompson*, 210 Pa. 355, 59 Atl. 1114. See also, *Paulk v. Ensign-Oskamp Co.*, 123 Ga. 467, 51 S. E. 344; *Illinois Land & Loan Co. v. Speyer*, 138 Ill. 137, 27 N. E. 931; *Lynch v. United States*, 13 Okla. 142, 73 Pac. 1095; *El Reno v. El Reno Water Co.*, 14 Okla. 53, 76 Pac. 126.

⁸¹ *Cummins v. Boyle*, 1 J. J. Marsh (Ky.) 480.

⁸² *Dockray v. Thurston*, 43 Maine 216; *Dale v. Roosevelt*, 6 Johns. Ch. (N. Y.) 255.

⁸³ *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152, 6 L. ed. 289; *Marr's Exrx. v. Southwick*, 2 Port. (Ala.) 351; *Graham v. Elmore*, Har. (Mich.) 265; *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 437.

§ 2443. Plaintiffs in suits to cancel conveyances.—In suits to cancel conveyances the heirs and devisees of a deceased grantor are usually necessary parties plaintiff to a suit to set aside a conveyance made by the deceased,⁸⁴ but his executor or administrator is not a necessary party, having no interest in the land.⁸⁵ The widow of the grantor of realty is a real party in interest entitled to sue for the cancellation of a deed procured from the grantor through fraud and undue influence of the grantees.⁸⁶ In general, all the owners of real estate who join in a conveyance thereof are necessary parties to a suit in equity to cancel the deed.⁸⁷ Thus, a husband can not alone maintain a suit in equity to avoid a release of a right of homestead executed by himself and his wife, since without her presence no decree can be rendered affecting her rights in the premises.⁸⁸ Where several grantors execute a deed of trust, by which the trustee is given control of the property merely to pay a certain debt of the grantors, all of such grantors are necessary parties to a suit in equity against the trustee to cancel the deed.⁸⁹ Where a conveyance of land is obtained by fraud, the grantor may disregard such conveyance and convey the same land to a third party, who may establish the fraud and obtain rescission in equity in the same manner his grantor might have done but for the conveyance.⁹⁰

§ 2444.—Plaintiffs in suits to cancel other instruments.—In a suit to cancel a mortgage on the ground of fraud the mortgagor is a necessary party.⁹¹ Also, the wife is a necessary party to a suit brought by her husband to set aside a chattel mortgage executed by them on her separate prop-

⁸⁴ Webb v. Janney, 9 App. D. C. 41; Foxworth v. Bullock, 44 Miss. 457; Keenan v. Keenan, 58 Hun (N. Y.) 605, 34 N. Y. St. 996, 12 N. Y. S. 747. See also, Brown v. Brown, 62 Kans. 666, 64 Pac. 599; Lane v. Lane, 106 Ky. 530, 21 Ky. L. 9, 50 S. W. 857.

⁸⁵ Webb v. Janney, 9 App. D. C. 41; Keenan v. Keenan, 58 Hun (N. Y.) 605, 34 N. Y. St. 996, 12 N. Y. S. 747.

⁸⁶ Page v. Carver, 146 Cal. 577, 80 Pac. 860.

⁸⁷ Robinson v. Kind, 23 Nev. 330, 47 Pac. 1.

⁸⁸ Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537.

⁸⁹ Robinson v. Kind, 23 Nev. 330, 47 Pac. 1.

⁹⁰ Whitney v. Roberts, 22 Ill. 381; Bellair v. Wool, 35 Mich. 440; Paine v. Baker, 15 R. I. 100, 23 Atl. 141.

⁹¹ Oakes v. Yonah Land & Mining Co., 89 Fed. 243.

erty.⁹² And a grantee of mortgaged lands may sue for cancellation of the mortgage on the ground that it was executed by the mortgagor under duress.⁹³ The right to cancel a lease on the ground of duress is held to be a personal right of the lessor and does not pass to his grantee.⁹⁴ All parties to a partnership agreement between a surviving partner and representatives of a deceased partner are necessary parties to a suit to set aside the agreement.⁹⁵ In a suit to cancel a policy of insurance on the ground of fraudulent conspiracy between the insured and others, brought after the death of the insured, the coconspirators may be made parties defendant with the personal representatives or beneficiaries for the purpose of having liability for costs adjudicated.⁹⁶ In a suit in equity to cancel a patent to land, every person having an interest in the land covered by the patent is an indispensable party, without whom equity will not proceed.⁹⁷

§ 2445. **Defendants—In general.**—In a suit in equity, those only are parties defendant against whom process is prayed, or who are specifically named and described as defendants.⁹⁸ And if, in the event of the plaintiff's success, the defendant will have a right to call upon a third party for reimbursement, such third party is a necessary, or at least a proper, party to the determination of the whole controversy.⁹⁹ Infants having a contingent interest in an insurance policy are necessary parties defendant in a suit to set aside the policy.¹ An assignor who has transferred all his interest in a contract is not a necessary party to a suit for equita-

⁹² *Tatum Bros. v. Walker*, 77 Ala. 563; *Beane v. Givens*, 5 Idaho 774, 51 Pac. 987.

⁹³ *Gray v. Freeman*, 37 Tex. Civ. App. 556, 84 S. W. 1105.

⁹⁴ *Schee v. McQuilken*, 59 Ind. 269; *Stiner v. Stiner*, 58 Barb. (N. Y.) 643, affd. 49 N. Y. 679.

⁹⁵ *Smith v. Irvin*, 95 N. Y. S. 731, 108 App. Div. 218.

⁹⁶ *Union Life Ins. Co. v. Riggs*, 123 Fed. 312, revd. 129 Fed. 207, 63 C. C. A. 365.

⁹⁷ *Lynch v. United States*, 13 Okla. 142, 73 Pac. 1095.

⁹⁸ *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280; *Green v. McKinney's Heirs*, 6 J. J. Marsh. (Ky.) 193; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438.

⁹⁹ *Alexander v. Horner*, 1 McCrary (U. S.) 634, Fed. Cas. No. 169.

¹ *Equitable Life Assur. Soc. v. Patterson*, 1 Fed. 126; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395.

ble relief against the assignee alone.² Where a defendant holds a contract merely as a bailee or depositary, the real owner not being joined as defendant, cancelation of the instrument will be denied.³

§ 2446.—**Defendants in suits to cancel conveyances.**—A court of equity will not attempt to cancel a written instrument conveying title to property without having before it all the parties to be affected by the proposed cancelation. We have stated that all the grantors in a conveyance are necessary parties to a suit in equity to cancel the conveyance. If they have not been made plaintiffs, they should be joined as defendants.⁴ So, also, all the heirs of a deceased grantor, if not joined as plaintiffs in a suit to set aside a conveyance, are at least proper parties defendant,⁵ and if they can be brought in as parties before final decree is rendered, they have been held to be necessary parties.⁶ All persons claiming an interest in the subject-matter of the conveyance which is sought to be canceled are properly joined as defendants.⁷ As a general rule, subsequent grantees of the original grantee are properly joined with such original grantee in a suit to set aside a conveyance obtained by fraud.⁸ But they are not necessary parties unless their rights are affected by the decree.⁹ Also, a person instrumental in the fraud, but having no interest in the property, need not be made a party defendant unless for the purpose of having liability for costs adjudicated.¹⁰

² Mullins v. McCandless, 57 N. Car. 425.

³ Edwards v. Brightly, 6 Sad. (Pa.) 583, 12 Atl. 91, affg. 44 Leg. Int. (Pa.) 132.

⁴ Malone v. Kelly, 101 Ga. 194, 28 S. E. 689; Hannibal & St. J. R. Co. v. Nortoni, 154 Mo. 142, 55 S. W. 220; Fairchild v. Fairchild (N. J.), 44 Atl. 944.

⁵ Canton v. McGraw, 67 Md. 583, 11 Atl. 287.

⁶ Harding v. Handy, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

⁷ Palmer v. Searing, 46 Hun (N. Y.) 680, 12 N. Y. St. 559; Palmer v. Stevens, 100 Mass. 461; Trustees of

Schools Town, 16 N. R. 11 W., in Morgan County v. Braner, 71 Ill. 546.

⁸ Ross v. Hobson, 131 Ind. 166, 26 N. E. 775; Free v. Buckingham, 57 N. H. 95; Silberberg v. Pearson, 75 Tex. 287, 12 S. W. 850.

⁹ Edwards v. Richards, 95 Ga. 655, 22 S. E. 690; Silberberg v. Pearson, 75 Tex. 287, 12 S. W. 850; Muzzy v. Tompkinson, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652.

¹⁰ Union Life Ins. Co. v. Riggs, 123 Fed. 312, revd. 129 Fed. 207, 63 C. C. A. 365; Seiferd v. Mulligan, 36 App. Div. (N. Y.) 33, 55 N. Y. S. 140, 28 Civ. Proc. (N. Y.) 373.

§ 2447.—Defendants in suits to cancel other instruments.

—The mortgagor is a necessary party defendant to a suit by a purchaser of land to cancel a mortgage thereon.¹¹ Also, where it is sought to cancel a mortgage in equity on the ground of payment of the debt which is represented by several negotiable notes in the hands of different persons, all such holders of the notes are necessary parties.¹² But in an action brought to cancel a nonnegotiable note on the ground of fraud, an intermediate indorser is neither a necessary nor, it seems, a proper party.¹³ In a suit to cancel a deed of trust the trustee or his heirs and all the beneficiaries named in the deed have been held necessary parties.¹⁴ But contingent remaindermen in a deed of trust are not necessary parties, as their interests are represented by the trustees.¹⁵ Nor is it necessary to make the bondholders secured by a deed of trust parties to a suit to set aside the deed, as whatever binds the trustees will bind the bondholders, the trustees being parties to the suit.¹⁶ Where it is sought to cancel a conveyance made to one party for the benefit of another, both are proper parties defendant.¹⁷ Where the ground for cancellation is a defect of the vendor's title, it is not necessary to join other parties for the purpose of determining whether title could be made to the vendor.¹⁸

§ 2448. Complaint or bill.—So far as applicable the ordinary rules of pleading govern actions to cancel instruments. The first pleading on the part of the party seeking rescission and cancellation is the complaint or bill which should contain allegations of all the facts necessary to make out his right to relief.¹⁹ The bill or complaint in a suit to

¹¹ *Beeler v. Pope*, 4 Bibb. (Ky.) 26.

¹² *Chandler v. Ward*, 188 Ill. 322, 58 N. E. 919; *Beach v. Mosgrove*, 4 McCrary (U. S.) 50, 16 Fed. 305.

¹³ *Campodonico v. Grossini*, 66 Cal. 358, 5 Pac. 609.

¹⁴ *Barth v. Denel*, 11 Colo. 494, 19 Pac. 471; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918; *Erisman v. Erisman*, 59 Mo. 367; *Voorhis v. Gamble*, 6 Mo. App. 1; *Conkling v. Davies*, 53 How. Pr. (N. Y.) 409.

¹⁵ *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366.

¹⁶ *F. G. Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 367.

¹⁷ *Miller v. Whittaker*, 23 Ill. 453; *Ross v. Hobson*, 131 Ind. 166, 26 N. E. 775.

¹⁸ *Prewitt v. Graves*, 5 J. J. Marsh. (Ky.) 114.

¹⁹ *Stiles v. Hermosa Beach Land & Water Co.*, 81 Cal. App. 352, 97 Pac. 91; *Peckham v. Lane*, 81 Kans. 489, 106 Pac. 464, 25 L. R. A. (N. S.) 967.

rescind a contract must set forth the essential facts with clearness and certainty.²⁰ It must allege the ground upon which a right to rescind is based, an offer to rescind, without unnecessary delay, by a tender of the property received, with a request for a return of the consideration, and the offer to return the property must be continuous and kept good by a proper averment to that effect.²¹ The plaintiff can no more recover without sufficient averments in his complaint than he can without proof of his allegations if properly made.²² The formal parts of a bill or complaint in a suit in equity may be dispensed with except the stating part and the prayer for relief.²³

§ 2449. Allegations of bill or complaint.—The bill or complaint for rescission should clearly and with distinct certainty allege all the facts and circumstances justifying the exercise of the discretionary powers of a court of equity.²⁴ Thus, where the ground relied upon for cancellation is mistake, the allegation with reference thereto must be precise.²⁵ Also, where fraud is relied upon, the facts constituting the alleged fraud must be set forth fully and explicitly,²⁶ and facts constituting legal fraud, actual or constructive, must be pleaded.²⁷ But in case fraud is alleged, but is not an essential element of the case stated, it is not

²⁰ *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403.

²¹ *Potter v. Roeth*, 67 Cal. XX, 7 Pac. 762; *Miller v. Whittaker*, 23 Ill. 453; *Seymour v. Shea*, 62 Iowa 708, 16 N. W. 196; *J. B. Alfree Mfg. Co. v. Grape*, 59 Nebr. 777, 82 N. W. 11; *Martin v. Cook*, 59 N. Car. 199; *Terrell v. Dewitt*, 20 Tex. 256.

²² *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

²³ *Comstock v. Herron*, 45 Fed. 660.

²⁴ *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403; *Robertson v. Covenant Mut. Life Ins. Co.*, 123 Mo. App. 238, 100 S. W. 686; *Field v. Holbrook*, 14 How. Pr. (N. Y.) 103; *Gordon v. Maas*, 115 App. Div. (N. Y.) 377, 100 N. Y. S. 891.

²⁵ *Salinas v. Stillman*, 66 Fed. 677, E. 651; *Stover v. Poole*, 67 Maine

(30 U. S. App. 40), 14 C. C. A. 50; *Carbine v. McCoy*, 85 Ga. 185, 11 S. 217.

²⁶ *Pinkston v. Boykin*, 130 Ala. 483, 30 So. 398; *Smith v. Collins*, 148 Ala. 672, 41 So. 825; *Bartol v. Walton & Co.*, 92 Fed. 13; *Tomlinson v. Tomlinson*, 162 Ind. 530, 70 N. E. 881; *Wetherell v. Johnson*, 208 Ill. 247, 70 N. E. 229; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796; *Leavenworth, L. & G. R. Co. v. Douglas County*, 18 Kans. 169; *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Butler v. Viele*, 44 Barb. (N. Y.) 166; *Corey v. Howard*, 19 R. I. 723, 37 Atl. 946; *Upchurch v. Anderson* (Tenn.), 62 S. W. 1115.

²⁷ *Dorris v. McManus*, 3 Cal. App. 576, 86 Pac. 909.

necessary to allege the facts constituting fraud.²⁸ It is held that the allegation of fraud in general terms without stating the facts is insufficient.²⁹ But allegations that the execution of a deed was procured by fraud and undue influence, that the grantor was weak in mind and incompetent to manage his affairs and that defendant, knowing this, had complete control over his mind and property, and, taking advantage thereof, procured the deed without consideration, sufficiently alleged the fraud.³⁰ The bill or complaint must allege that injury resulted to plaintiff as a result of misrepresentations made by the defendant.³¹ So, also, the result of undue influence, not merely the particular acts constituting it, must be alleged.³²

§ 2450. Allegations of bill or complaint—Pleading facts.

—The facts constituting the gist of the action must be pleaded, and this rule applies where the ground relied on for rescission is either undue influence,³³ mental incapacity,³⁴ inadequacy of consideration,³⁵ or a failure to comply with the provisions of the contract.³⁶ Where the ground relied upon for rescission is incapacity, the complaint must allege the facts constituting such incapacity so as to put it in issue.³⁷ Also, where undue influence is relied upon as a ground for rescission, the complaint must aver the facts which show the domination of the will of the person alleged

²⁸ *Ennis v. Padgett*, 122 Mo. App. 539, 99 S. W. 782.

²⁹ *Penny v. Jackson*, 85 Ala. 67, 4 So. 720; *Conway v. Ellison*, 14 Ark. 360; *Stettauer v. Dwight*, 54 Ill. App. 194; *Butler v. Viele*, 44 Barb. (N. Y.) 166; *McCaleb v. Peery*, 6 Tenn. 489; *Prentice v. Madden*, 3 Pen. (Wis.) 376, 4 Chand. (Wis.) 170.

³⁰ *Johnson v. Velve*, 86 Minn. 46, 90 N. W. 126.

³¹ *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Smith v. Briffenham*, 98 Ill. 188; *Srader v. Srader*, 151 Ind. 339, 51 N. E. 479.

³² *McLeod v. McLeod*, 137 Ala. 267, 34 So. 228; *Baker v. Maxwell*, 99 Ala. 558, 14 So. 468; *Armstrong v. Penn*, 105 Ga. 229, 31 S. E. 158;

Ross v. Hobson, 131 Ind. 166, 26 N. E. 775; *Grundy v. Louisville & C. R. Co.*, 98 Ky. 117, 17 Ky. L. 669, 32 S. W. 392; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Weirich v. Dodge*, 101 Wis. 621, 77 N. W. 906.

³³ *Mullin v. Mullin*, 119 App. Div. (N. Y.) 521, 104 N. Y. S. 323.

³⁴ *Studebaker v. Faylor* (Ind. App.), 80 N. E. 861; *Pritz v. Jones*, 117 App. Div. (N. Y.) 643, 102 N. Y. S. 549.

³⁵ *Smith v. Collins*, 148 Ala. 672, 41 So. 825.

³⁶ *Tillamook County v. Wilson River Road Co.*, 49 Ore. 309, 89 Pac. 958.

³⁷ *Hutchinson v. Brown*, Clark Ch. (N. Y.) 408; *Harding v. Handy*, 11 Wheat. (U. S.) 103, 6 L. ed. 429.

to be unduly influenced by the will of another.³⁸ The bill or complaint should set out a copy of the contract sought to be canceled, or at least it should be described with such certainty that an officer executing the court's order can identify it.³⁹ And it is held that a mere reference to the contract as an exhibit attached to the complaint is not sufficient, but the contract itself must be incorporated in, or stated in substance in, the complaint.⁴⁰ The instrument need not be set out in detail, but may be pleaded, in most jurisdictions, by its legal effect.⁴¹ Where suit is not filed promptly, the complaint should allege sufficient reasons for the delay.⁴² Where an offer to restore the consideration or benefits received under the contract is required before beginning suit to rescind, the complaint must allege the making of such offer, or a sufficient excuse for failure to make it.⁴³

§ 2451. Allegations of bill or complaint—Placing defendant in statu quo.—It is held generally that the bill or complaint is bad on demurrer which does not offer to place the defendant in statu quo, or allege such facts as sufficiently excuse the plaintiff from that duty.⁴⁴ Thus, a complaint for

³⁸ Jackson v. Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637. See also, Hicks v. Thomas, 90 Cal. 289, 27 Pac. 208. See also, Ashmead v. Reynolds, 134 Ind. 139, 33 N. E. 763, 39 Am. St. 238; Yount v. Yount, 144 Ind. 133, 43 N. E. 136; Hounshell v. Sams, 10 Ky. L. 485, 9 S. W. 410; Brice v. Brice, 5 Barb. (N. Y.) 533.

³⁹ Nation v. Cameron, 2 Dak. 347, 11 N. W. 525; Cobb v. Baker, 95 Maine 89, 49 Atl. 425.

⁴⁰ Barnett v. Bryce Furnace Co., 28 Ind. App. 88, 60 N. E. 363.

⁴¹ McDonald v. Mission View Homestead Assn., 51 Cal. 210; Anderson v. Gaines, 156 Mo. 664, 57 S. W. 726; Bishop v. Aldrich, 48 Wis. 619, 4 N. W. 775.

⁴² Scruggs v. Decatur Mineral & Co., 86 Ala. 173, 5 So. 440; Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804; Axtel v. Chase, 77 Ind. 74; Parszyk v. Mach, 10 S. Dak. 555, 74 N. W. 1027; Northern Pac. R. Co. v. Kin-

dred, 3 McCrary (U. S.) 627, 14 Fed. 77 (holding that ratification need not be negatived in the bill).

⁴³ Davis v. Tarwater, 15 Ark. 286; Bridges v. Barbree, 127 Ga. 679, 56 S. E. 1025; Supreme Council of Knights and Ladies of Columbia v. Apman, 39 Ind. App. 670, 80 N. E. 640; Norgren v. Jordan, 46 Wash. 437, 90 Pac. 597.

⁴⁴ Loxley v. Douglas, 121 Ala. 575, 25 So. 998; Johnson v. Walker, 25 Ark. 196; Buena Vista Fruit & C. Co. v. Tuohy, 187 Cal. 243, 40 Pac. 386; Travelers' Ins. Co. v. Redfield, 6 Colo. App. 190, 40 Pac. 195; Dillman v. Nadlehofer, 119 Ill. 567, 7 N. E. 88; Westhafer v. Patterson, 120 Ind. 459, 22 N. E. 414, 16 Am. St. 330; Seymour v. Shea, 62 Iowa 708, 16 N. W. 196; Western & Southern Life Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456; Shipp v. Wheelless, 33 Miss. 646; Fry v. Piersol, 166 Mo. 429, 66 S. W. 171; Waite v. Vinson, 14

the cancelation of an instrument should tender to the defendant all the property and benefits derived thereunder by the plaintiff.⁴⁵ The complaint should offer to do complete equity or should state all the facts so that the court may do complete equity between the parties.⁴⁶ Where the cause of action is apparently barred by the statute of limitations, the complaint must contain allegations bringing the cause within the statutory exception.⁴⁷ It is not necessary to allege that the plaintiff is without an adequate remedy at law, but the facts themselves should be pleaded from which that conclusion can be drawn.⁴⁸ Money damages may be awarded in a proper case without any specific prayer therefor.⁴⁹

§ 2452. Demurrer or motion to make more specific.—

Where the complaint fails to set out the conveyance sought to be canceled, the objection may be raised by a motion to make the complaint more specific, or by a special demurrer, as it is held that a general demurrer will not be sufficient.⁵⁰ So, also, if the complaint fails to allege with certainty the time of the discovery of the ground relied on for rescission, the objection should be raised by a motion to make more certain or a special demurrer.⁵¹ A complaint to cancel a deed by plaintiff's testator, alleging undue influence, incapacity and weakness of mind of decedent, is held to be sufficient, unless on special demurrer or motion to make more specific, though it does not directly allege fraud.⁵² So, also,

Mont. 405, 36 Pac. 828; *Spencer v. Clark*, 48 Hun (N. Y.) 621, 15 N. Y. St. 949, 7 N. Y. S. 533; *Martin v. Cook*, 59 N. Car. 199; *Cates v. Sparkman*, 73 Tex. 619, 11 S. W. 846, 15 Am. St. 806; *Ryan v. Nuce*, 67 W. Va. 485, 68 S. E. 110.

⁴⁵ *Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456; *Ryan v. Nuce*, 67 W. Va. 485, 68 S. E. 110.

⁴⁶ *Haydon v. St. Louis & C. R. Co.*, 117 Mo. App. 76, 93 S. W. 833, *affd.* 121 S. W. 15.

⁴⁷ *LeRoy v. Mulliken*, 59 Cal. 281; *Walker v. Pogue*, 2 Colo. App. 149, 29 Pac. 1017; *Woods v. James*, 87 Ky. 511, 10 Ky. L. 531, 9 S. W. 513;

Morrill v. Little Falls Mfg. Co., 60 Minn. 405, 62 N. W. 548; *Smith v. Linder*, 77 S. Car. 535, 58 S. E. 610.

⁴⁸ *Mosier v. Walter*, 17 Okla. 305, 87 Pac. 877.

⁴⁹ *Johnson v. Carter*, 143 Iowa 95, 120 N. W. 320.

⁵⁰ *Bishop v. Aldrich*, 48 Wis. 619, 4 N. W. 775.

⁵¹ *Cohen v. Ellis*, 16 Abb. N. Cas. (N. Y.) 320. See also, *DePedrorena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787; *Moore v. Cross* (Tex. Civ. App.), 26 S. W. 122, *revd.* 87 Tex. 557, 29 S. W. 1051.

⁵² *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327.

a complaint setting forth with sufficient clearness alleged fraud and artifice practiced to secure a conveyance will not be subject to demurrer for vagueness, and if it alleges that when the contract was made the grantor was old, devoid of memory, and incapable of transacting business, it is not subject to a general demurrer for a failure to allege that she remained so incapable until her death.⁵³ Unilateral mistake and fraud may be sufficiently alleged in general terms, where a motion to make the complaint more specific is not interposed.⁵⁴ If there are equitable considerations meriting the attention of the court, and sufficient to warrant the withholding from plaintiff the decree demanded, the questions must be presented by answer and can not be raised on demurrer.⁵⁵ In an action to rescind a deed, a demurrer to the complaint does not admit the allegation therein that the deed was never lawfully delivered.⁵⁶

§ 2453. Plea or answer.—The answer to a bill or complaint to rescind a contract must contain a sufficient denial to the allegations of the complaint or must set up a good affirmative defense.⁵⁷ So, cancelation of an instrument will not be decreed in favor of a defendant who seeks no affirmative relief, either specifically or generally, in his answer.⁵⁸ And where the answer sets up an affirmative defense which raises no issue that has not already been raised by the pleadings, such defense may be stricken out upon motion.⁵⁹ Inconsistent defenses should not be set up in the answer.⁶⁰ Where the defense to a suit for cancelation is that plaintiff has an adequate remedy at law, the matter must be specially pleaded, when not apparent on the face

⁵³ *Eagan v. Conway*, 115 Ga. 130, 41 S. E. 493.

⁵⁴ *Johnson v. Carter*, 143 Iowa 95, 120 N. W. 320; *Jesse French Piano & Organ Co. v. Garza*, 53 Tex. Civ. App. 346, 116 S. W. 150; *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

⁵⁵ *Lange v. Geiser*, 138 Cal. 682, 72 Pac. 343.

⁵⁶ *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68.

⁵⁷ *Graybill v. Drennen*, 150 Ala. 227, 43 So. 568; *Womble v. Wilbur*, 3 Cal. App. 535, 86 Pac. 916.

⁵⁸ *Atkinson v. Schell* (Mich.), 126 N. W. 443; *Griffin v. Griffin*, 118 Mich. 446, 76 N. W. 974; *Coach v. Adsit*, 97 Mich. 563, 56 N. W. 937.

⁵⁹ *Shaw v. O'Neill*, 45 Wash. 98, 88 Pac. 111.

⁶⁰ *Bluett v. Wilce*, 43 Wash. 492, 86 Pac. 853. Some jurisdictions allow this, however, in separate paragraphs.

of the complaint.⁶¹ Thus, in a purely equitable action to cancel a contract, a mere allegation that the plaintiff has an adequate remedy at law is not good as a defense.⁶² Where defective title is the ground upon which rescission of a contract for the purchase of land is sought the defendant should set forth his title in his answer to the complaint.⁶³ It is generally necessary to make the defense of the statute of frauds by answer, but when the contract set out in the complaint appears upon the face thereof to be within the statute of frauds, there is no reason why the defense should not be made by demurrer, and such now is generally the practice in this country in actions both at law and in equity.⁶⁴

§ 2454. Counterclaim or cross-bill.—In a suit for rescission it is generally held that affirmative relief can not be given the defendant except on counterclaim or cross-bill.⁶⁵ And rescission will not be decreed on counterclaim in a case where equity would not rescind the contract on an original complaint.⁶⁶ But it has been held that in some cases the defendant may, by a sufficient cross-bill, ask for the enforcement of an instrument in a suit for its cancellation.⁶⁷ Where a wife's complaint for divorce sets up facts showing a deed by her husband void, and makes the grantee a party defendant, the validity of such deed can be determined only on a cross-complaint by the grantee against the wife, answer thereto and proof on the issue thus made.⁶⁸ Where cancelation of an instrument is sought by the defendant in her cross-bill, alleging fraud and duress as a ground for such relief, the facts constituting such fraud must be set forth specifically, as it is not sufficient to charge

⁶¹ *Rose v. Merchants' Trust Co.*, 96 N. Y. S. 946; *Irving v. Bruen*, 110 App. Div. (N. Y.) 558, 97 N. Y. S. 180, affd. 186 N. Y. 605, 79 N. E. 1107.

⁶² *Edmonds v. Stern*, 89 App. Div. (N. Y.) 539, 85 N. Y. S. 665.

⁶³ *Topp v. White*, 12 Heisk. (Tenn.) 165.

⁶⁴ *Galway v. Shields*, 1 Mo. App.

546; *Roth v. Goerger*, 118 Mo. 556, 24 S. W. 176.

⁶⁵ *Walker v. Walker*, 93 Iowa 643, 61 N. W. 930; *Bray v. Shrader*, 50 Miss. 326.

⁶⁶ *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, 51 N. W. 1082.

⁶⁷ *Phoenix Ins. Co. v. Smith*, 95 Miss. 347, 48 So. 1020.

⁶⁸ *Zumbiel v. Zumbiel*, 26 Ky. L. 1193, 83 S. W. 598.

it in a general manner.⁶⁹ Where affirmative relief by way of cancelation is sought in a cross-complaint, it has been held that such cross-complaint must be confined to the parties in the original complaint.⁷⁰

§ 2455. Amendments.—The amendment of pleadings in equity rests in the discretion of the court, and the exercise of that discretion depends largely on the special circumstances of each case,⁷¹ and the amendment can not be made without leave of court.⁷² New parties may be brought in by amendment.⁷³ In an action to cancel a contract and for other equitable relief the amended pleading should not present new ground of relief.⁷⁴ Nor will the party amending be entitled to any other or additional relief than that asked for in the original pleading.⁷⁵ Even after judgment decreeing cancelation, the court may grant leave to amend a pleading in furtherance of justice.⁷⁶

§ 2456. Variance.—It is a well-settled rule that the allegations and proofs in suits in equity must set forth and support the same cause of action. A party can not set forth one cause of action in his pleading and make a different one by his proofs.⁷⁷ Thus, in a suit to cancel an instrument

⁶⁹ *Mortimer v. McMullen*, 102 Ill. App. 593, *affd.* 202 Ill. 413, 67 N. E. 20.

⁷⁰ *Shaw v. Millsaps*, 50 Miss. 380.

⁷¹ *Ferguson Contracting Co. v. Manhattan Trust Co.*, 118 Fed. 791, 55 C. C. A. 529; *McDougald v. Williford*, 14 Ga. 665; *Barm v. Bragg*, 70 Ill. 283; *March v. Mayers*, 85 Ill. 177; *Clough v. Adams*, 71 Iowa 17, 32 N. W. 10; *Kiefer v. Rogers*, 19 Gil. (Minn.) 14; *Tanner v. Hicks*, 12 Miss. (4 Smedes & M.) 294; *Ratliff v. Sommers*, 55 W. Va. 30, 46 S. E. 712.

⁷² *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *Walsh v. Smyth*, 3 Bland. (Md.) 9; *Clark v. Judson*, 2 Barb. (N. Y.) 90; *Baker v. Baldwin*, 1 R. I. 489.

⁷³ *Tatum Bros. v. Walker*, 77 Ala. 563; *Thompson v. Thompson*, 6 Houst. (Del.) 225; *Thomas v. Adams*, 30 Ill. 37; *Foster v. Hunt*,

⁷⁴ *Bibb. (Ky.)* 32; *Arendell v. Blackwell*, 16 N. Car. 354; *Noyes v. Sawyer*, 3 Vt. 160.

⁷⁵ *Sleeman v. Hotchkiss*, 59 Hun 623, 36 N. Y. St. 540, 13 N. Y. S. 98; *Lyster v. Stickney*, 4 McCrary (U. S.) 109, 12 Fed. 609.

⁷⁶ *Tatum Bros. v. Walker*, 77 Ala. 563; *Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70; *Toomey v. Hughes*, 8 Pa. Co. Ct. R. 384.

⁷⁷ *Carter v. West*, 93 Ky. 211, 14 Ky. L. 191, 19 S. W. 592; *Hill v. Nash*, 73 Miss. 849, 19 So. 707.

⁷⁸ *Hooper v. Strahan*, 71 Ala. 75; *Francis v. Wells*, 2 Colo. 660; *South Park Comrs. v. Kerr*, 13 Fed. 502; *Keaton v. McGwier*, 24 Ga. 217; *Morris v. Tillson*, 81 Ill. 607; *Peelman v. Peelman*, 4 Ind. 612; *Robinson v. Morgan*, Litt. Sel. Cas. (Ky.) 56; *Lemaster v. Burckhart*, 2 Bibb. (Ky.) 25; *Small v. Owings*, 1 Md. Ch. 363; *Elliott v. Amazon*

on the single ground of the grantor's mental unsoundness and incompetency, no other question can be considered.⁷⁸ So, also, where the complaint in a suit to cancel an instrument alleges failure of consideration as the sole ground for cancelation, a decree based on evidence of usury is unwarranted.⁷⁹ In a case where fraud is the ground alleged, the plaintiff is not, in general, entitled to a decree on proof of some one or more of the facts, quite independent of fraud, which might by themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally.⁸⁰ Thus, a complaint for cancelation on the ground of fraud, it is held, is not sustained by evidence which shows only an honest mistake or unintentional misrepresentation.⁸¹

§ 2457. Burden of proof in general.—It is a general rule that the burden of proof is on the party holding the affirmative,⁸² and this rule applies to proof in actions to cancel instruments.⁸³ But where the plaintiff bases his ground for

Ins. Co., 49 Mich. 579, 14 N. W. 554; Rudd v. Rudd, 33 Mich. 101; Lenox v. Harrison, 88 Mo. 491; Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180, revd. 31 N. J. Eq. 706; Kelsey v. Western, 2 N. Y. 500; Mallory v. Mallory, 45 N. Car. 80; Dille v. Woods, 14 Ohio 122; Fite v. Wiel (Tenn. Ch. App.), 46 S. W. 330; Shaw v. Patterson, 2 Tenn. Ch. 171; Barrett v. Sargeant, 18 Vt. 365; Floyd v. Jones, 19 W. Va. 359; Williams v. Starr, 5 Wis. 534.

⁷⁸ Snider v. Wilson (Iowa), 78 N. W. 802; Doughty v. Doughty, 7 N. J. Eq. 643; Snodgrass v. Knight, 43 W. Va. 294, 27 S. E. 233.

⁷⁹ Bang v. Phelps & Co. Windmill Co., 96 Tenn. 361, 34 S. W. 516.

⁸⁰ Bailor v. Daly, 7 Mackey (D. C.) 175; Hoyt v. Hoyt, 27 N. J. Eq. 399, affd. 28 N. J. Eq. 485; Patterson v. Patterson, 24 N. Y. Super. Ct. 184; McCraw v. Gwin, 42 N. Car. 55.

⁸¹ Porter v. Collins, 90 Ala. 510, 8 So. 80; Williams v. Sturdevant, 27 Ala. 598; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Goode v. Hawkins, 17 N. Car. 393.

⁸² Givens v. Tidmore, 8 Ala. 745; Craig v. Adair, 22 Ga. 373; English v. Porter, 109 Ill. 285; McClure v. Pursell, 6 Ind. 330; McCollister v. Yard, 90 Iowa 621, 57 N. W. 447; Amos v. Livingston, 26 Kans. 106; Commonwealth v. Louisville & N. R. Co., 17 Ky. L. 417, 31 S. W. 473; Bryan's Admr. v. Spruell, 16 La. 313; Loring v. Steineman, 1 Metc. (Mass.) 204; Wildey v. Crane, 69 Mich. 17, 36 N. W. 734; Mask v. Allen (Miss.), 17 So. 82; Heineman v. Heard, 62 N. Y. 448, revg. 2 Hun (N. Y.) 324, 4 Thomp. & C. (N. Y.) 666; Pollock v. Warwick, 104 N. Car. 638, 10 S. E. 699; Titus v. Lewis, 33 Ohio St. 304; Farley v. Parker, 4 Ore. 269; Zerbe v. Miller, 16 Pa. St. 488; Connor v. Green Pond, W. & B. R. Co., 23 S. Car. 427; Mills v. Johnston, 23 Tex. 308; Pusey v. Gardner, 21 W. Va. 469.

⁸³ Colton Imp. Co. v. Richter, 26 Misc. (N. Y.) 26, 55 N. Y. S. 486; Ward v. Ward, 43 W. Va. 1, 26 S. E. 542; McCartney v. Bolyard, 22 W. Va. 641.

rescission upon a negative allegation, there is much dispute among the authorities as to whether the burden is upon the plaintiff or upon his adversary.⁸⁴

§ 2458. Burden of proof in particular cases.—In the absence of confidential relations between the parties, the burden of proving that the contract was obtained by fraud, mistake, duress or undue influence rests upon the party attacking it.⁸⁵ And this burden does not shift, even though the burden of going forward with proof may shift.⁸⁶ But where a fiduciary relation existed between the parties to the original transaction, the burden of proof to establish equitable conduct in the formation of the contract rests with the party who held the position of superiority by virtue of the relation.⁸⁷ When the plaintiff makes out a *prima facie* case entitling him to relief, the defendant must take up the burden and meet the case so made by other evidence.⁸⁸ In an action to rescind a deed on the ground of the grantor's

⁸⁴ *Lynch v. Johnson*, 2 Litt. (Ky.) 98; *Kerr v. Freeman*, 33 Miss. 292.

⁸⁵ *Blanks v. Clark*, 68 Ark. 98, 56 S. W. 1063; *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *Lawlor v. Merritt*, 81 Conn. 715, 72 Atl. 143; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 233 Ill. 475, 84 N. E. 670; *Arnhorst v. National Union*, 179 Ill. 486, 53 N. E. 988; *Oaks v. Harrison*, 24 Iowa 179; *Barnes v. Johnson* (Ky.), 111 S. W. 372; *Mays v. Pelly* (Ky.), 125 S. W. 713; *Wicks v. Dean*, 103 Ky. 69, 19 Ky. L. 1708, 44 S. W. 397; *Couder v. Oteri*, 34 La. Ann. 694; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. 530; *Skajewski v. Zantarski*, 103 Minn. 27, 114 N. W. 247; *Hatcher v. Hatcher*, 139 Mo. 614, 39 S. W. 479; *Spicer v. Spicer*, 54 N. Y. Super. Ct. 280; *Lore's Heir's Lessee v. Truman*, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250; *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28; *Harpold v. Moss* (Tex. Civ. App.), 106 S. W. 1131; *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68; *Cooper v. Reilly*, 90 Wis. 427,

63 N. W. 885. See also, *Teakle v. Bailey*, 2 Brock. (U. S.) 43, Fed. Cas. No. 13811.

⁸⁶ *Koppe v. Koppe*, 57 Tex. Civ. App. 204, 122 S. W. 68.

⁸⁷ *Burke v. Taylor*, 94 Ala. 530, 10 So. 129; *Arellanes v. Arellanes* (Cal.), 90 Pac. 1059; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Givan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Maze's Exrs. v. Maze*, 30 Ky. L. 679, 99 S. W. 336; *Whiteley v. Whiteley*, 120 Mich. 30, 78 N. W. 1009; *Cooper v. Moore*, 55 Misc. (N. Y.) 102, 104 N. Y. S. 1049; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963; *Brummond v. Krause*, 8 N. Dak. 573, 80 N. W. 686; *Stepp v. Frampton*, 179 Pa. St. 284, 36 Atl. 177; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517; *Doyle v. Welch*, 100 Wis. 24, 75 N. W. 400. See also, *Starr v. De Lashmutter*, 76 Fed. 907.

⁸⁸ *Studebaker v. Faylor* (Ind. App.), 80 N. E. 861; *Owings v. Turner*, 48 Ore. 462, 87 Pac. 160; *Boyle v. Robinson*, 129 Wis. 567, 109 N. W. 623; *Champeau v. Champeau*, 132 Wis. 136, 112 N. W. 36.

insanity, the presumption is of sanity, and the burden of proving or introducing evidence to prove insanity rests on the party alleging it; but if general confirmed insanity be shown, not connected with or traceable to a cause in its nature temporary, the presumption is of its continuance, and the burden of removing the presumption devolves on the party affirming the validity of an act done after the time the insanity is shown to have existed.⁸⁹

§ 2459. Sufficiency of proof.—To justify a court of equity in rescinding an executed contract upon the ground that it was procured by fraud, the evidence must be of the clearest and most satisfactory kind.⁹⁰ Thus, it is held that an instrument will not be rescinded on the ground of fraud in its inception unless such fraud is established by satisfactory proof, and is shown to have caused actual injury to the party defrauded.⁹¹ Likewise, where the ground relied upon for rescission is that of mistake the proof must be strong and conclusive.⁹² Where duress or undue influence is the ground relied upon for rescission, the allegations must be established by at least a preponderance of the evidence.⁹³ In general, the degree of proof required to rescind a contract is

⁸⁹ *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Harden v. Hays*, 9 Pa. St. 151. See also, *Turner v. Rusk*, 53 Md. 65.

⁹⁰ *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112. See also, *Johnson v. Rogers*, 112 Ala. 576, 20 So. 929; *Mastin v. Noble*, 85 C. C. A. 98, 157 Fed. 506; *Condit v. Dady*, 56 Ill. App. 545, affd. 163 Ill. 511, 45 N. E. 224; *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549; *Chirurg v. Ames*, 138 Iowa 697, 116 N. W. 865; *Stapleton v. Haight*, 135 Iowa 564, 113 N. W. 351; *Coughlin v. Richmond*, 77 Iowa 188, 41 N. W. 613; *Goodwin v. White*, 59 Md. 503; *Hunter v. Hopkins*, 12 Mich. 227; *McCall v. Bushnell*, 41 Minn. 37, 42 N. W. 545; *Hall v. Thompson*, 1 Sm. &

M. (Miss.) 443; Weissenfels v. Cable, 208 Mo. 515, 106 S. W. 1028; *Jackson v. Wood*, 88 Mo. 76; *Freeman v. Staats*, 9 N. J. Eq. 816; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Christmas v. Spink*, 15 Ohio 600; *Miller v. Piatt*, 33 Pa. Super. Ct. 547; *Campbell's Exrx. v. Patterson*, 95 Pa. St. 447; *Mayberry v. Nichol* (Tenn. Ch.), 39 S. W. 881; *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516.

⁹¹ *McCann v. Preston*, 79 Md. 223, 28 Atl. 1102.

⁹² *Stover v. Poole*, 67 Maine 217; *Beall v. Greenwade's Admrs.*, 9 Md. 185; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Hirsch v. Jones* (Tex. Civ. App.), 42 S. W. 604; *Weidebusch v. Hartenstein*, 12 W. Va. 760.

⁹³ *Russell v. Carpenter*, 153 Mich. 170, 116 N. W. 989; *Fred Macey Co. v. Macey*, 152 Mich. 164, 115 N. W. 966.

the same as in an action to reform a contract for mistake,⁹⁴ but greater than that required to resist a specific performance.⁹⁵ And when there has been considerable delay in bringing suit, the courts insist on the proof being plain, clear and decisive.⁹⁶

§ 2460. Relief granted in general.—In a suit in equity to rescind a contract, the court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in statu quo, and will require each to restore to the other what he obtained by virtue of the contract.⁹⁷ The relief, if granted, must be upon proof of the grounds alleged,⁹⁸ and a general prayer for relief will authorize cancellation.⁹⁹ A decree setting aside a deed may provide that the deed be marked upon the records of deeds of the county as canceled by the court.¹ While a court of equity will sometimes decree a partial rescission,² it must decree an entire rescission where the action is on an entire contract.³

§ 2461. Cancellation, rescission or reconveyance.—Where a court of equity has obtained jurisdiction to cancel an instrument or rescind a contract it will usually give complete relief in the premises. Thus, where a deed is rescinded the court will usually direct a reconveyance from the party claiming under it;⁴ or direct that an entry of the fact of

⁹⁴ *Lavassar v. Washburne*, 50 Wis. 200, 6 N. W. 516. *Contra*, *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337.

⁹⁵ *Stearns v. Beckham*, 31 Grat. (Va.) 379.

⁹⁶ *Robinson v. Gould*, 26 Iowa 89; *Richardson v. Medbury*, 107 Mich. 176, 65 N. W. 4; *Davis v. Fox*, 59 Mo. 125; *In re Richard's Appeal*, 100 Pa. St. 51; *Weidebusch v. Hartenstein*, 12 W. Va. 760.

⁹⁷ *Bell v. Felt*, 102 Ill. App. 218; *Bruner v. Miller*, 59 W. Va. 36, 52 S. E. 995.

⁹⁸ *Dubois v. Nugent*, 69 N. J. Eq. 145, 60 Atl. 339.

⁹⁹ *McClun v. McClun*, 176 Ill. 376, 52 N. E. 928; *Laverty v. Sexton*, 41 Iowa 435; *Prewit v. Graves*,

5 J. J. Marsh. (Ky.) 114; *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773.

¹ *Fenton v. Way*, 44 Iowa 438; *Jones v. Porter*, 59 Miss. 628.

² *Prewit v. Graves*, 5 J. J. Marsh. (Ky.) 114.

³ *Johnston's Heirs v. Mitchell's Heirs*, 1 A. K. Marsh. (Ky.) 225, 10 Am. Dec. 727. And it has been held that a minor, after reaching majority, can not have a cancellation of a single provision of a lease while retaining the benefit of its other provisions. *Goin v. Cincinnati Realty Co.*, 200 Fed. 252.

⁴ *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182, revd. 15 Johns. (N. Y.) 555, 8 Am. Dec. 282.

rescission be made upon the proper record where the instrument is recorded.⁵ So, also, the surrender of an instrument is usually an incident to the cancelation thereof, but it sometimes happens that the court will direct that the instrument be left in the hands of the defendant in order to enable him to enforce whatever rights he might have against an indorser.⁶

§ 2462. **Alternative, additional or incidental relief.**—Having once acquired jurisdiction to cancel an instrument or rescind a contract, the court will usually give such additional relief as the exigencies of the case may require. Thus, the court may order repayment of the consideration,⁷ or delivery of possession.⁸ Also, in a proper case, the court may award an injunction,⁹ or a partition of realty.¹⁰ And in a suit by a grantor to rescind a deed, where for any reason the grantee is unable to restore the property, the court may give the grantor a money judgment for the value of the land.¹¹ Cancelation—of a conveyance by an aged person, mentally incompetent, conveying land and vesting title to cash—at suit of the heirs-at-law after death of the grantor, relates to the realty, and the court, having taken jurisdiction, may retain it to recover the money.¹² Where the plaintiff in an action to rescind a contract of purchase is the vendee therein, he must account to his vendor for his use and occupation of the land from the time when he received possession.¹³ And in a suit where the vendor is plaintiff, the vendee is generally entitled to an allowance

⁵ *Fenton v. Way*, 44 Iowa 438; *Jones v. Porter*, 59 Miss. 628.

⁶ *Huston v. Roosa*, 43 Ind. 517.

⁷ *Cohen v. Ellis*, 16 Abb. N. Cas. (N. Y.) 320.

⁸ *Woodsworth v. Tanner*, 94 Mo. 124, 7 S. W. 104.

⁹ *Rickle v. Dow*, 39 Mich. 91.

¹⁰ *Masterson v. Finnigan*, 2 R. I. 316.

¹¹ *Bullock v. Tuttle*, 90 Ala. 435, 8 So. 69; *Atlanta &c. R. Co. v. Hodnett*, 36 Ga. 669; *Long v. Fox*, 100 Ill. 43; *Erickson v. Fisher*, 51

Minn. 300, 53 N. W. 638; *Daiker v. Strelinger*, 28 App. Div. (N. Y.) 220, 50 N. Y. S. 1074.

¹² *Eagan v. Conway*, 115 Ga. 130, 41 S. E. 493.

¹³ *Penfield v. Penfield*, 41 Conn. 474; *Underwood v. West*, 52 Ill. 397; *Axtel v. Chase*, 77 Ind. 74; *Wood v. Wheeler*, 106 N. Car. 512, 11 S. E. 590; *Adams v. Kibler*, 7 S. Car. 47; *Worthington v. Collins's Admr.*, 39 W. Va. 406, 19 S. E. 527.

for the value of permanent improvements placed by him on the land.¹⁴

¹⁴ McIntire v. Pryor, 10 App. D. Ill. 46; Smith v. Townshend, 27 C. 432, affd. 173 U. S. 38, 43 L. ed. Md. 368, 92 Am. Dec. 637; McClure 606, 19 Sup. Ct. 352; Macon v. v. Lewis, 72 Mo. 314; Tyler v. Huff, 60 Ga. 221; Oard v. Oard, 59 Cate, 29 Ore. 515, 45 Pac. 800.

CHAPTER LIV.

INJUNCTION.

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(a) *GENERAL PRINCIPLES OF INJUNCTION.*

§ 2480. **Definition.**—An injunction is a judicial order or process issuing out of a court of equity, whereby the defendant is commanded to abstain from doing, or is commanded to perform a certain act. It may be, therefore, either preventive or remedial in its operation, but the most ordinary form is that which operates to prevent the performance of an act. The remedy of injunction has been variously defined by the courts,¹ and by statute in some states. Thus, the code of Louisiana provides: "Injunction, or prohibition, is a mandate obtained from a court,

¹ *Gaines v. Hale*, 26 Ark. 168, *affd.* 93 U. S. 3, 23 L. ed. 782; *McDonogh v. Calloway*, 7 Rob. (La.) 442; *Pelzer v. Hughes*, 27 S. Car. 408, 3 S. E. 781.

by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims."²

§ 2481. **Nature of remedy.**—The writ of injunction is the strong arm of a court of equity, and its particular function is to restrain and prevent.³ Just as the courts of law are powerless to compel the performance of contracts, and can only give a remedy, after they are broken, for the damages sustained, so also they can not prevent a threatened injury to property. But with courts of equity it is different. They can prevent a threatened wrong or injury from being done, or if it be done already, they can in many cases repair the injury by requiring the property and the parties to be placed in statu quo. However, courts of equity will not exercise their discretion to grant an injunction except where a proper case in accordance with the principles and practice of equity is made out.⁴ But it is not a fatal objection that the issue of the writ for the particular purpose for which it is sought is novel.⁵ An injunction, being prohibitive in its nature, can not be granted to undo acts already done.⁶ A suit for injunction is always equitable, but when the court, in the exercise of its chancery powers, undertakes to administer such relief, it has jurisdiction to award compensatory damages when there has been a trespass and in other proper cases.⁷

² Code Pr. (La.) (1894), § 296.

³ *Chester Forging & Engineering Co. v. Tindel-Morris Co.*, 165 Fed. 899, 91 C. C. A. 577; *Champion v. Hannahan*, 138 Ill. App. 387; *Porter v. Armour*, 241 Ill. 145, 89 N. E. 356; *Atchison, T. & S. F. R. Co. v. Billings*, 77 Kans. 119, 93 Pac. 590; *Norwood v. Leeves* (Tex. Civ. App.), 115 S. W. 53.

⁴ *Defiance Fruit Co. v. Fox*, 72 N. J. Eq. 297, 73 Atl. 851; *Harry Angelo Co. v. Improved Property Holding Co.*, 105 N. Y. S. 590; *Pacific States Tel. Co. v. Salem*, 49 Ore. 110, 89 Pac. 145. See also, *People v. Grand Truck Western R. Co.*, 232 Ill. 292,

83 N. E. 839; *Burrell v. Middleton*, 72 N. J. Eq. 774, 65 Atl. 978; *Myersdale & S. St. R. Co. v. Pennsylvania &c. R. Co.*, 219 Pa. 558, 69 Atl. 92. ⁵ *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65.

⁶ *Newlin v. Prevo*, 81 Ill. App. 75; *Sparhawk v. Union Passenger R. Co.*, 54 Pa. St. 401.

⁷ *Atlantic & C. Air Line R. Co. v. Victor Mfg. Co.*, 79 S. Car. 266, 60 S. E. 675; *McClellan v. Taylor*, 54 S. Car. 430, 32 S. E. 527; *Bird v. Wilmington & Manchester R. Co.*, 8 Rich. Eq. (S. Car.) 46, 64 Am. Dec. 739.

§ 2482. **Prohibitory and mandatory injunctions.**—Injunctions are divided into two great classes, prohibitory injunctions and mandatory injunctions. Prohibitory injunctions, as the name implies, are those injunctions which require the defendant to abstain from doing a certain act, or from pursuing a certain line of conduct; and these constitute by far the larger part of injunctions granted by courts of equity. Mandatory injunctions are those which require the defendant to do some act.⁸ While there is unquestioned power in a court of equity to issue mandatory injunctions on proper occasions, it will not issue such an injunction unless legal rights are unlawfully invaded or legal duties wantonly neglected.⁹ Under the code in some states, the court can not issue a purely mandatory injunction,¹⁰ but even where such injunction is so prohibited, an order, the essential nature of which is to restrain, may be granted, although the defendant may incidentally be compelled to perform some act.¹¹ Mandatory injunctions are frequently issued upon complaints for specific performance, as where a defendant is required to execute a deed, or to perform some similar act.¹² It follows, as a matter of course, that an injunction in aid of specific performance should not

* *Carver v. San Pedro*, L. A. & S. L. R. Co., 151 Fed. 334; *Chicago*, St. P. & K. C. R. Co. v. *Kansas City & C. R. Co.*, 38 Fed. 58; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061; *Webber v. Gage*, 39 N. H. 182; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. 405; *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; *Lutheran Evangelical Church v. Gristgan*, 34 Wis. 328.

⁸ *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Atchison, T. & S. F. R. Co. v. Billings*, 77 Kans. 119, 93 Pac. 590; *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591; *Cox v. Malden & Melrose Gaslight Co.*, 199 Mass. 324, 85 N. E. 180, 127 Am. St. 503; *Gates v. Detroit & M. R. Co.*, 151 Mich. 548, 115 N. W. 420; *McCabe v. Watt*, 224 Pa. St. 253, 73 Atl. 453, 24 L. R. A. (N. S.) 274; *Farnsworth v. Wil-*

bur, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320; *Lovett v. West Virginia Cent. Gas. Co.*, 65 W. Va. 739, 65 S. E. 196, 24 L. R. A. (N. S.) 230n. Mandatory injunction will issue to compel removal of encroaching structure. *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402, and many other cases cited in note. And it has been granted where mandamus is inadequate. *Bourke v. Olcott Water Co.*, 84 Vt. 121, 78 Atl. 715, Ann. Cas. 1912D, 108, and note.

¹⁰ *Hart v. Atlanta Terminal Co.*, 128 Ga. 754, 58 S. E. 452.

¹¹ *Merchants' & Miners' Transp. Co. v. Granger*, 132 Ga. 167, 63 S. E. 700; *Mackenzie v. Minis*, 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003n.

¹² *Biddle v. Ramsey*, 52 Mo. 153; *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243.

be granted where the complaint does not make out a case of specific performance.¹³ Where there is a clear contract and a plain breach of it, equity may decree a specific performance and enjoin a breach of the contract if there is not a complete remedy at law.¹⁴

§ 2483. Interlocutory and perpetual injunctions.—Injunctions are also divided into interlocutory and perpetual injunctions. This classification has reference simply to the stage of the case at the time the injunction is issued and to its duration, not to its character otherwise. Injunctions are frequently issued upon the filing of the complaint or soon after, and, before the case has been heard and decided, upon its merits. Such injunctions are called preliminary or interlocutory injunctions, and they are to continue only until the further order of the court. They are always within the control and discretion of the court, and may, upon proper cause shown at any time during the progress of the cause, be modified or dissolved.¹⁵ An interlocutory injunction is not a matter of right, but rests in the sound discretion of the court.¹⁶ It will not issue except where the party seeking the relief shows by his pleadings that he is clearly entitled to the remedy,¹⁷ but, on the other hand, it is not necessary that he should make a showing which would entitle him to an injunction on final

¹³ Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395; Allen v. Burke, 2 Md. Ch. 534; Fargo v. New York & C. R. Co., 3 Misc. (N. Y.) 205, 52 N. Y. St. 205, 23 N. Y. S. 360; McKibbin v. Brown, 14 N. J. Eq. 13.

¹⁴ Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243.

¹⁵ Brackebush v. Dorsett, 138 Ill. 167, 27 N. E. 934; Spicer v. Hoop, 51 Ind. 365; State v. Johnston, 78 Kans. 615, 97 Pac. 790; State v. Graves, 82 Nebr. 282, 117 N. W. 717; Chetwood v. Brittan, 2 N. J. Eq. 438.

¹⁶ Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667; Central of Georgia R. Co. v. McLendon, 155 Fed. 974; Southern R. Co. v. Simon,

153 Fed. 234; Seymour v. La Furgey, 47 Wash. 450, 92 Pac. 267. It will not ordinarily be issued to take property from one party and transfer it to another where the title is in dispute. Note in 39 L. R. A. (N. S.) 31-37.

¹⁷ Oliver Typewriter Co. v. American Writing Mach. Co., 156 Fed. 177; Hall v. Horne, 52 Fla. 510, 42 So. 383; William v. Riley, 79 Nebr. 554, 113 N. W. 136; Millville Gas Light Co. v. Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504; Tolman v. Mulcahy, 103 N. Y. S. 936; Ellis v. Ellis, 55 Misc. (N. Y.) 34, 106 N. Y. S. 217; Roberts v. Huntington R. Co., 56 Misc. (N. Y.) 62, 105 N. Y. S. 1031.

hearing.¹⁸ A perpetual injunction is one which is ordered after a final hearing of the case upon its merits. When the decision is in favor of complainant, such an injunction constitutes a part of the final decree, and thus it passes from the control of the court; and, like any other final decree, it can be set aside or modified only upon a rehearing or review of the case.¹⁹

§ 2484. Right requiring protection.—A strong *prima facie* case should be shown in order to justify the interposition of a court by an injunction before the rights of the parties have been determined by a full trial.²⁰ The powers of a court of equity can not be invoked to issue an injunction unless the plaintiff shows by his complaint that he has an interest which would be injured by the act which he prays may be restrained.²¹ He must allege facts bringing his case under some acknowledged head of equity jurisdiction.²² Furthermore, he must make out a plain case of injury and damages of a permanent and irreparable character, for which there is no adequate remedy at law.²³ The plaintiff must show right in himself as well as absence of right in the defendant,²⁴ and that the relief sought does not rest on doubtful principles of law.²⁵ Courts of equity have no jurisdiction to interfere by injunction to protect rights which are merely political, and where no civil or property right is involved.²⁶ Nor will equity interfere by injunction

¹⁸ *Pere Marquette R. Co. v. Bradford*, 149 Fed. 492; *Mitchell v. United Box Board & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938; *New York Cent. Iron Works Co. v. Brennan*, 105 N. Y. S. 865.

¹⁹ *Spangler v. Cleveland*, 43 Ohio St. 526, 3 N. E. 365.

²⁰ *Rend v. Venture Oil Co.*, 48 Fed. 248; *American Preservers' Co. v. Norris*, 43 Fed. 711.

²¹ *Bennett v. American Art Union*, 7 N. Y. Super. Ct. 614.

²² *Pierce v. Carlock*, 224 Ill. 608, 79 N. E. 959; *State v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; *Defiance Fruit Co. v. Fox*, 72 N. J. Eq. 297, 73 Atl. 851.

²³ *Gorham v. City of New Haven*,

82 Conn. 153, 72 Atl. 1012; *Heslip v. Anderson*, 134 Ill. App. 8; *Devou v. Pence*, 32 Ky. L. 697, 106 S. W. 874; *Merchants' Exch. of St. Louis v. Knott*, 212 Mo. 616, 111 S. W. 565; *Berkey v. Berwind-White Coal Min. Co.*, 220 Pa. 65, 69 Atl. 329, 16 L. R. A. (N. S.) 851n; *Myersdale & S. St. R. Co. v. Pennsylvania & C. R. Co.*, 219 Pa. 558, 69 Atl. 92; *Lee v. Broocks*, 54 Tex. Civ. App. 220, 118 S. W. 164; *Jacobs v. Lakeside Lumber Co.*, 134 Wis. 179, 114 N. W. 443.

²⁴ *Watson v. McGrath*, 111 La. 1097, 36 So. 204.

²⁵ *Everett v. Tabor*, 119 Ga. 128, 46 S. E. 72.

²⁶ *Fletcher v. Tuttle*, 151 Ill. 41, 37

to restrain persons from exercising the functions of public officers on the ground of the illegality of the statute under which their appointments were made, but will leave the question to be determined by a legal forum.²⁷ It has been commonly declared by the courts that equity will interfere to protect rights of property or rights in property only, and not to protect merely personal rights.²⁸

§ 2485. **Threatened injury.**—While a court of equity can not grant an injunction merely to allay fears and apprehensions of persons because of threatened acts,²⁹ yet it is evident that the remedy would lose much of its efficacy if it could not be applied in a proper case before the actual commission of the threatened act, and where there is a threat to wrongfully enter upon one's real estate and take permanent possession thereof and effect a permanent lodgment there, the threatened injury is irreparable in itself and may be enjoined.³⁰ The plaintiff must show reasonable grounds for apprehending that the injury threatened will be done unless the injunction issue.³¹ If, however, it is shown that the person making the threat has the power to carry it out, the court will usually issue the writ.³² So, to justify the issue of an injunction, it is not necessary that any injurious act should actually have been done by the defendant. Whenever the intention to do the wrong has

N. E. 683, 25 L. R. A. 143, 42 Am. St. 220; Shoemaker v. Des Moines, 129 Iowa 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; McDonald v. Lyon, 43 Tex. Civ. App. 484, 95 S. W. 67.

²⁷ Green v. Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90.

²⁸ Chappell v. Stewart, 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. 476; Van de Plaat v. Undertakers' & Liverymen's Assn., 453 N. J. Eq. 116, 62 Atl. 453; Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. 828.

²⁹ Burnett v. Whitesides, 13 Cal. 156; Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585, 79 C. C. A.

37; Lester Real Estate Co. v. St. Louis, 169 Mo. 227, 69 S. W. 300; German Evangelical Lutheran Church v. Maschop, 10 N. J. Eq. 57; Watrous v. Rodgers, 16 Tex. 410. See also, Selma Water Co. v. Selma, 154 Fed. 138.

³⁰ Trade Dollar Consol. Min. Co. v. Fraser, 148 Fed. 585, 79 C. C. A. 37. See also, Williams v. School Dist. (Mo. App.), 151 S. W. 506.

³¹ Goodwin v. New York, N. H. & H. R. Co., 43 Conn. 494; Bigelow v. Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

³² McArthur v. Kelly, 5 Ohio 139; Bonaparte v. Camden & C. R. Co., Baldw. (U. S.) 205, Fed. Cas. No. 1617.

clearly been manifested, especially if there has been any conduct showing that the party was preparing to carry his threat into execution, equity will interfere.³³ But injunction will not be granted in case of apprehension of a trivial injury or ungrounded apprehension of a real injury.³⁴

§ 2486. Speculative injury.—A party seeking injunctive relief must make out a case of special and peculiar injury to be apprehended or sustained, or at least a reasonable probability, not merely a bare possibility, that a real injury will occur if the writ is not granted.³⁵ And it is held that a mere possibility, or anything short of a reasonable probability of injury, is insufficient to warrant the issue of an injunction against any proposed use of property by its owner.³⁶ The complaint must show facts from which the court can determine that an irreparable wrong is threatened or about to be committed.³⁷ The mere apprehension that a person is about to commit certain acts, without proof of circumstances *prima facie* warranting it, does not justify a court of equity in enjoining the commission of such acts.³⁸ Thus, it has been held that equity will not entertain a suit to prevent a cloud upon the title to real estate, unless there is a determined effort on the part of

³³ *Sherman v. Nutt*, 35 Fed. 149; *Owens v. Crossett*, 105 Ill. 354; *Milan McArthur v. Kelly*, 5 Ohio 139. See also, *Shevalier v. Stevenson* (Nebr.), 139 N. W. 233.

³⁴ *Blatchford v. Chicago Dredging & Dock Co.*, 22 Ill. App. 376; *Potter v. Saginaw Street R. Co.*, 83 Mich. 285, 47 N. W. 217, 10 L. R. A. 176; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; *Genet v. Delaware & H. Canal Co.*, 122 N. Y. 505, 25 N. E. 922; *Head v. James*, 13 Wis. 641.

³⁵ *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Ruge v. Apalachicola Oyster Canning & Fish Co.*, 25 Fla. 656, 6 So. 489; *Rousaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Hutchinson v. De-*

lano, 46 Kans. 345, 26 Pac. 740; *Hurd v. Atchison, T. & S. F. R. Co.*, 73 Kans. 83, 84 Pac. 553; *McLemore v. McNeley*, 56 Mo. App. 556; *Sherman v. Clark*, 4 Nebr. 138, 97 Am. Dec. 516; *Butler v. Rogers*, 9 N. J. Eq. 487; *German Evangelical Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Commercial Bank v. Bowman*, 1 Handy (Ohio) 246, 12 Ohio Dec. 125; *White v. Schurer*, 4 Baxt. (Tenn.) 23.

³⁶ *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 227, 69 S. W. 300.

³⁷ *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228; *Carswell v. Swindell*, 102 Md. 636, 62 Atl. 956.

³⁸ *Bean v. Pettengill*, 30 N. Y. Super. Ct. 7.

the defendant to create a cloud, and the danger is not anticipative, but real.³⁹

§ 2487. Injury already sustained.—The exclusive function of a writ of injunction is to afford only preventive relief, and it will not issue to attempt to restrain an injurious act already committed.⁴⁰ Thus, equity will not intervene to restrain the issuing of municipal bonds in aid of a subscription to a railroad company when the bonds have been actually issued and delivered to the company.⁴¹ So, a suit to enjoin a city from making any contract with any person for electric lights will not lie, if the contract alleged to be illegal has already been made.⁴² The proper remedy for past injury or trespass is an action at law for compensation in damages.⁴³ Nevertheless, it has been held that a remedy for an injury already committed may sometimes be given as an incident to an injunction.⁴⁴ An injunction may be granted if cause for it existed when the complaint was filed, although the defendant has since ceased to commit or to threaten the acts complained of.⁴⁵

§ 2488. Substantiality of injury.—The rule is well established that equity will not grant an injunction where the complainant suffers or will suffer no substantial injury from the wrongful act.⁴⁶ And the remedy has also been denied in

³⁹ *Weed v. Roberts*, 22 Misc. (N. Y.) 46, 49 N. Y. S. 366.

⁴⁰ *Huntington Dry-Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 121 Fed. 136; *Smith v. Davis*, 22 Fla. 405; *Georgia Pac. R. Co. v. Douglasville*, 75 Ga. 828; *Mead v. Cleland*, 62 Ill. App. 294; *Heinl v. Terre Haute*, 161 Ind. 44, 66 N. E. 450; *Shafer v. Fry*, 164 Ind. 315, 73 N. E. 698; *McCurdy v. Lawrence*, 9 Kans. App. 883, 57 Pac. 1057; *Trevigne v. School Board*, 31 La. Ann. 105; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700; *Sherman v. Clark*, 4 Nebr. 138, 97 Am. Dec. 516; *United N. J. R. & Canal Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. 659.

⁴¹ *Alma v. Loehr*, 42 Kans. 308, 22 Pac. 424.

⁴² *McMaster v. Waynesboro*, 122 Ga. 231, 50 S. E. 122.

⁴³ *Owen v. Ford*, 49 Mo. 436; *Verdin v. St. Louis*, 131 Mo. 126, 33 S. W. 480, 36 S. W. 52.

⁴⁴ *Gardner v. Stroeveer*, 89 Cal. 30, 26 Pac. 618; *Tucker v. Howard*, 128 Mass. 361; *Sherman v. Clark*, 4 Nebr. 138, 97 Am. Dec. 516; *Hammond v. Fuller*, 1 Paige (N. Y.) 197.

⁴⁵ *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994, 26 L. R. A. 158, *affd.* 57 Fed. 85, 6 C. C. A. 258.

⁴⁶ *Irwin v. Exton*, 125 Cal. 622, 58 Pac. 257; *Reid v. Macon*, 24 Ga. 205; *Barnard v. Commissioners of Highways*, 172 Ill. 391, 50 N. E. 120;

cases where the injury is merely nominal or theoretical.⁴⁷ The rule that the injury must be actual and substantial, to entitle complainant to injunctive relief, applies to cases where the injury is continuous as well as where it is single.⁴⁸ But it has been held that the continuous breach of a covenant with respect to the use of real estate may be enjoined, though no injury resulting from the breach is shown.⁴⁹ This is upon the ground that one may not make a solemn engagement, and then disregard it on the plea that no harm will result to the other party.⁵⁰

§ 2489. Irreparable injury.—Courts of equity will not interfere to prevent injury by injunction unless the injury will be great or the damages irreparable.⁵¹ If, however, the injury threatened be irreparable, a court of equity will interfere to prevent the injury by injunction.⁵² Irreparable

Stauffer v. Cincinnati, R. & M. R. Co., 33 Ind. App. 356, 70 N. E. 543; *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570; *Barker v. Warren*, 6 Ky. L. 86; *Swan Creek Tp. v. Brown*, 130 Mich. 382, 90 N. W. 38; *Wakeman v. New York, L. E. & W. R. Co.*, 35 N. J. Eq. 496; *Neiman v. Butler*, 46 N. Y. St. 928; 19 N. Y. S. 403; *Watrous v. Rodgers*, 16 Tex. 410; *Tift Co. v. State Medical Institute*, 53 Wash. 365, 101 Pac. 1081; *Head v. James*, 13 Wis. 641.

⁴⁷ *Devou v. Pence*, 32 Ky. L. 697, 106 S. W. 874; *Hendrix v. Bull*, 111 Md. 389, 74 Atl. 572; *Caskey v. Edwards*, 128 Mo. App. 237, 107 S. W. 37; *Southwest Missouri R. Co. v. Morning Hour Min. Co.*, 138 Mo. App. 129, 119 S. W. 982; *Red Raven Social Club v. Bingham*, 62 Misc. (N. Y.) 401, 116 N. Y. S. 709.

⁴⁸ *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Woodbury v. Portland Marine Soc.*, 90 Maine 18, 37 Atl. 323; *Dickhaus v. Olderheide*, 22 Mo. App. 76; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524; *Sargent v. George*, 56 Vt. 627; *Head v. James*, 13 Wis. 641.

⁴⁹ *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App.

370, 74 S. W. 474; *Hall v. Wesster*, 7 Mo. App. 56.

⁵⁰ *Ives v. Edison*, 124 Mich. 402, 83 N. W. 120, 50 L. R. A. 134, 83 Am. St. 329; *Dewey v. Bellows*, 9 N. H. 282; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Johnston v. Hyde*, 32 N. J. Eq. 446; *Merritt v. Parker*, 1 N. J. L. 460.

⁵¹ *Ritter v. Patch*, 12 Cal. 298; *New York Grape-Sugar Co. v. American Grape-Sugar Co.*, 10 Fed. 835, 20 Blatchf. (U. S.) 386; *Bolster v. Catterlin*, 10 Ind. 117; *Cockey v. Carroll*, 4 Md. Ch. 344; *Walker v. Brooks*, 125 Mass. 241; *Jones v. Brandon*, 60 Miss. 556; *Eidemiller Ice Co. v. Guthrie*, 42 Nebr. 238, 60 N. W. 717, 28 L. R. A. 581; *Thorn v. Sweeney*, 12 Nev. 251; *Perkins v. Foye*, 60 N. H. 496; *Lewis v. Elizabeth*, 25 N. J. Eq. 298; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 43 N. Y. Super Ct. 292; *Commercial Bank v. Bowman*, 1 Handy (Ohio) 246, 12 Ohio Dec. 125; *Portland v. Baker*, 8 Ore. 356.

⁵² *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Western Union Tel. Co. v. Norman*, 77 Fed. 13; *Bolton v. McShane*, 67 Iowa 207, 25 N. W. 135; *Hunter v. Bertram*, 6 Ky. L. (abstract) 593; *Jones v. Brandon*, 60 Miss. 556; *Williamston & T. R. Co. v. Battle*, 66 N. Car. 540; *Flippin v.*

injury is an injury which can not be measured by any pecuniary standard, or which, because of its nature or the financial condition of the wrongdoer, can not be adequately compensated in damages.⁵³ However, it does not mean beyond the possibility of compensation in damages, or that it must be very great, and the fact that no actual damages can be proved, so that in an action at law the jury could award only nominal damages, often furnishes the best reason why equity should interfere.⁵⁴

§ 2490. Inadequacy of legal remedy.—One of the well settled grounds of equitable jurisdiction is the want of an adequate remedy at law, and in cases of irreparable injury, for which damages will not be adequate compensation, relief will be granted by injunction.⁵⁵ It follows as a matter of course that injunction should not issue where the law affords an adequate remedy.⁵⁶ Jurisdiction of equity, however, is not defeated by concurrent law jurisdiction unless the remedy at law, as to final relief and the mode of securing it, is as efficient as that in equity.⁵⁷ So, the adequate remedy at law, in order to defeat a court of equity

Knaffle, 2 Tenn. Ch. 238; Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. 565.

⁵³ Cole v. Manners, 76 Nebr. 454, 107 N. W. 777.

⁵⁴ Central of Georgia R. Co. v. American Const. Co., 133 Ga. 392, 65 S. E. 855; Espenscheid v. Bauer, 235 Ill. 172, 85 N. E. 230; Ainsworth v. Munoskong Hunting & Fishing Club, 153 Mich. 185, 116 N. W. 992, 17 L. R. A. (N. S.) 1236n, 126 Am. St. 474.

⁵⁵ Waskey v. McNaught, 90 C. C. A. 289, 163 Fed. 929; Espenscheid v. Bauer, 235 Ill. 172, 85 N. E. 230; Eisenhauer v. Quinn, 36 Mont. 368, 93 Pac. 38, 14 L. R. A. (N. S.) 435n, 122 Am. St. 370; Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329, 16 L. R. A. (N. S.) 851n; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441.

⁵⁶ Perry v. Hamilton, 138 Ind. 271, 35 N. E. 836; Mathews v. Farmersville, 121 La. 313, 46 So. 339; Bonaparte v. Denmead, 108 Md. 174, 69

Atl. 697; Grandchamp v. McCormick, 150 Mich. 232, 114 N. W. 80; Mohat v. Hutt, 75 Nebr. 732, 106 N. W. 659; St. Columbia's Church v. North Jersey St. R. Co., (N. J. Eq.) 70 Atl. 692; Fox v. Fitzpatrick, 190 N. Y. 259, 82 N. E. 1103; Kistler v. Weaver, 135 N. Car. 388, 47 S. E. 478; Continental Hose Co. No. 1 v. Mitchell, 15 N. Dak. 144, 105 N. W. 1108; Winans v. Beidler, 6 Okla. 603, 52 Pac. 405; Thompson v. Tucker, 15 Okla. 486, 83 Pac. 413; Beaver County v. Central Dist. & Tel. Co., 219 Pa. 340, 68 Atl. 846; Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329, 16 L. R. A. (N. S.) 851n; Frazier v. Coleman (Tex. Civ. App.), 111 S. W. 662. See also, Baum v. Longwell, 200 Fed. 450.

⁵⁷ American Smelting & Refining Co. v. Godfrey, 158 Fed. 225; Dittgen v. Racine Paper Goods Co., 164 Fed. 84; Hall v. Dunn, 52 Ore. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193n.

of jurisdiction, must be as certain, complete, prompt and efficient as the remedy in equity.⁵⁸ Thus, a court of equity should issue an injunction to stay an action at law upon a promissory note for the purchase-price until the defense of reduction, arising out of the same transaction, is allowed, whenever the remedy at law is less certain, prompt and efficient to attain the ends of justice, either because the interests of the parties require that the title to the land should be perfected, that their rights should be adjudicated, and that the litigation over it should be closed—a result which no remedy at law is adequate to accomplish—or because it entails circuity of action, or because there is serious danger of unjustifiable loss or injury to the vendee, which a court of equity may, but a court of law can not, prevent.⁵⁹

§ 2491. Damages at law adequate.—Injunction will be denied when it is shown that complainant has an adequate remedy by an action at law for damages.⁶⁰ Accordingly, injunction will not be granted where liquidated damages are provided for, even in cases where, without such provision, injunction would be given on the ground that the remedy at law is not adequate.⁶¹ However, a party is not bound to resort to the legal remedy if that remedy is not as practicable and efficient to the ends of justice and its prompt administration, both in respect to the final relief and the mode of obtaining it, as the equitable remedy. In

⁵⁸ *Williams v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Quick v. Lemon*, 105 Ill. 578; *Forbes v. Cooper*, 88 Ky. 285, 10 Ky. L. 865, 11 S. W. 24; *Green v. Campbell*, 55 N. Car. 446; *North Chicago Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 38 L. ed. 565.

⁵⁹ *Coy v. Downie*, 14 Fla. 544; *Jaques v. Esler*, 4 N. J. Eq. 461; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76; *Walker v. Wilson*, 13 Wis. 522.

⁶⁰ *Middleton v. Franklin*, 3 Cal. 238; *Stolp v. Hoyt*, 44 Ill. 219; *Laughlin v. Lamasco City*, 6 Ind. 223; *Din-*

widdie v. Roberts, 1 G. Greene (Iowa) 363; *Hardesty v. Taft*, 23 Md. 512, 87 Am. Dec. 584; *Victor Min. Co. v. Morning Star Min. Co.*, 50 Mo. App. 525; *Atchison v. Peterson*, 1 Mont. 561, affd. 20 Wall. (U. S.) 507, 22 L. ed. 414; *Morris Canal & Banking Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Jordan v. Lanier*, 73 N. Car. 90; *Stroebe v. Fehl*, 22 Wis. 337.

⁶¹ *Dills v. Doeblor*, 62 Conn. 366, 26 Atl. 398, 20 L. R. A. 432, 36 Am. St. 345; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

such a case equity may be invoked.⁶² And, having once acquired jurisdiction in a case, equity will retain it to give such full relief as will finally dispose of the controversy.⁶³

§ 2492. **Insolvency of defendant as ground for remedy.**—Insolvency of the person against whom relief is sought is rarely of itself sufficient to give jurisdiction.⁶⁴ But some courts have granted injunctions on this ground where the insolvency of the defendant would have rendered any action against him fruitless and the remedy at law was for money damages.⁶⁵ Thus, equity will enjoin the transfer of mining stock pending an action of specific performance for its transfer where the defendant is insolvent.⁶⁶ That there must be some other equitable ground with insolvency,⁶⁷ that the threatened wrong could not be adequately compensated for in damages, and that it would be impossible or difficult to measure them by any pecuniary standard, would alone seem to constitute irreparable injury justifying jurisdiction, though cases generally join with the foregoing elements the insolvency of the defendant.⁶⁸ So, if insolvency be joined with other grounds it may strengthen the plaintiff's claims for injunctive relief.⁶⁹ One of the instances in which the jurisdiction of a court of equity is often exercised is in relation to negotiable instruments before their maturity. In such cases an injunction is generally granted against the transferring of such an instrument. Thus, where an insolvent holder of a note secured by a chattel mortgage

⁶² *Thatcher v. Humble*, 67 Ind. 444; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. 594; *Lewis v. Cocks*, 23 Wall. (U. S.) 466, 23 L. ed. 70. See also, *Gano v. Cunningham* (Kans.), 128 Pac. 372.

⁶³ *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 99; *Drayton v. Chandler*, 93 Mich. 383, 53 N. W. 558; *In re Axtell*, 95 Mich. 244, 54 N. W. 889.

⁶⁴ *Lewis v. Hall*, 64 W. Va. 147, 61 S. E. 317.

⁶⁵ *Carswell v. Macon Mfg. Co.*, 38 Ga. 403; *Brownston v. Cropper*, 1

Litt. (Ky.) 173; *Hume v. Burns*, 50 Ore. 124, 90 Pac. 1009.

⁶⁶ *Rau v. Seidenberg*, 53 Misc. (N. Y.) 386, 104 N. Y. St. 798.

⁶⁷ *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597; *Gossard Co. v. Crosby*, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115n; *Bledsoe v. Robinett* (Va.), 54 S. E. 861.

⁶⁸ *Cole v. Manners*, 76 Nebr. 454, 107 N. W. 777.

⁶⁹ *Merchants' Exch. of St. Louis v. Knott*, 212 Mo. 616, 111 S. W. 565; *Meinecke v. Smith*, 135 Wis. 220, 115 N. W. 816.

has seized the property in order to foreclose, and the note, which was procured by the defendant's fraud, is not yet due, a court of equity has jurisdiction to cancel the note and mortgage and enjoin the transfer of the note.⁷⁰ While it is true that the insolvency of a trespasser is not, alone, sufficient to give a court of equity jurisdiction to enjoin his tortious acts in a case where there is an absence of other necessary facts, still insolvency is an important element or factor in determining the question of the inadequacy of the relief afforded by an action at law, or, in other words, it affords an additional reason to justify a court of equity to interfere, as the inability of the wrongdoer to respond in damages renders the legal remedy ineffectual.⁷¹ So, the court will not usually assume jurisdiction merely because the defendant is not able to pay such damages as might be recovered in an action at law.⁷² It has been held in a recent case that a city can not be considered insolvent so as to render a remedy at law against it inadequate merely because it is unable to pay its debts when due, on account of restrictions on its taxing powers.⁷³

§ 2493. Remedy as ground for prevention of multiplicity of suits.—Prevention of a multiplicity of suits constitutes a frequent ground for the exercise of the jurisdiction of equity by way of injunction.⁷⁴ And this remedy will be given in such cases, although the only injury resulting from the wrongful acts is pecuniary loss.⁷⁵ However, before courts of equity will interfere to prevent a multiplicity of suits, there must usually be several persons controverting the same right, and each standing upon his own pretension of rights.⁷⁶

⁷⁰ *Hodson v. Eugene Glass Co.*, 156 Ill. 397, 40 N. E. 971. See also, *Carpenter v. Talbot*, 33 Fed. 537; *Lanier v. Adams*, 72 Ga. 145; *Petillon v. Noble*, 73 Ill. 567; *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357; *Becker v. Anderson*, 6 Nebr. 499; *Badgett v. Frick*, 28 S. Car. 176, 5 S. E. 355.

⁷¹ *Wabash R. Co. v. Engelman*, 160 Ind. 329, 66 N. E. 892; *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787.

⁷² *Morgan v. Palmer*, 48 N. H. 336.

⁷³ *Marshall v. Allen* (Tex. Civ. App.), 115 S. W. 849.

⁷⁴ *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Kendall v. Dow*, 46 Ga. 607; *MacRoberts v. Washburne*, 10 Minn. 23; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. 566; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567.

⁷⁵ *Owen v. Phillips*, 73 Ind. 284.

⁷⁶ *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am. St. 101.

As a general rule, wherever the rights of a party aggrieved can not be protected or enforced in the ordinary course of a proceeding at law, except by numerous suits, equity may properly interpose and offer relief by injunction. Upon this ground equity often grants an injunction to restrain wrongful acts which are of a continuing nature, or which are frequently repeated. A separate remedy at law for each violation of the plaintiff's right would not be an adequate remedy, and the ends of justice require in such a case that the whole wrong shall be arrested and concluded by a single proceeding. Such relief equity affords, and thereby fulfils its appropriate mission of supplying the deficiencies of legal remedies.⁷⁷ Thus, it is held that a multiplicity of actions at law, involving conflicting claims to the same property, which a court of law could not solve without working injustice, founded upon one continuous and fraudulent scheme, inflicting a similar injury upon all, and differing only in detail and degree, and, where the legal remedy of fifty defenses to fifty replevin suits is shown to be destructive to the lien and right of the plaintiff, presents a state of facts which fully justifies the interference of equity.⁷⁸ But whether or not an injunction will lie to prevent a multiplicity of suits depends upon the circumstances of each particular case.⁷⁹ Jurisdiction will not be entertained on such grounds where courts would have power to consolidate the actions,⁸⁰ nor in a case no more subject to multiplied suits than others of its particular class.⁸¹ Injunction will be refused where parties claiming the relief can control the number of suits brought.⁸² Also the giving of an injunction in certain cases can not be construed as allowing it where no multiplicity of suits or other equitable grounds appear.⁸³

⁷⁷ Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. 671; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884, affd. 110 Mo. 557, 19 S. W. 809; Shaffer v. Stull, 32 Nebr. 94, 48 N. W. 882.

⁷⁸ National Park Bank v. Goddard, 131 N. Y. 494, 30 N. E. 566.

⁷⁹ Adams v. Orberndorf, 121 Ill. App. 497.

⁸⁰ Gainesville v. Dean, 124 Ga. 750, 53 S. E. 183.

⁸¹ Clark v. Peck, 75 Vt. 275, 65 Atl. 14.

⁸² Attorney-General v. Board of Education, 133 Mich. 681, 95 N. W. 746.

⁸³ Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892.

§ 2494. **Defenses or objections to relief.**—It may be stated, as a general rule, that an injunction will not be granted where it will be productive of greater injuries than will result from a refusal of it.⁸⁴ Nor will the relief be granted where, under the evidence, it is shown to be wholly impracticable.⁸⁵ Ordinarily, an injunction that bears heavily on the defendant without benefiting the plaintiff will be withheld as oppressive.⁸⁶ Thus, where the injury to the plaintiff from threatened acts will be slight, and the injury to the defendant by issuance of an injunction would be considerable, and the defendant is solvent and responsible, equity will refuse to grant relief to the plaintiff.⁸⁷ But the relatively greater inconvenience to the defendant is not always a controlling element.⁸⁸ So, also, where an injunction would cause serious injury to an individual or to the community at large and a relatively slight benefit to the plaintiff, the relief will usually be denied and the parties left to their action at law.⁸⁹ It has been said, however, that this doctrine is applicable only on an application for a preliminary and not for a permanent injunction.⁹⁰ The weight of authority seems to hold that where the existence of a nuisance is clearly shown, together with the fact of its causing another material, substantial and irreparable injury for

⁸⁴ *Whittlesey v. Hartford P. & F. R. Co.*, 23 Conn. 421; *Hartridge v. Rockwell*, Charl. (Ga.) 260; *Varney v. Pope*, 60 Maine 192; *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Atchison v. Peterson*, 1 Mont. 561, affd. 20 Wall. (U. S.) 507, 22 L. ed. 414; *Duncan v. Hayes*, 22 N. J. Eq. 25; *McCorkle v. Brem*, 76 N. Car. 407; *In re Richards' Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202; *Sheldon v. Rockell*, 9 Wis. 166, 76 Am. Dec. 265. See also, *Union Planters' Bank & Co. v. Memphis Hotel Co.*, 124 Tenn. 649, 139 S. W. 715, 39 L. R. A. (N. S.) 580. But compare, *Bristol v. Palmer*, 83 Vt. 54, 74 Atl. 332, 31 L. R. A. 881. The notes to these cases as last reported consider the whole doctrine and its limitations.

⁸⁵ *McKee v. Grand Rapids*, 137 Mich. 200, 100 N. W. 580.

⁸⁶ *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961.

⁸⁷ *Mann v. Parker*, 48 Ore. 321, 86 Pac. 598.

⁸⁸ *Cleveland v. Martin*, 218 Ill. 73, 75 N. E. 772, 3 L. R. A. (N. S.) 629.

⁸⁹ *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621; *Bliss v. Washoe Copper Co.*, 186 Fed. 789, 109 C. C. A. 133; *Mt. Morris Bank v. New York & C. R. Co.*, 50 Misc. (N. Y.) 417, 100 N. Y. S. 844; *Bentley v. Empire Portland Cement Co.*, 48 Misc. (N. Y.) 457, 96 N. Y. S. 831; *Knoth v. Manhattan R. Co.*, 109 App. Div. (N. Y.) 802, 96 N. Y. S. 844; *Gray v. Manhattan R. Co.*, 128 N. Y. 499, 28 N. E. 498.

⁹⁰ *United States v. Luce*, 141 Fed. 385.

which there is no adequate legal remedy, the injured person is primarily entitled, as a matter of right, to the issuance of an injunction enjoining or abating the nuisance, without reference to the comparative injury resulting therefrom.⁹¹

§ 2495. **Injunction as discretionary.**—The issuance of an injunction rests in the sound discretion of the court, and the exercise of this discretion in granting or refusing the remedy is not as a rule subject to be interfered with or reviewed on appeal.⁹² The discretion vested in a court of equity in injunction proceedings is a sound judicial discretion, however, not an arbitrary one, nor one exercised contrary to the facts shown.⁹³ It follows from what we have said that the granting or refusing of an injunction is not an act minis-

⁹¹ *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465; *Weimer v. Lowery*, 11 Cal. 104; *Wente v. Commonwealth Fuel Co.*, 232 Ill. 526, 83 N. E. 1049; *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Evans v. Reading Chemical & Fertilizing Co.*, 60 Pa. St. 209, 28 Atl. 702. See also, *Sullivan v. Jones & Steel Co.*, 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712; *American Smelting & C. Co. v. Godfrey*, 158 Fed. 224, 89 C. C. A. 139; note in 31 L. R. A. (N. S.) 888.

⁹² *Davis v. Sowell*, 77 Ala. 262; *Miller v. O'Bryan*, 36 Ark. 200; *Goldstein v. Kelly*, 51 Cal. 301; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586; *McKinne v. Dickenson*, 24 Fla. 366, 5 So. 34; *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737; *Hanford v. Blessing*, 80 Ill. 188; *Logansport v. Uhl*, 99 Ind. 531; *Fuson v. Connecticut General Life Ins. Co.*, 53 Iowa 609, 6 N. W. 7; *Mead v. Anderson*, 40 Kans. 203, 19 Pac. 708; *Cameron v. Godchaux*, 49 La. Ann. 1345, 20 So. 710; *Morse v. Machias Water Power & C. Co.*, 42 Maine 119; *Spencer v. Falls Townpike Road Co.*, 70 Md. 136, 16 Atl. 451; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. 446; *Pineo v. Heffelfinger*, 29 Minn. 183, 12 N. W. 522; *Brown v.*

Speight, 30 Miss 45; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539, 55 Pac. 112; *Sierra Nevada Silver Min. Co. v. Sears*, 10 Nev. 346; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. 768; *Couch v. Orne*, 3 Okla. 508, 41 Pac. 368; *Longshore Printing & Publishing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640; *In re Richards' Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202; *Pelzer v. Hughes*, 27 S. Car. 408, 3 S. E. 781; *Flippin v. Knaffle*, 2 Tenn. Ch. 238; *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. 217; *Leitham v. Cusick*, 1 Utah 242; *Stetson v. Stevens*, 64 Vt. 649, 25 Atl. 429; *Jenkins v. Waller*, 80 Va. 668; *Pioneer Wood-Pulp Co. v. Bensley*, 70 Wis. 476, 36 N. W. 321.

⁹³ *English v. Progress Electric Light & Motor Co.*, 95 Ala. 259, 10 So. 134; *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Citizens' Bank v. Cook*, 63 Ga. 159; *College Corner & R. Gravel Road Co. v. Moss*, 77 Ind. 139; *Beebe v. Guinault*, 29 La. Ann. 795; *Schilling v. Reagan*, 19 Mont. 508, 48 Pac. 1109; *Thorn v. Sweeney*, 12 Nev. 251; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Strasser v. Moonellis*, 108 N. Y. 611, 15 N. E. 730; *Walters v. McElroy*, 151 Pa. St. 549, 25 Atl. 125.

terial in its character, but an exercise of judicial discretion; and, according to the weight of authority, mandamus will not lie to compel a court to issue an injunction.⁹⁴ The power to issue an injunction should be exercised with great caution and the relief should not be given where the court is not indubitably satisfied of facts claimed for its issuance.⁹⁵ The question as to the issuance of an injunction calls for the exercise of a reasonable discretion on the part of the court, and where it is clearly shown that substantial, material and irreparable injury is resulting and will result to the plaintiff, for which there is no adequate remedy at law, injunction will usually be granted.⁹⁶ Of course, the right to invoke the jurisdiction of a court of equity must depend upon the peculiar and particular facts in each case, and the court may consider, in a proper case, whether it would not do greater injury by enjoining than it would by refusing an injunction and leaving the parties to adopt some other remedy.⁹⁷

§ 2496. Injunction as a matter of right.—It is said that a preliminary injunction is not a matter of strict right. Many courts hold that the remedy is not of right, but of grace, and a chancellor is not bound to make a decree which does far more mischief and works far greater injury than the wrong he is asked to redress.⁹⁸ A chancellor does act as of grace, but that grace can sometimes become a matter of right to the suitor in his court, and when it is clear that the law can not give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them.⁹⁹

⁹⁴ *McMillen v. Smith*, 28 Ark. 613; *State v. Judge*, 37 La. Ann. 400.

⁹⁵ *Burrell v. Middleton*, 72 N. J. Eq. 774, 65 Atl. 978; *Harry Angelo Co. v. Improved Property Holding Co.*, 105 N. Y. St. 590; *Pacific States Tel. Co. v. Salem*, 49 Ore. 110, 89 Pac. 145.

⁹⁶ *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192; *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621.

⁹⁷ *In re Huckstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669. But see last note to § 2494 supra.

⁹⁸ *Keeling v. Pittsburg, V. & C. R. Co.*, 205 Pa. 31, 54 Atl. 485; *Robb v. Carnegie Bros. & Co.*, 145 Pa. St. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. 694; *In re Richards' Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202.

⁹⁹ *Walters v. McElroy*, 151 Pa. St. 549, 25 Atl. 125.

Thus, where the existence of a nuisance is clearly shown, together with the fact that it is causing another material, substantial and irreparable injury for which there is no adequate legal remedy, the weight of authority is to the effect that the injured person is primarily entitled, as a matter of right, to the issuance of an injunction enjoining or abating the nuisance, without reference to the comparative benefit conferred thereby, or the comparative injury resulting therefrom; and in such cases the issuance of the injunction is not discretionary with the court.¹ The meaning of the term "discretion" to be exercised by a court in the issuance of an injunction in this class of cases is that the judge must be discreet, and must act with discretion and discrimination, and take into consideration and give weight to each circumstance in the case in accordance with its actual value in a court of equity.²

§ 2497. Remedy incidental to actions or other proceedings.—Courts of law and of equity are co-ordinate tribunals of clear authority within their respective jurisdiction, and neither has any right to assume nor to exercise any control over the other, or to prescribe to the other what suits it may or may not entertain. A court of equity has no control over a court of law, and therefore can not act directly upon the latter.³ But a court of equity may have jurisdiction over individuals who are litigants in a court of law, and by its power with them it can, indirectly but most effectually, control the proceedings in the latter court. It can enjoin a plaintiff in a suit at law from prosecuting his suit, or it can enjoin a defendant in such suit from set-

¹ *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465; *Weimer v. Lowery*, 11 Cal. 104; *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. 1000; *McCleery v. Highland Boy Gold Min. Co.*, 140 Fed. 951; *Wente v. Commonwealth Fuel Co.*, 232 Ill. 526, 83 N. E. 1049; *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Shaw v. Queen City Forging Co.*, 10 Ohio Dec. 107, 7 Ohio N. P. 254; *In re Pennsylvania Lead Co.'s*

Appeal, 96 Pa. St. 116, 42 Am. Rep. 534; *Evans v. Reading & Chemical Fertilizing Co.*, 160 Pa. St. 209, 28 Atl. 702; note in 31 L. R. A. (N. S.) 881.

² *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374.

³ *Stanton v. Embry*, 46 Conn. 65; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Given's Appeal*, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. 795.

ting up a purely legal defense whenever there is a good answer in equity to such suit or defense which can not be availed of at law.⁴ By this power a court of equity can redress wrongs which otherwise would be remediless. Its authority is exercised over the person of the defendant, but not over the court itself. Not only can a court of equity give relief to a party, pending a suit at law, to prevent an unjust judgment against him, but also, when a judgment has been obtained fraudulently, without the fault of the defendant, it can give relief by enjoining the fraudulent party from enforcing his judgment.⁵ A court of equity will enjoin a suit at law whenever the defendant has a defense which is not available or competent at law, or which is a good defense in equity.⁶ But whenever the defense is as available at law as in equity, a court of equity will not enjoin prosecution of a suit at law.⁷ So, also, it has been held that equity will enjoin a defendant from setting up a strictly legal defense whenever he is equitably estopped from availing himself of that defense.⁸

§ 2498. Restraining commencement and prosecution of civil action.—The rule is well settled that a court of equity will not usually enjoin an action at law on grounds which may be urged as a defense to such actions.⁹ Thus, a suit

⁴ McKibbin v. Bristol, 50 Mich. 319, 15 N. W. 491; Ferrin v. Errol, 59 N. H. 234; Hall v. Piddock, 21 N. J. Eq. 311; Becker v. Church, 115 N. Y. 562, 22 N. E. 748; In re Thompson's Appeal, 107 Pa. St. 559; Atlantic Delaine Co. v. Tredick, 5 R. I. 171.

⁵ Pearce v. Olney, 20 Conn. 544; Bassett v. Henry, 34 Mo. App. 548; Wingate v. Haywood, 40 N. H. 437; Cairo & Fulton R. Co. v. Titus, 27 N. J. Eq. 102; Wistar v. McManes, 54 Pa. St. 318, 93 Am. Dec. 700; Johnson v. Christian, 128 U. S. 374, 32 L. ed. 412, 9 Sup. Ct. 87.

⁶ Atlantic Delaine Co. v. Tredick, 5 R. I. 171.

⁷ Manchester Fire Assur. Co. v. Stockan & Co. Works, 38 Fed. 378; Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Chase's Exr. v. Chase,

50 N. J. Eq. 143, 24 Atl. 914; Bank of Bellows Falls v. Rutland & Burlington R. Co., 28 Vt. 470; Westminster v. Willard, 65 Vt. 266, 26 Atl. 952.

⁸ Woodbury Sav. Bank & Bldg. Assn. v. Charter Oak Fire and Marine Ins. Co., 31 Conn. 517.

⁹ Holt v. Pickett, 11 Ala. 362, 20 So. 432; Earle's Admx. v. Hale's Admr., 31 Ark. 473; Waymire v. San Francisco & S. M. R. Co., 112 Cal. 646; Hayes v. Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709; Burnhans v. Jefferson, 76 Fed. 25, 22 C. C. A. 25; Cohen v. L'Engle, 24 Fla. 542, 5 So. 235; Williams v. Stewart, 56 Ga. 663; Cook County v. Chicago, 158 Ill. 524, 42 N. E. 67; Shoemaker v. Axtell, 78 Ind. 561; Central Iowa R. Co. v. Moulton & Co. R. Co., 57 Iowa 249, 10 N. W. 639; Bonin v. Monot, 28

to recover a statutory penalty for cutting trees will not be enjoined on the ground that the defendant entered under the belief that he had title, for such defense could be made in the original action.¹⁰ Also, where the maker of a promissory note brought suit to recover possession of same on the ground of payment, and its possession had been refused on demand, it furnished no ground for an equitable proceeding on behalf of the payee that he denied the full payment and that he could not obtain judgment on it in the trover suit, or that the city court in which that suit had been brought had no equitable jurisdiction.¹¹ But the prosecution of an action at law may be enjoined where a party is entitled to some relief which can be afforded only by a court of equity.¹² Also, equity will enjoin the prosecution of a number of simultaneous actions at law brought against a single party where all the proceedings depend upon the same law and facts so that the matter may be decided in one proceeding;¹³ but the mere fact that several law actions may be tried in one proceeding is no ground for enjoining the law actions.¹⁴

§ 2499. Injunction where one court has properly acquired jurisdiction.—Whether one court has jurisdiction to enjoin proceedings in another court of co-ordinate jurisdiction is an unsettled question.¹⁵ But where one court has properly acquired jurisdiction, proceedings in another court interfering with such jurisdiction may be restrained.¹⁶ Also,

La. Ann. 597; *Banks v. Valentine*, 130 Mass. 119; *Detroit, B. H. & M. R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52; *Elder v. Shaw*, 12 Nev. 78; *Chase's Exr. v. Chase*, 50 N. J. Eq. 143, 24 Atl. 914; *People v. Watson*, 64 N. Y. 167; *In re Olmsted's Appeal*, 86 Pa. St. 284; *Clarke v. Clarke*, 7 R. I. 45; *Gibson v. Moore*, 22 Tex. 611; *Steger & Sons Piano Mfg. Co. v. MacMaster* (Tex. Civ. App.), 113 S. W. 337.

¹⁰ *Ryder v. Johnson*, 153 Ala. 482, 45 So. 181.

¹¹ *Long v. McIntosh*, 129 Ga. 660, 59 S. E. 779.

¹² *Butler v. Holmes*, 128 Ga. 333, 57 S. E. 715.

¹³ *Cleveland v. Ins. Co. of North America*, 151 Ala. 191, 44 So. 37.

¹⁴ *Toole v. Lanier*, 128 Ga. 279, 57 S. E. 516.

¹⁵ *Gray v. South & N. A. R. Co.*, 151 Ala. 215, 43 So. 859, 11 L. R. A. (N. S.) 581n.

¹⁶ *Board of Trade v. Donovan Commission Co.*, 121 Fed. 1012, revd. 145 Fed. 31, 76 C. C. A. 16; *Board of Trade v. L. A. Kinsey Co.*, 125 Fed. 72, revd. 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59; *Christie Grain & Stock Co. v. Board of Trade*, 125 Fed. 661, 61 C. C. A. 11.

equity may enjoin proceedings pending or threatened in another court to prevent oppressive and vexatious litigation, especially when not brought in good faith, and to that end will act upon parties within its jurisdiction with respect to action in a foreign state.¹⁷ But an injunction will not be granted to stay proceedings in another equitable suit, either on application of the parties to the proceedings to be restrained, their privies, or of strangers thereto, when the relief desired is procurable in the suit sought to be enjoined.¹⁸ It is generally held that where two courts have an equal and concurrent jurisdiction, the one that commences the exercise of its jurisdiction first has the preference, and is not to be obstructed in the legitimate exercise of its powers by the court that, on the subject-matter, would be only co-ordinate, and the court first taking cognizance of the cause retains it to the exclusion of the other.¹⁹ It is a well established rule that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and that, where the jurisdiction of the court and right of the plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court.²⁰ It has been held in many cases that the court ought not, in one action, to restrain proceedings in another equitable action to which the party applying for the injunction was a party. These cases have gone on the ground that adequate remedy was open to the parties in the original action.²¹ Indeed, there are authorities, not only questioning the right and propriety, but denying the jurisdiction, of one court

¹⁷ Greer v. Cook, 88 Ark. 93, 113 S. W. 1009; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178; Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153. See also, Shevalier v. Stephenson (Nebr.), 139 N. W. 233.

¹⁸ Jackson v. Stearns, 48 Ore. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390.

¹⁹ King v. Smith, 15 Ala. 264; Troy Fertilizer Co. v. Prestwood, 116 Ala.

119, 22 So. 262; Stearns v. Stearns, 16 Mass. 167. See also, McIntosh v. Brown (Iowa), 139 N. W. 926.

²⁰ Wilson v. Baker, 64 Cal. 476, 2 Pac. 253; Peck v. Jenness, 7 How. (U. S.) 612, 12 L. ed. 841.

²¹ Smith v. American Life Ins. & Trust Co., Clark Ch. (N. Y.) 307; Platto v. Deuster, 22 Wis. 482; Endter v. Lennon, 46 Wis. 299, 50 N. W. 194.

to enjoin the proceedings in another court of co-ordinate jurisdiction.²²

§ 2500. Injunction—Foreign suits.—By the great weight of authority it is held that a state court may restrain its citizens from prosecuting another citizen in another state,²³ and this right is not to be defeated, because the party complaining has other legal defenses availing in the foreign jurisdiction.²⁴ A court of equity may enjoin proceedings pending or threatened in another court to prevent oppressive and vexatious litigation, and to that end will act upon parties within its jurisdiction with respect to an action in a foreign state, especially where substantially the same relief is sought, arising out of the same subject-matter.²⁵ Thus, a court foreclosing a mortgage securing bonds may, at the suit of a purchaser, enjoin a subsequent foreclosure of the same mortgage in another jurisdiction by other bondholders.²⁶ But the existence of an earlier suit in equity between the same parties for the same cause of action in one jurisdiction is not ground for an injunction to stay the prosecution of a later action and does not prevent a determination of the issues in the former suits.²⁷ The courts do not, in this class of cases, pretend to direct or to control the foreign courts, but the decree acts solely upon the party.

²² Gray v. South & N. A. R. Co., 151 Ala. 215, 43 So. 859, 11 L. R. A. (N. S.) 581n; Waymire v. San Francisco & S. M. R. Co., 112 Cal. 646, 44 Pac. 1086; Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042; Endter v. Lennon, 46 Wis. 299, 50 N. W. 194; Platto v. Deuster, 22 Wis. 482. See also, McIntosh v. Brown (Iowa), 139 N. W. 926; McLean v. Wayne Circ. Judge, 52 Mich. 257, 18 N. W. 396.

²³ Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Hager v. Adams, 70 Iowa 746, 30 N. W. 36; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193; Cunningham v. Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657, affd. 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. 269; Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. 534;

Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360; 58 L. R. A. 484, 92 Am. St. 682; Kendall v. McClure Coke Co., 182 Pa. St. 1, 37 Atl. 823, 61 Am. St. 688; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. 269; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. 680; Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792.

²⁴ Sandage v. Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. 165.

²⁵ Webster v. Columbian Nat. Life Ins. Co., 62 Misc. (N. Y.) 345, 115 N. Y. S. 892.

²⁶ Alton Water Co. v. Brown, 166 Fed. 840, 92 C. C. A. 598.

²⁷ Guardian Trust Co. v. Kansas City Southern R. Co., 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620.

The jurisdiction rests on the authority vested in courts of equity over persons within the limits of their jurisdiction and judicial process to stay acts contrary to equity and good conscience. The state has power to compel its own citizens to respect its laws, even beyond its own territory limits. A power of the court is undoubted to restrain one citizen from prosecuting in the courts of a foreign state an action against another which will result in a fraud or gross wrong or oppression.²⁸ But the court will not restrain the prosecution of a suit in a foreign jurisdiction unless a clear equity is presented requiring the interposition of a court to prevent a manifest wrong and injustice. It is not enough that there may be reason to anticipate a difference of opinions between the two courts, and that the courts of the foreign state would arrive at a judgment different from the decisions of the courts in the state of the residence of the parties.²⁹

§ 2501. Federal courts enjoining actions in state courts.

—Federal statutes expressly prohibit the federal courts from enjoining actions or proceedings pending in any state court.³⁰ But this prohibition does not apply to the proceedings of a special commission not strictly constituting a court, although possessed with judicial powers; thus, a federal court may enjoin railroad rates fixed by the state commission where the same are confiscatory, despite the fact that the commission is for some purposes a court, for the act of fixing rates is legislative.³¹ Nor does it prevent the federal courts from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction, or to make

²⁸ *Royal League v. Kavanaugh*, 233 Ill. 175, 84 N. E. 178; *Wilson v. Josephs*, 107 Ind. 490, 8 N. E. 616; *Teager v. Landsley*, 69 Iowa 725, 27 N. W. 739; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Snook v. Snetzer*, 25 Ohio St. 516.

²⁹ *Royal League v. Kavanaugh*, 233 Ill. 175, 84 N. E. 178; *Carson v. Dun-*

ham, 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 202, 14 Am. St. 397.

³⁰ *Fleischman Co. v. Murray*, 161 Fed. 152; *Pierce's United States Code* (1910), § 7356.

³¹ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67. See also, *Murray v. Wilson Distilling Co.*, 164 Fed. 1, 92 C. C. A. 1; *Fleischman Co. v. Murray*, 161 Fed. 152.

effectual its own prior judgment determining the rights of parties before it;³² nor from restraining a defendant from enforcing a state court judgment where necessary to preserve the rights of parties properly before the federal court until a final hearing;³³ nor from restraining parties from prosecuting other suits subsequently brought and involving the same subject-matter, although such suits may be in a foreign jurisdiction.³⁴ So, also, the federal courts may restrain actions in state courts to recover assets from a trustee in bankruptcy.³⁵ Likewise, a federal court to which a cause has been removed may enjoin further proceedings in the state court, and may also enjoin a state court from relitigating a question already decided by the former.³⁶ These exceptions to the general rule, however, are based upon the preservation of a jurisdiction already obtained, and the federal courts will enjoin proceedings in a state court only when necessary for the exercise of their own jurisdiction previously obtained.³⁷ The statute referred to does not preclude the issuances of an injunction by the federal courts to restrain certain acts, though the right to the performances of such act is involved in an action in the state courts in which the parties are not the same and other and different relief is sought.³⁸

§ 2502. Injunctive relief against fraudulent judgments.

—A court of equity can not enter into a case which has already been investigated in a court of law according to the usual rules of investigation in such court, merely on the ground that injustice has been done.³⁹ But when a judgment has been obtained against a party fraudulently and without his fault or neglect, equity may give relief by

³² St. Louis Min. & Mill Co. v. Montana Min. Co., 148 Fed. 450.

³³ Southern R. Co. v. Simon, 153 Fed. 234.

³⁴ Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642; United Cigarette Mach. Co. v. Wright, 156 Fed. 244.

³⁵ Berman v. Smith, 171 Fed. 735.

³⁶ Donovan v. Wells, Fargo & Co., 169 Fed. 363, 94 C. C. A. 609; 22 L.

R. A. (N. S.) 1250; Missouri Pac. R. Co. v. Jones, 170 Fed. 124.

³⁷ Potter v. Selwyn, 170 Fed. 223.

³⁸ New York Cotton Exch. v. Hunt, 144 Fed. 511, affd. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. 529.

³⁹ Finch v. Hollinger, 47 Iowa 173; Kinney v. Ogden, 3 N. J. Eq. 168; Williams v. Wright, 9 Humph. (Tenn.) 493; Fletcher v. Warren, 18 Vt. 45.

enjoining the fraudulent party from enforcing his judgment.⁴⁰ However, if the plaintiff be guilty of laches or negligence in the original suit, relief will not be given.⁴¹ The necessity for this equitable interference arises from the fact that at law a domestic judgment is conclusive between the parties, and the defendant is not permitted to allege that it was obtained by fraud. The decree of a court in such cases is pointed solely at the party and does not extend to the tribunal where the suit or proceeding is pending.⁴² Since a judgment at law is conclusive upon the parties to it, it is incompetent for either party to set up as a defense at law that the judgment was obtained by fraud. But in equity this constitutes a good defense. The estoppel at law does not operate there, and therefore equity will enjoin the fraudulent party from availing himself of the fruits of his own fault.⁴³ Equity will not restrain the enforcement of the judgment, even though irregularly obtained, unless a meritorious defense is shown.⁴⁴

§ 2503. Injunctive relief against judgments obtained through failure to make defense.—A court of equity may enjoin the enforcing of a judgment at law in a case where the party seeking the relief has some good defense in law or equity of which, without his negligence or fault, he was not able to avail himself of in the suit at law. His failure to make such defense may have been the result of ignorance, mistake or accident,⁴⁵ not attributable to his own

⁴⁰ *Pearce v. Olney*, 20 Conn. 544; *Bassett v. Henry*, 34 Mo. App. 548; *Wingate v. Haywood*, 40 N. H. 437; *Cairo & Fulton R. Co. v. Titus*, 27 N. J. Eq. 102; *Wistar v. McManes*, 54 Pa. St. 318, 93 Am. Dec. 700; *Johnson v. Christian*, 128 U. S. 374, 32 L. ed. 412, 9 Sup. Ct. 87.

⁴¹ *Albro v. Dayton*, 28 Ill. 325; *Darling v. Baltimore*, 50 Md. 1; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443, 15 L. ed. 123; *Pettes v. Whitehall Bank*, 17 Vt. 435.

⁴² *Dehon v. Foster*, 4 Allen (Mass.) 545.

⁴³ *Gainty v. Russell*, 40 Conn. 450; *Hager v. Buechler*, 6 Ill. App. 462;

Baker v. Redd, 44 Iowa 179; *Scriven v. Hursh*, 39 Mich. 98; *Wingate v. Haywood*, 40 N. H. 437; *Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. (N. Y.) 97, 62 Am. Dec. 152; *Long v. Thayer*, 150 U. S. 520, 37 L. ed. 1167, 14 Sup. Ct. 189.

⁴⁴ *Brown v. Pegram*, 149 Fed. 515; *Toole v. Lanier*, 128 Ga. 279, 57 S. E. 516; *Reed v. New York Nat. Exch. Bank*, 230 Ill. 50, 82 N. E. 341.

⁴⁵ *Owens v. Ranstead*, 22 Ill. 161; *Wagner v. Shank*, 59 Md. 313; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; *Power's*

negligence. Here no fraud is imputed to the other party. In these cases the indispensable requisite is that the party seeking relief should not have been guilty of any laches or misconduct.⁴⁶ So, if the party seeking equitable relief negligently without excuse failed to present his defense in the original action, the general rule is that the injunction will be denied.⁴⁷

§ 2504. Remedy against judgment at law where defense is not available.—A court of equity will not enjoin the institution of a suit to which the party seeking the relief may have a defense available to him on the trial on the same.⁴⁸ But where the complainant for an injunction suffers a judgment to go against him because his only defense thereto was purely equitable and therefore not cognizable at law, the relief against the judgment may be granted.⁴⁹ So, it may be stated, as a general rule, that equity will enjoin a judgment at law where the complainant could not avail himself of a meritorious defense in the action at law because it was of a purely equitable character and not cognizable at law.⁵⁰ Also, equity may grant relief against a judgment

Exrs. v. Butler's Admr., 4 N. J. Eq. 465; *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283; *Given's Appeal*, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. 795; *Stowell v. Eldred*, 26 Wis. 504.

⁴⁶ *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, 32 Am. St. 270; *Carolus v. Koch*, 72 Mo. 645; *New York v. Brady*, 115 N. Y. 599, 22 N. E. 237; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Hiles v. Mosher*, 44 Wis. 601.

⁴⁷ *Foshee v. McCreary*, 123 Ala. 493, 26 So. 309; *Cummins v. Bently*, 5 Ark. 9; *Beaudry v. Felch*, 47 Cal. 183; *Fisher v. Greene*, 5 Colo. 541; *Griffin v. Smyly*, 105 Ga. 475, 30 N. E. 416; *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. 328; *Center Tp. v. Marion County*, 110 Ind. 579, 10 N. E. 291; *Lamb v. Drew*, 20 Iowa 15; *Kimball v. Hutchison*, 61 Kans. 191, 59 Pac. 275; *Ahern v. Fink*, 64 Md. 161, 3 Atl. 32; *Farmers' Fire Ins. Co. v. Johnston*, 113 Mich. 426, 71 N. W. 1074; *Clark v. Lee*, 58 Minn. 410, 59

N. W. 970; *Norwegian Plow Co. v. Bollman*, 47 Nebr. 186, 66 N. W. 292, 31 L. R. A. 747; *Brick v. Burr*, 47 N. J. Eq. 189, 19 Atl. 842; *Jones v. Cameron*, 81 N. Car. 154; *Waldo v. Denton*, 135 Pa. St. 181, 19 Atl. 1078; *Ballow v. Wichita County*, 74 Tex. 339, 12 S. W. 48. See also, *Post v. Tradesmen's Bank*, 28 Conn. 420.

⁴⁸ *Waters v. Waters*, 124 Ga. 349, 52 S. E. 425; *Bryan v. Windsor*, 99 Ga. 176, 25 S. E. 268; *Chicago City R. Co. v. General Elect. Co.*, 74 Ill. App. 465; *Virginia Mining Co. v. Wilkinson*, 92 Va. 98, 22 S. E. 839.

⁴⁹ *Greenlee v. Gaines*, 13 Ala. 198, 48 Am. Dec. 49; *Clifton v. Livor*, 24 Ga. 91; *Vennum v. Davis*, 35 Ill. 568; *Johnson v. Christian*, 128 U. S. 374, 32 L. ed. 412, 9 Sup. Ct. 87.

⁵⁰ *Calloway v. McElroy*, 3 Ala. 406; *Newton v. Field*, 16 Ark. 216; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Hawkins v. Harding*, 37 Ill. App. 564, revd. 141 Ill. 572, 31 N. E. 307, 33 Am. St. 347; *Hill v. Reifsnider*, 46 Md. 555; *Anderson v. Biddle*, 10 Mo.

if the matter relied on for a defense could not have been received as such by reason of the forms of legal pleading.⁵¹ So, also, such relief will be granted when a defense could not at the time or under the circumstances be made available at law.⁵² And in such case it matters not if the facts material to the merits should be discovered after the trial, if by ordinary diligence they could not have been discovered before the trial.⁵³ Before a court will grant relief to a party against the enforcement of a judgment at law it must be shown that he has an interest in staying the proceedings and the ground for such equitable interference must be established by clear and convincing evidence beyond all reasonable controversy.⁵⁴ Thus, persons not parties to an action can not restrain it, nor will injunction issue against persons whose interest in the proceedings sought to be restrained has ceased.⁵⁵ A complaint to restrain a judgment will not be viewed so strictly where the defendant is an administrator, without personal knowledge of the matter in litigation.⁵⁶

§ 2505. Remedy against void judgments.—Some courts have held that the fact that a judgment at law is void because the court in which it is rendered had no jurisdiction of the subject-matter will constitute no ground for enjoining it, the reason for such holding being that the complainant has an adequate remedy at law of which he must avail himself.⁵⁷ But other courts have taken the opposite view and granted equitable relief where the want of jurisdiction has been alleged and proved.⁵⁸ By the great weight

20; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Cornelius v. Thomas*, 1 Tenn. Ch. 283; *Lamb v. Anderson*, 2 Pin. (Wis.) 251, 1 Chand. (Wis.) 224.

⁵¹ *Ferriday v. Selcer*, Freem. Ch. (Miss.) 258.

⁵² *Baltzell v. Randolph*, 9 Fla. 366; *Bassett v. Henry*, 34 Mo. App. 548; *Wilhite v. Ferry*, 66 Mo. App. 453.

⁵³ *Baltzell v. Randolph*, 9 Fla. 366.

⁵⁴ *Bankers' Surety Co. v. Wyman*, 141 Iowa 574, 120 N. W. 116; *Boring*

v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A. (N. S.) 1080.

⁵⁵ *Hooper v. Birchfield*, 138 Ala. 423, 35 So. 351; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179.

⁵⁶ *Polarek v. Gordon*, 102 Ill. App. 356.

⁵⁷ *Morris v. Morris*, 76 Ga. 733; *Stockton v. Ransom*, 60 Mo. 535; *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

⁵⁸ *Dial v. Olsen*, 4 Ariz. 293, 36 Pac. 175; *Connell v. Stelson*, 33 Iowa 147;

of authority it is held that courts of equity have the power to enjoin the enforcement of judgments that are void for want of jurisdiction of the person. Thus, injunction will lie to enjoin a judgment rendered against a party upon whom no service of process or notice of suit was had, by reason whereof he did not appear to make defense to the action.⁵⁹ However, the decisions on this question are not harmonious. Some courts seem to hold, without any qualifications, that a judgment void because the defendant was not served by process can not be relieved against in equity by injunction or otherwise.⁶⁰ A party seeking to enjoin the enforcement of a judgment rendered without service of process must allege and prove facts showing that he has a good defense to the action in which the judgment was rendered.⁶¹ By virtue of a statute in Illinois, and independently thereof, a court of equity will not enjoin the enforcement of a judgment on the ground that the court did not lawfully acquire jurisdiction of the person of the debtor, unless it is alleged that complainant has a valid defense to the cause of action on which the judgment was entered.⁶²

§ 2506. Remedy against judgment obtained through error and irregularity.—The rule is well settled that where a court in which a judgment or decree is rendered has jurisdiction of both the subject-matter and the parties, equity can not enjoin the enforcement of such judgment on the ground of errors or irregularities in the proceedings leading thereto or in the judgment or decree itself.⁶³ Thus,

Hernandez v. James, 23 La. Ann. 483; Johnson v. Van Cleve, 23 Nebr. 559, 37 N. W. 320.

⁵⁹Rice v. Tobias, 89 Ala. 214, 7 So. 765; Martin v. Parsons, 49 Cal. 94; Smith v. Morrill, 11 Colo. App. 284, 52 Pac. 1110; Jeffery v. Fitch, 46 Conn. 601; Wilday v. McConnell, 63 Ill. 278; Nicholson v. Stephens, 47 Ind. 185; Leonard v. Capital Ins. Co., 101 Iowa 482, 70 N. W. 629; Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. 216; Newman v. Taylor, 69 Miss. 670, 13 So. 831; Wilson v.

Shipman, 34 Nebr. 573, 52 N. W. 576, 33 Am. St. 660; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Miller v. Gorman, 38 Pa. St. 309; Wooten v. Daniel, 16 Lea (Tenn.) 156; Jennings v. Shiner (Tex.), 43 S. W. 276.

⁶⁰Hart v. Lazaron, 46 Ga. 396; Emmons v. McKesson, 58 N. Car. 92.

⁶¹Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748.

⁶²Young v. Deneen, 220 Ill. 350, 77 N. E. 193.

⁶³Saunders v. Albritton, 37 Ala. 716;

equity will not enjoin a judgment on the ground of defects and objections as to parties thereto.⁶⁴ Nor will such relief be granted because of defects and objections as to the pleadings.⁶⁵ And it is immaterial that the judgment or decree against which relief is sought is unjust or that the error was such as to warrant the granting of a new trial.⁶⁶ So, it is likewise immaterial that the judgment was rendered on default.⁶⁷ But it has been held that where a court of law makes a mistake in calculating the amount for which judgment should be given, equity will relieve against the mistake.⁶⁸ It has been held that the sufficiency of evidence to sustain a judgment can not be questioned in an action to have it declared void.⁶⁹ So, also, a trial with more than the legal number of jurymen, though objected to by the defendant, does not entitle him to enjoin the judgment.⁷⁰

§ 2507. Relief against judgments by default or confession.—Where a party having an available legal defense to an action at law fails or neglects to present it at the proper time, and suffers judgment to go against him by default, he will not usually be entitled to an injunction against the judgment, at least in the absence of surprise, accident, mis-

Daly v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. 61; Brown v. Pegram, 149 Fed. 515; Toole v. Lanier, 128 Ga. 279, 57 S. E. 516; Gibson v. Cohen, 85 Ga. 850, 11 S. E. 141; Reed v. New York Nat. Exch. Bank, 230 Ill. 50, 82 N. E. 341; Gibbons v. Bressler, 61 Ill. 110; Hart v. O'Rourke, 151 Ind. 205, 51 N. E. 330; Parkins v. Alexander, 105 Iowa 74, 74 N. W. 769; Meixell v. Kirkpatrick, 28 Kans. 315; Miller v. Duvall, 26 Md. 47; Ammons v. Whitehead, 31 Miss. 99; Fox v. McClay, 48 Nebr. 820, 67 N. W. 888; Nicklin v. Hobbin, 13 Ore. 406, 10 Pac. 835; Dunham v. Downer, 31 Vt. 249. See also, Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 9 L. R. A. (N. S.) 524, and note.

⁶⁴ Church v. Gallic, 75 Ark. 507, 88 S. W. 307; Mott v. Bernard, 97 Mo. App. 265, 70 S. W. 1093.

⁶⁵ McCormick v. Webster, 89 Ind. 105; Evans v. International Trust Co. (Tenn. Ch. App.), 59 S. W. 373.

⁶⁶ Reynolds v. Horine, 13 B. Mon. (Ky.) 234; Wood v. Lenox, 5 Tex. Civ. App. 318, 23 S. W. 812.

⁶⁷ Turpin v. Thomas' Representatives, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615.

⁶⁸ Wilson v. Boughton, 50 Mo. 17. See also, as to over-statement in notice of foreclosure and sale under statute, Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787, Ann. Cas. 1912C, 568, and note.

⁶⁹ Norman v. Burns, 67 Ala. 248; Pico v. Sunol, 6 Cal. 294; Brigot's Heirs v. Brigot, 49 La. Ann. 1428, 22 So. 641; Jordan v. Corley, 42 Tex. 284.

⁷⁰ Rhodes-Burford Furniture Co. v. Mattox, 135 Ind. 372, 34 N. E. 326, 25 N. E. 11.

take or fraud.⁷¹ So, where the party suffers a judgment to be obtained against him on account of his neglect, it constitutes no ground for equitable intervention that his adversary obtained more relief than he was entitled to.⁷² But it is a sufficient ground for enjoining a default judgment that it was obtained through the fraud of the adverse party.⁷³ In any event, to justify relief by injunction from a default judgment the complainant must allege and prove that he has a meritorious defense to the cause of action on which the judgment is based,⁷⁴ that he has no adequate remedy at law,⁷⁵ and that he himself is not guilty of negligence.⁷⁶ A bill in equity to stay proceedings at law after judgment is always examined with jealous scrutiny. The general rule is that no relief will be granted where the matter upon which the claim to relief is founded was litigated in the original action. Accordingly, where a party moves for a new trial and fails, he can not, then, upon the same facts, apply to the same judge for an injunction, and retry his case in equity; nor will a court of equity, as a general rule, set aside a judgment because it is founded upon perjured evidence.⁷⁷ Also, where a party to an action at law voluntarily confesses judgment, he is not usually entitled to an injunction against the judgment, unless without negligence on his part he was prevented from making his defense by fraud, accident, surprise or mistake.⁷⁸

⁷¹ *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288; *Murdock v. DeVries*, 37 Cal. 527; *Faulkner v. Campbell, Morris* (Iowa) 148; *Ivey v. McConnell* (Tex.), 21 S. W. 403.

⁷² *Murdock v. DeVries*, 37 Cal. 527.
⁷³ *Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. 544.

⁷⁴ *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288; *Reagan v. Fitzgerald*, 75 Cal. 230, 17 Pac. 198; *Massachusetts Ben. L. Assn. v. Lohmiller*, 74 Fed. 23, 20 C. C. A. 274; *Bankers' Life Ins. Co. v. Robbins*, 53 Nebr. 44, 73 N. W. 269; *White v. Crow*, 110 U. S. 183, 28 L. ed. 113, 4 Sup. Ct. 71.

⁷⁵ *Reagan v. Fitzgerald*, 75 Cal. 230, 17 Pac. 198; *Woodward v. Pike*, 43 Nebr. 777, 62 N. W. 230.

⁷⁶ *Bankers' Life Ins. Co. v. Robbins*, 53 Nebr. 44, 73 N. W. 269. Negligence of his attorney in failing to set up a certain defense will not authorize an injunction. *Donovan v. Miller*, 12 Idaho 600, 88 Pac. 82, 9 L. R. A. (N. S.) 524.

⁷⁷ *Collins v. Butler*, 14 Cal. 223; *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 156; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

⁷⁸ *Moore v. Barclay*, 23 Ala. 739; *Morehead v. Deford*, 6 W. Va. 316.

(b) APPLICATION OF PRINCIPLES IN VARIOUS RELATIONS.

§ 2508. Injunction to restrain threatened violation of contract.—Injunction may issue to restrain a threatened violation of a contract in those cases where there is no adequate remedy at law and it is clear that a violation is fully intended by the defendant.⁷⁹ But the case of an intended violation must be clear. The writ will be refused, as prematurely demanded, in cases where there is no evidence of a threatened violation of the terms of the contract.⁸⁰

§ 2509. Injunction to restrain enforcement of contracts wanting in fairness or mutuality.—A contract manifestly unfair and wanting in mutuality may not be enforced by injunction. Thus, an agreement under which one bound himself to play baseball for a period of time, which, at the option of the club, might equal the term of the player's life and which gave the club the right to discharge the player at ten days' notice without cause was held so unfair and wanting in mutuality as to justify a court in refusing an injunction to require performance on the violation of the contract by the player.⁸¹

§ 2510. Injunction to restrain breach of covenant where breach criminal.—Generally speaking, an injunction will not issue to restrain the breach of a covenant on the ground that the acts complained of are criminal. This was the conclusion in a case where an injunction was sought to restrain the violation of a covenant in a deed against doing business on the premises on Sunday and it appeared that the condition had been openly violated for several years by the grantee and his privies and by other grantees of

⁷⁹ *Casey v. Holmes*, 10 Ala. 776. But see, *Redfield v. Middleton*, 7 Bosw. (N. Y.) 649. See generally, *Harris v. Theus*, 149 Ala. 133, 43 So. 131, 123 Am. St. 17; *Cincinnati & C. Co. v. Wall*, 48 Ind. App. 605, 96 N. E. 389; *Board of Control of Grant County v. Allpin* (Ky.), 153 S. W. 417; *Plainfield-Union Water Co. v.*

Inhabitants of Plainfield (N. J.), 85 Atl. 321, for other illustrative cases in which violation of contract was enjoined. See also, note in 6 L. R. A. 654, and numerous cases cited in subsequent sections of this chapter.

⁸⁰ *Vernam v. Palmer*, 5 N. Y. S. 71.
⁸¹ *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct. 57.

the same grantor, and it further appeared that the defendant had expended large sums in improving this property in reliance on the apparent abandonment of the restriction by the grantor.⁸²

§ 2511. Injunction to restrain interference with contracts by third persons.—Injunction is the proper remedy to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable.⁸³ And where there is a malicious interference with lawful and valid contracts a permanent injunction will ordinarily issue without proof of express malice.⁸⁴ So, an injunction may be issued where the complainant and the defendant were business rivals and the defendant had induced the customers of the complainant to break their contracts with him by agreeing to indemnify them against liability for damages.⁸⁵ So, an employé who breaks his contract of employment may be enjoined from inducing other employés to break their contracts and enter into contracts with the new employer of the servant who first broke his contract.⁸⁶ But the remedy by injunction can not be used to restrain a legitimate competition, though such competition would involve the violation of a contract.⁸⁷ Nor will equity ordinarily enjoin employés who have quit the service of their employer from attempting by proper argument to persuade others from taking their places so long as they do not resort to force or intimidation or obstruct the public thoroughfares.⁸⁸

⁸² *Ocean City Assn. v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914. See also, *Gee v. Pritchard*, 2 Swanst. 402.

⁸³ *Proctor & Collier Co. v. Mahin*, 93 Fed. 875; *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800; *Nashville, C. & C. R. Co. v. McConnell*, 82 Fed. 65; *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. (N. Y.) 396, 84 N. Y. S. 225; *Kinner v. Lake Shore & C. R. Co.*, 23 Ohio Cir. Ct. 294.

⁸⁴ *Sperry & Hutchinson Co. v. Pommer*, 199 Fed. 309.

⁸⁵ *Citizens' Light & C. Co. v. Montgomery Light & C. Co.*, 171 Fed. 553.

⁸⁶ *Kinney v. Scarborough (Ga.)*, 74 S. E. 772. See also, *Iron Molders' Union No. 125 v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 2 L. R. A. (N. S.) 315; *Beekman v. Masters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201.

⁸⁷ *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. (N. Y.) 715, 132 N. Y. S. 37.

⁸⁸ *Master Builders' Assn. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782;

§ 2512. Injunction to restrain enforcement of usurious contracts.—Where legal remedies on usurious contracts are inadequate, courts of equity will interfere to prevent their enforcement through the writ of injunction or through some of the other forms of equitable relief.⁸⁹ A court of equity may, for example, enjoin the foreclosure of usurious mortgages and sales under deeds of trust with power of sale.⁹⁰ But the sale on foreclosure will not be enjoined in cases where the notice of sale proposes to sell for only the true amount without the usury.⁹¹ Equity may likewise enjoin the negotiation of paper tainted with usury where the legal remedies are inadequate.⁹² In cases where the usurious note and collateral have been successively transferred to several indorsees to each of whom usurious payments have been made, it has been held that the maker is

Union Pac. R. Co. v. Ruef, 120 Fed. 102; Jones v. Van Winkle &c. Machine Co., 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. 235; Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn., 59 N. J. Eq. 49, 46 Atl. 208; National Protective Assn. v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. 648; Perkins v. Rogg, 11 Ohio Dec. (reprint) 585; Everett Waddey Co. v. Richmond Typographical Union No. 90, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792. See further on this subject, Ch. 56, Remedies for Interference by Third Persons.

⁸⁹ McLaren v. Steapp, 1 Ga. 376; Johnson v. Thompson, 28 Ill. 352; Morrison v. Miller, 46 Iowa 84; Pearce v. Hedrick, 3 Litt. (Ky.) 109; Thomas v. Watson, 9 Md. 536 note; Horner v. Nitsch, 103 Md. 498, 63 Atl. 1052; American Freehold Land &c. Co. v. Jefferson, 69 Miss. 770, 12 So. 464, 30 Am. St. 587; Purvis v. Woodward, 78 Miss. 922, 29 So. 917; Bell v. Mulholland, 90 Mo. App. 612; Schermerhorn v. Talman, 14 N. Y. 93; In re Duquesne Bank's Appeal, 74 Pa. St. 426; Coleman v. Childress, 6 Yerg. (Tenn.) 398; Buchanan v. Nolin, 3 Humph. (Tenn.)

63; Day v. Cummings, 19 Vt. 496; Rorer v. Holston Building &c. Assn., 55 W. Va. 255, 46 S. E. 1018, 104 Am. St. 993.

⁹⁰ Ward v. Bank of Abbeville, 130 Ala. 597, 30 So. 341; Equitable Mortgage Co. v. Braswell, 98 Ga. 139, 26 S. E. 487; Gantt v. Grindall, 49 Md. 310; Southern Home Building &c. Assn. v. Tony, 78 Miss. 916, 29 So. 825; Hawley v. Kountze, 16 Misc. (N. Y.) 249, 73 N. Y. St. 788, 38 N. Y. S. 327, revd. 6 App. Div. (N. Y.) 217, 39 N. Y. S. 897; Glover v. Silverman, 6 Misc. (N. Y.) 347, 58 N. Y. St. 137, 26 N. Y. S. 779; Hyland v. Stafford, 10 Barb. (N. Y.) 558; Cook v. Patterson, 103 N. Car. 127, 9 S. E. 402; Cabaness v. Matthews, 2 Grat. (Va.) 325; Washington Bank v. Arthur, 3 Grat. (Va.) 173; Martin v. Lindsay's Admrs., 1 Leigh (Va.) 499; Marks v. Morris, 2 Munf. (Va.) 407, 5 Am. Dec. 481; Meem v. Dulaney, 88 Va. 674, 14 S. E. 363; Edmunds' Exr. v. Bruce, 88 Va. 1007, 14 S. E. 840; Ruffin v. Commercial Bank, 90 Va. 708, 19 S. E. 790; Rohrer v. Travers, 11 W. Va. 146; Smith v. McMillian, 46 W. Va. 577, 33 S. E. 283; Rorer v. Holston Building &c. Assn., 55 W. Va. 55, 46 S. E. 1018, 104 Am. St. 993.

⁹¹ Smith v. McMillian, 46 W. Va. 577, 33 S. E. 283.

⁹² Wilhemson v. Bentley, 25 Nebr. 473, 41 N. W. 387.

not entitled to an injunction restraining the last holder from transferring the note and collateral, for equity will require each transferee who has received usury to repay the same to the complainant.⁹³ But the maxim of equity that one who seeks equity must do equity obtains where injunctive relief is asked, and this requires the applicant to tender or offer to pay defendant the principal sum lent with lawful interest.⁹⁴ Where, however, the amount due on the

⁹³ *Eltonhead v. Found*, 153 Ill. App. 191.

⁹⁴ *Fitzroy v. Gwillim*, 1 T. R. 153; *Lindsay v. United States Saving Co.*, 127 Ala. 366, 28 So. 717, 51 L. R. A. 393; *Pearson v. Bailey*, 23 Ala. 537; *Hunt v. Acre*, 28 Ala. 580; *Noble v. Walker*, 32 Ala. 456; *Miller v. Bates*, 35 Ala. 580; *McGehee's Admr. v. George*, 38 Ala. 323; *Eslava v. Elmore*, 50 Ala. 587; *Rogers v. Torbut*, 58 Ala. 523; *Eslava v. Crampton*, 61 Ala. 507; *Uhlfelder v. Carter's Admr.*, 64 Ala. 527; *Masterton v. Grubbs*, 70 Ala. 406; *Hawkins v. Pearson*, 96 Ala. 369, 11 So. 304; *Turner v. Merchants' Bank*, 126 Ala. 397, 28 So. 469; *Ruddell v. Ambler*, 18 Ark. 369; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Anthony v. Lawson*, 34 Ark. 628; *Sheldon v. Steere*, 5 Conn. 181; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Hazel v. Sinex*, 6 Del. Ch. 19, 6 Atl. 625; *Norman v. Peper*, 24 Fed. 403; *Peacock v. Terry*, 9 Ga. 137; *Campbell v. Murray*, 62 Ga. 86; *Ziegler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 116; *Whately v. Barker*, 79 Ga. 790, 4 S. E. 387; *Evans v. Dial*, 88 Ga. 209, 14 S. E. 190; *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863; *Ferguson v. Sutphen*, 8 Ill. 547; *Cushman v. Sutphen*, 42 Ill. 255; *Henderson v. Bellew*, 45 Ill. 322; *Tooke v. Newman*, 75 Ill. 215; *Clark v. Finlon*, 90 Ill. 245; *Jenkins v. Greenbaum*, 95 Ill. 11; *Stevens v. Meers*, 11 Ill. App. 138, affd. 106 Ill. 549; *Garlick v. Mutual Loan & Bldg. Assn.*, 129 Ill. App. 402; *Rosencrans v. Schnacke*, 13 Ill. App. 216; *Crawford v. Harvey*, 1 Blackf. (Ind.) 382; *Conner v. Myers*, 7 Blackf. (Ind.) 337; *Muir v. Clark*, 7 Blackf. (Ind.) 423; *Clemons v. Elder*, 9 Iowa 272;

Binford v. Boardman, 44 Iowa 53; *Morrison v. Miller*, 46 Iowa 84; *Pearce v. Hedrick*, 3 Litt. (Ky.) 109; *Hodge v. Owings*, 5 T. B. Mon. (Ky.) 91; *Legoux v. Wante*, 3 Har. & J. (Md.) 184; *Trumbo v. Blizzard*, 6 Gill & J. (Md.) 18; *Jordon v. Trumbo*, 6 Gill & J. (Md.) 103; *Carter v. Dennison*, 7 Gill (Md.) 157; *Grinder v. Nelson* (*Baughner v. Nelson*), 9 Gill (Md.) 299, 52 Am. Dec. 694; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Scott v. Leary*, 34 Md. 389; *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, 38 Md. 75; *Hill v. Reifsnider*, 39 Md. 429; *Neurath v. Hecht*, 62 Md. 221; *Thurston v. Prentiss*, 1 Mich. 193; *Salter v. Embrey* (Miss.), 18 So. 373; *McRaven v. Forbes*, 6 How. (Miss.) 569; *Rush v. Pearson*, 92 Miss. 153, 45 So. 723; *Deans v. Robertson*, 64 Miss. 195, 1 So. 159; *American Freehold Land & C. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464, 30 Am. St. 587; *Ransom v. Hays*, 39 Mo. 445; *Rutherford v. Williams*, 42 Mo. 18; *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727, 33 Am. St. 512; *Bohen v. Wright*, 89 Nebr. 116, 131 N. W. 185; *Eiseman v. Gallagher*, 24 Nebr. 79, 37 N. W. 941; *Wilhelmson v. Bentley*, 27 Nebr. 658, 43 N. W. 397; *Miller v. Ford*, 1 N. J. Eq. 358; *Ware v. Thompson's Admrs.*, 13 N. J. Eq. 66; *Giveans v. McMurtry*, 16 N. J. Eq. 468, affd. 17 N. J. Eq. 510; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87, affd. 17 N. J. Eq. 547; *Crandall v. Grow*, 41 N. J. Eq. 482, 5 Atl. 136; *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Thompson v. Berry*, 3 Johns. Ch. (N. Y.) 395, affd. 17 Johns. (N. Y.) 436; *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283; *Morgan v. Schermerhorn*, 1 Paige (N. Y.)

usurious contract can not be definitely determined until an accounting, an actual tender of the amount admitted to be due by the debtor in an action to restrain its collection, coupled with an offer in the bill to pay the amount legally due, has been held to constitute a sufficient tender within the rule.⁹⁵ A stockholder of a corporation may enjoin the making of a usurious contract where it is not inequitable for him to do so as between himself and other stockholders and where he will suffer injury from the transaction.⁹⁶

§ 2513. Injunction to restrain breach of contract to devise realty.—An agreement based on a valid consideration to devise lands to one who has executed his part of the agreement may be indirectly enforced by an injunction which restrains the doing of that which would render performance of the contract impossible. Thus, the plaintiff and the defendant in one of the cases entered into a parol agreement by which the defendant agreed to devise to the plaintiff certain property and upon the performance of which agreement the defendant honestly and faithfully entered and continued for several years. Afterwards the defendant sold and conveyed the property to another and the plaintiff brought an action to enjoin such conveyance. It

544, 19 Am. Dec. 449; Mitchell v. Oakley, 7 Paige (N. Y.) 68; Gee v. Southworth, 10 Paige (N. Y.) 297; Smith v. Cross, 16 Hun (N. Y.) 487; Dunham v. Dey, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282, affd. 16 Johns. (N. Y.) 367, 8 Am. Dec. 323; Williams v. Fitzhugh, 37 N. Y. 444; Taylor v. Smith, 9 N. Car. 465; Ballinger v. Edwards, 39 N. Car. 449; Beard v. Bingham, 76 N. Car. 285; Purnell v. Vaughan, 82 N. Car. 134; Cook v. Patterson, 103 N. Car. 127, 9 S. E. 402; Carver v. Brady, 104 N. Car. 219, 10 S. E. 565; Gore v. Lewis, 109 N. Car. 539, 13 S. E. 909; Churchill v. Turnage, 122 N. Car. 426, 30 S. E. 122; Wooster Bank v. Stevens, 1 Ohio St. 233, 59 Am. Dec. 619; Shelton v. Gill, 11 Ohio 417; Rains v. Scott, 13 Ohio 107; Union Bank v. Bell, 14 Ohio St. 200; Jones v. Kilgore, 2 Rich. Eq. (S. Car.) 63; Sporrer v. Eifler, 1 Heisk. (Tenn.) 633;

Chester v. Apperson, 4 Heisk. (Tenn.) 639; Boyers v. Boddie, 3 Humph. (Tenn.) 666; Bang v. Phelps & Co. Windmill Co., 96 Tenn. 361, 34 S. W. 516; Spann v. Stearns' Admrs., 18 Tex. 556; Bexar Building & Assn. v. Robinson, 78 Tex. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. 36; Hubbard v. Tod, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. 14; Brown v. Swann, 10 Pet. (U. S.) 497, 9 L. ed. 508; Missouri & Co. v. Krungsig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. 179; McDaniels v. Barnum, 5 Vt. 279; Marks v. Morris, 2 Munf. (Va.) 407, 5 Am. Dec. 481; Young v. Scott, 4 Rand. (Va.) 415; Turpin v. Povall, 8 Leigh (Va.) 93; Rietz v. Foeste, 30 Wis. 693.

⁹⁵ Purvis v. Woodward, 78 Miss. 922, 29 So. 917.

⁹⁶ Fletcher v. Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748.

was held that the injunction should issue.⁹⁷ However, in the absence of such a contract and its execution in whole or in part by the complaining party, a court is generally without jurisdiction to interfere with transfers of property by will.⁹⁸

§ 2514. Injunction to restrain employés from breaking contracts of employment.—The general rule is that where the service of an employé is neither special, extraordinary nor unique, in the sense that it can not otherwise be supplied and that its loss would cause irreparable injury, an injunction will not ordinarily be granted to restrain such an employé from leaving his employment.⁹⁹ In some states this rule has been enacted into statutes.¹ Where the contract is for services of special skill, the writ is granted with great caution, even though the legal remedy of damages may be inadequate.² In line with the main principle, one of the courts has denied an injunction to restrain members of a trade union from striking where their services were not of a special character and their places could be easily supplied.³ So, it has been held that an injunction would not lie to restrain the breach of a contract to employ only members of a union where the employment was neither

⁹⁷ *Pflugar v. Pultz*, 43 N. J. 440, 11 Atl. 123. See also, *Ridley v. Ridley*, 34 Beav. 478; *Bell v. Hewitt's Exrs.*, 24 Ind. 280; *Peters v. Westborough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142; *Updike v. Ten Broeck*, 32 N. J. L. 105; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502.

⁹⁸ *Palmer v. Gardiner*, 77 Ill. 143. ⁹⁹ *Roquemore v. Mitchell Bros.* 167 Ala. 475, 52 So. 423; *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465; *Comstock v. Lopokowa*, 190 Fed. 599; *Barnes v. Berry*, 156 Fed. 72; *Paxson v. Butterick Pub. Co.*, 136 Ga. 774, 71 S. E. 1105; *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124; *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432; *Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, 57 Atl. 1080, aff'd. 68 N. J. Eq. 795, 64 Atl. 746; *Taylor Iron & Co. v. Nichols*, 70 N. J. Eq.

541, 61 Atl. 946; *Universal Talking Machine Co. v. English*, 34 Misc. (N. Y.) 342, 69 N. Y. S. 813; *Kessler v. Chappelle*, 73 App. Div. (N. Y.) 447, 77 N. Y. S. 285; *Stone Cleaning & Co. v. Russell*, 38 Misc. (N. Y.) 513, 77 N. Y. S. 1049; *Mapleson v. Lablache*, 13 Abb. N. Cas. (N. Y.) 147n; *Dockstader v. Reed*, 121 App. Div. (N. Y.) 846, 106 N. Y. S. 795; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. 726; *Columbia College of Music v. Tunberg*, 64 Wash. 19, 116 Pac. 280.

¹ *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465; *Paxson v. Butterick Pub. Co.*, 136 Ga. 774, 71 S. E. 1105; *Hammond v. Georgian Co.*, 133 Ga. 1, 65 S. E. 124.

² *Roquemore v. Mitchell*, 167 Ala. 475, 52 So. 423.

³ *Barnes v. Berry*, 156 Fed. 72.

unique nor extraordinary.⁴ But equity may interfere where the servant betrays a trust and confidence reposed in him by his employer by attempting to take away the customers of his employer, where the knowledge of these customers was acquired in the course of the performance of duty as an employé.⁵ Where the right to the injunction is clear, it is not an excuse for denial of the writ that it would amount to an unlawful attempt to indirectly compel the defendant to perform personal services for the plaintiff.⁶

§ 2515. Injunction to compel continuance of contract of employment.—A court of equity has no power to make or extend contracts, and hence can not by injunction compel a corporation to continue the employment of a servant, though such servant owns all but a controlling portion of the stock. After the expiration of the contract of such an employé, he is in no better situation than any other stockholder without a contract.⁷

§ 2516. Injunction to restrain discharge of servant.—An injunction will not ordinarily issue to prevent the discharge of an employé at work under a contract. The remedy is an action at law for breach of the contract and not in equity to enjoin the discharge.⁸ "It would be intolerable," says one of the courts, "if a man could be compelled by a court of equity to serve another against his will, or if a man could be compelled to retain in his employ one he does not want; courts of equity exercise no such power and grant no such relief."⁹

§ 2517. Injunction to restrain violation of trade secret.—Generally speaking, one who invents or discovers, and

⁴ *Stone Cleaning &c. Union v. Russell*, 38 Misc. (N. Y.) 513, 77 N. Y. S. 1049.

⁵ *Cahill v. Madison*, 94 Ill. App. 216. See also, *Kinney v. Scarborough* (Ga.), 74 S. E. 772; *McCall Co. v. Wright*, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249n.

⁶ *Butterick Pub. Co. v. Rose*, 141 Wis. 533, 124 N. W. 647.

⁷ *Stewart v. Pierce*, 116 Iowa 733, 89 N. W. 234.

⁸ *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Thomas v. Cook County*, 56 Ill. 351; *Healy v. Allen*, 38 La. Ann. 867; *Miller v. Warner*, 42 App. Div. (N. Y.) 208, 59 N. Y. S. 956.

⁹ *Boyer v. Western Union Tel. Co.*, 124 Fed. 246.

keeps secret, a process of manufacture, whether a proper subject for a patent or not, has not an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of equity will protect against one who in violation of contract and in breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction of equity to interfere by injunction to prevent such a breach of trust when the injury would be irreparable and the remedy at law inadequate, is well established.¹⁰ The court may not only enjoin the disclosure, but may also award damages for injuries already inflicted by the disclosure.¹¹ The injunction will issue not only against employés, but against any one who fraudulently obtains the trade secret.¹² The case is particularly strong where an employé enters employment under an agreement that in consideration of the employment he will not divulge the

¹⁰ *Steamship White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017; *Philadelphia Extracting Co. v. Keystone Extracting Co.*, 176 Fed. 830; *Wiggins Sons' Co. v. Cott-A-Lap Co.*, 169 Fed. 150; *Simmons Medicine Co. v. Simmons*, 81 Fed. 163; *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135n; *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; *Roberts v. McKee*, 29 Ga. 161; *Westervelt v. National Paper Co.*, 154 Ind. 673, 57 N. E. 552; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911; *Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. 469; *Sanitas Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454; *Stone v. Goss*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. 794; *Pomeroy Ink. Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698; *Vulcan Netting Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Taylor Iron & C. Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946; *Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co.*, 69 Misc.

(N. Y.) 90, 124 N. Y. S. 956; *G. F. Harvey Co. v. National Drug Co.*, 75 App. Div. (N. Y.) 103, 77 N. Y. S. 674; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. 740; *National Gum & C. Co. v. Braendly*, 27 App. Div. (N. Y.) 219, 51 N. Y. S. 93; *Eastman Co. v. Reichenbach*, 20 N. Y. S. 110, 47 N. Y. St. 435, 62 N. Y. St. 97, affd. 79 Hun (N. Y.) 183, 62 N. Y. St. 97, 29 N. Y. S. 1143; *Little v. Gallus*, 4 App. Div. (N. Y.) 569, 38 N. Y. S. 487, 73 N. Y. St. 643; *Witkop & Holmes Co. v. Boyce*, 131 App. Div. (N. Y.) 922, 115 N. Y. S. 1150; *Peerless Pattern Co. v. Pictorial Review Co.*, 132 N. Y. S. 37; *Cincinnati Bell Foundry Co. v. Dadds*, 10 Ohio Dec. 154; *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 Atl. 4; *Stevens v. Stiles*, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933n.
¹¹ *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911.
¹² *Tipping v. Clarke*, 2 Hare 383; *Chamber of Commerce v. Wells*, 100 Minn. 205, 111 N. W. 157; *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488, 47 N. W. 814, 11 L. R. A. 267, 36 Am. St. 755.

trade secrets of his employer.¹³ In such a case it is not a defense that the plaintiff had no right to the trade secret because it had been obtained honestly by the plaintiff from one who had dishonestly obtained the knowledge from the discoverer.¹⁴ Neither is it a defense that the manufacture by plaintiff of the article of commerce to which the secret related was *ultra vires*.¹⁵ But where one honestly comes into possession of a trade secret, and does not, in securing possession of the same, violate any contract or confidential relation, the courts will not interfere to prevent his making such use of the same as he sees fit.¹⁶

§ 2518. Injunction to restrain breach of theatrical and amusement contracts.—The rule that forbids an injunction to restrain the breach of a contract for personal services unless the services of the contracting party are special, unique or extraordinary, or the services are of such a character that they can not be supplied elsewhere with a reasonable effort, or the act is such that it can not be done by another,¹⁷ is most frequently invoked in cases of breach of contract by operatic or theatrical performers. Where the contracting party is an acrobatic performer of excep-

¹³ *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290; *Stevens v. Stiles*, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933n.

¹⁴ *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290.

¹⁵ *Steamship White Dental Mfg. Co. v. Mitchell*, 188 Fed. 1017.

¹⁶ *Stewart v. Hook*, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. 442; *Watkins v. Landon*, 52 Minn. 389, 54 N. W. 193, 19 L. R. A. 236, 38 Am. St. 560; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698.

¹⁷ *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. 278; *Gossard Co. v. Crosby*, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115n; *Simms v. Burnette*, 55 Fla. 702, 46 So. 90, 16

L. R. A. (N. S.) 389n, 127 Am. St. 201; *Taylor Iron &c. Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Carter v. Ferguson*, 58 Hun (N. Y.) 569, 12 N. Y. S. 580; *Strobridge Litho. Co. v. Crane*, 58 Hun (N. Y.) 611, 35 N. Y. St. 473, 12 N. Y. S. 898, 20 Civ. Proc. 24; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Johnston v. Hunt*, 66 Hun (N. Y.) 504, 21 N. Y. S. 314; *Kessler v. Chappelle*, 73 App. Div. (N. Y.) 447, 77 N. Y. S. 285; *Universal Talking Machine v. English*, 34 Misc. (N. Y.) 342, 69 N. Y. S. 813; *Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. 726; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. 627; *Columbia College of Music v. Tunberg*, 64 Wash. 19, 116 Pac. 280; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106, 94 N. W. 78.

tional distinction,¹⁸ or an actor of great reputation,¹⁹ or a dancer of high order,²⁰ or a ball player of great ability and reputation,²¹ or an operatic singer of exceptional capacity, the injunction will issue to restrain a breach of the contract.²² The application for relief in this class of cases is addressed to the sound discretion of the court, and the injunction will not be granted where the parties seeking relief are not reciprocally bound by the contract.²³

§ 2519. Injunction to prevent unauthorized use of dramatic composition.—An injunction will issue to restrain any unauthorized production of a dramatic or musical composition. The remedy is allowed on the clear ground of preventing an injury for which the common law can not adequately compensate by an allowance of damages. The remedy is well established, provided the elements of threatened invasion, title, originality and decency exist. The complaint should show on its face the elements of title, originality, wrongful invasion and legality of subject-matter.²⁴ The right to the remedy is not limited to the author, but is available to his vendee, assignee, licensee or a part owner.²⁵ In this proceeding, good faith in using the manuscript, even though the defendant believes himself the

¹⁸ Keith v. Kellermann, 169 Fed. 196. But see, Cort v. Lassard, 18 Ore. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. 726.

¹⁹ Daly v. Smith, 49 How. Pr. (N. Y.) 150, 38 N. Y. Super. Ct. 158; Hayes v. Willio, 11 Abb. Pr. (N. S.) (N. Y.) 167, revd. 4 Daly (N. Y.) 259; Fredericks v. Mayer, 13 How. Pr. (N. Y.) 566; Hoyt v. Fuller, 47 N. Y. St. 504, 19 N. Y. S. 962; Duff v. Russell, 39 N. Y. St. 266, 14 N. Y. S. 134, 60 N. Y. Super. Ct. 80, affd. 41 N. Y. St. 955, 16 N. Y. S. 958.

²⁰ Comstock v. Lopokowa, 190 Fed. 599. But see, Butler v. Galletti, 21 How. Pr. (N. Y.) 465.

²¹ Columbus Baseball Club v. Reiley, 11 Ohio Dec. 272, 25 Wkly. L. Bul. 385; Philadelphia Ball Club v. Lajoie,

202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. 627.

²² Pratt v. Montegriffo, 57 Hun (N. Y.) 587, 32 N. Y. St. 508, 10 N. Y. S. 903, 25 Abb. N. Cas. (N. Y.) 334; Hammerstein v. Mann, 137 App. Div. (N. Y.) 580, 122 N. Y. S. 276. But see, Mapleson v. Lablache, 13 Abb. N. Cas. (N. Y.) 147n.

²³ Dockstader v. Reed, 121 App. Div. (N. Y.) 846, 106 N. Y. S. 795.

²⁴ Reade v. Lacey, Johns. & H. 524; Shook v. Daly, 49 How. Pr. (N. Y.) 366; Martinetti v. Macguire, 1 Abb. (U. S.) 356, Deady (U. S.) 216, Fed. Cas. No. 9173; Daly v. Palmer, 6 Blatchf. (U. S.) 256, Fed. Cas. No. 3552.

²⁵ Aronson v. Fleckenstein, 28 Fed. 75; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480; Crowe v. Aiken, 2 Biss. (U. S.) 208, Fed. Cas. No. 3441.

actual owner, is not a defense.²⁶ Relief will not be granted, however, where it is shown that the composition has been legally published or abandoned and thereby dedicated to the public. This is an absolute defense. But the exhibition of a manuscript or composition to others is not deemed sufficient to constitute a publication which will deprive the author of his exclusive right.²⁷

§ 2520. Injunction to restrain injury to trade or business.—The right to carry on a lawful business without obstruction is a property right guaranteed by the constitution and may be protected by injunction when the ordinary remedies are inadequate.²⁸ “The right to acquire and protect property is as sacred in the case of intangible property as tangible, and an injunction may be granted to protect intangible rights no less than those that are tangible.”²⁹ Accordingly, an injunction has been held properly issued to enjoin the circulation in bad faith of statements that the product of a certain manufacturer infringed patents and that the customers of such manufacturer were liable to suit for such infringement.³⁰ So, it has been held that the owner of a vessel has a property right not only in the vessel itself, but in its use and the business in which it is employed, which he may protect by injunction against unlaw-

²⁶ *Shook v. Daly*, 49 How. Pr. (N. Y.) 366.

²⁷ *French v. Maguire*, 55 How. Pr. (N. Y.) 471.

²⁸ *Dingley v. Buckner*, 11 Cal. App. 181, 104 Pac. 478; *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042; *Dittgen v. Racine Paper Goods Co.*, 164 Fed. 84; *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450, 85 C. C. A. 16; *Baker-Whiteley Coal Co. v. Baltimore & C. R. Co.*, 188 Fed. 405, 110 C. C. A. 234; *Shaver v. Heller & Merz Co.*, 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; *Nashville & C. R. Co. v. McConnell*, 82 Fed. 65; *Continental Insurance Co. v. Fire Underwriters*, 67 Fed. 310; *Underhill v. Murphy*, 117 Ky. 640, 25 Ky. L. 1731, 78 S. W. 482, 111 Am. St. 262; *Citizens' Gas Light Co. v. Louisville Gas Co.*, 81 Ky. 263,

5 Ky. L. 72, revd. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901, 1 Am. St. 368; *Steinert v. Tegen*, 207 Mass. 394, 93 N. E. 584, 32 L. R. A. (N. S.) 1013n; *Davis v. New England R. Pub. Co.*, 203 Mass. 470, 89 N. E. 565, 25 L. R. A. (N. S.) 1024, 133 Am. St. 318; *Turner v. Stewart*, 78 Mo. 480; *Omaha & C. & C. R. Co. v. Omaha*, 90 Nebr. 6, 132 N. W. 731; *Smith v. Kernan*, 8 Ohio Dec. 32, 5 Wkly. L. Bul. 145; *North v. Peters*, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. 346.

²⁹ *Underhill v. Murphy*, 117 Ky. 640, 25 Ky. L. 1731, 78 S. W. 482, 111 Am. St. 262.

³⁰ *Dittgen v. Racine Paper Goods*, 164 Fed. 84. See also, *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911.

ful interference.³¹ So, injunction was held properly issued to restrain one from driving through the streets a wagon bearing placards announcing the existence of a strike, long after the strike had in fact ended.³² But the principle must in all cases be reasonably exercised. It is indispensable that injury should result to the plaintiff from the acts of which he complains.³³ Thus, where a manufacturing company had sold part of its plant and had ceased to do business for more than a year, it was denied a writ to enjoin another person from asserting that the manufacturing company had gone out of the business and that he was its successor, since these acts could not have injured the manufacturing company.³⁴

§ 2521. Injunction to restrain breach of contract not to engage in competitive business.—One who sells a business and as part of the consideration for the contract agrees not to engage in a like business in the same locality may be restrained by injunction from committing a breach of the contract in these particulars. The contract intended, however, is a contract not in total restraint of trade—for a contract of that character would be void—but a contract which amounts to a partial restraint and which is reasonably restricted as to time and place and which is based upon a sufficient consideration is valid and may be enforced by injunction. The remedy at law in such cases is plainly inadequate.³⁵ One who sells a business and agrees to re-

³¹ *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450, 85 C. C. A. 16. See also, *Baker-Whiteley Coal Co. v. Baltimore &c. R. Co.*, 188 Fed. 405, 110 C. C. A. 234.

³² *Steinert v. Tagen*, 207 Mass. 394, 93 N. E. 584, 32 L. R. A. (N. S.) 1013n.

³³ *Shonk Tin Printing Co. v. Shonk*, 138 Ill. 34, 27 N. E. 529; *Blatchford v. Chicago Dredging & Dock Co.*, 22 Ill. App. 376; *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795; *Berger v. Armstrong*, 41 Iowa 447.

³⁴ *Shonk Tin Printing Co. v. Shonk*, 138 Ill. 34, 27 N. E. 529.

³⁵ *Sanders v. Brown*, 145 Ala. 665, 39 So. 732; *Davis v. Booth*, 131 Fed. 31, 65 C. C. A. 269; *Acker &c. Co. v. McGaw*, 144 Fed. 864; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *Andrews v. Kingsbury*, 212 Ill. 97, 72 N. E. 11; *Baker v. Pottmeyer*, 75 Ind. 451; *Augusta Steam Laundry Co. v. Debow*, 98 Maine 496, 57 Atl. 845; *Dwight v. Hamilton*, 113 Mass. 175; *Grow v. Seligman*, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737; *Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; *Gordon v. Mansfield*, 84 Mo. App. 367; *Althen v. Vreeland* (N. J. Eq.), 36 Atl. 479; *Fleckenstein Bros. Co. v.*

main out of it will not be allowed to destroy the good will with which he has agreed not to interfere.³⁶ It is not essential to relief in all cases that the plaintiff should show that he has sustained damages by reason of the breach of the contract.³⁷ Relief by injunction may be had, though the broken contract provides for liquidated damages.³⁸

§ 2522. Breach of contract by engaging in competitive business—Illustrations.—The contract not to engage in competitive business is broken so as to authorize the writ in cases where the party who binds himself not to engage in a competitive business does engage in that business in the name of other persons,³⁹ or as agent for a competitor.⁴⁰ An injunction was granted to prevent a laundry driver from violating a contract in which he agreed that he would not at any time while in the employ of the plaintiff or within two years after leaving his service call for and deliver laundry for himself, or any other person, to persons who had been customers of the plaintiff.⁴¹ So, the writ

Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025; Hulen v. Earel, 13 Okl. 246, 73 Pac. 927; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984; Anderson v. Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911; Columbia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280; Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N. S.) 119n; Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975; Freudenthal v. Espey, 45 Colo. 488, 102 Pac. 280; Spier v. Lambdin, 45 Ga. 319; Anheuser-Busch Brew. Assn. v. Dwyer, 150 Ill. App. 315; O'Neal v. Hines, 145 Ind. 32, 43 N. E. 946; Home Tel. Co. v. North Manchester Tel. Co., 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234; Mills v. Ressler, 87 Kans. 549, 125 Pac. 58; Moorman v. Parkerson, 127 La. 835, 54 So. 47; Flaherty v. Libby, 108 Maine 377, 81 Atl. 166; Brown v. Benzinger (Md.), 84 Atl. 79; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Wills v. Forrester, 140 Mo. App. 321, 124 S. W. 1090; Bailey v. Collins, 59 N. H. 459;

Genelin v. Reisel, 10 N. J. L. J. 208; Niles v. Fenn, 12 Misc. (N. Y.) 470, 67 N. Y. St. 609, 33 N. Y. S. 857; Davies v. Racer, 72 Hun (N. Y.) 43, 55 N. Y. St. 191, 25 N. Y. S. 293; McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249n; Threlkeld v. Steward, 24 Okl. 403, 103 Pac. 630, 138 Am. St. 888; Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647.

³⁹ Columbia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280. ⁴⁰ Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11; Anderson v. Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

⁴¹ Augusta Steam Laundry Co. v. Debow, 98 Maine 496, 57 Atl. 845. ⁴² Cobbs v. Niblo, 6 Ill. App. 60; Eisel v. Hayes, 141 Ind. 41, 40 N. E. 119; Richardson v. Peacock, 26 N. J. Eq. 40.

⁴³ Flaherty v. Libby, 108 Maine 377, 81 Atl. 166.

⁴⁴ Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N. S.) 119n.

will issue to restrain the breach of an agreement of an employé not to enter into the service of a competing concern during the term of his employment in an administrative position wherein he will be placed in a position to use the trade secrets of his former employer.⁴² The rule is much the same in cases where one binds himself to sell a particular product of the other party to the exclusion of all other products of similar character. Thus, where the manufacturer of paper patterns entered into a contract with a merchant whereby the latter agreed to order patterns from the former for a specified price and not to handle other patterns, during the life of the contract, the merchant was enjoined from dealing in other patterns pending the contract.⁴³

§ 2523. Accounting on breach of contract not to engage in competitive business.—On enjoining a breach of covenant by a vendor not to engage in a business similar to the one sold, a court of equity has power to take an account of the loss of profits suffered by the purchaser in consequence of such breach.⁴⁴ A covenant, on a sale of a hair-

⁴² *McCall Co. v. Wright*, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249n. See also, *Kinney v. Scarborough Co. (Ga.)*, 74 S. E. 772.

⁴³ *Peerless Pattern Co. v. Gauntlett Dry Goods Co. (Mich.)*, 136 N. W. 1113.

⁴⁴ *Patterson v. Glassmire*, 166 Pa. St. 230, 31 Atl. 40. "Courts of equity, under the old rule, refrained altogether from awarding pecuniary reparation for damage sustained. Sedg. on Dam., § 3. This rule has been, however, modified from time to time, and is now abrogated by statute, in England, in all cases where chancery has jurisdiction to entertain applications for injunction against the breach of any contract. St. 21 and 22 Vict., c. 27. In this country it is now generally accepted that a court of equity has power to decree compensation, as incidental to other relief (*Bisp. on Eq.*, § 478; *Story on Eq. Jur.*, § 794)—not, indeed, as damages, in the sense in which the law gives them, but as a substitute for

damages (*Root v. Railway Co.*, 105 U. S. 215). By some the power is based upon the necessity of preventing a multiplicity of suits (*Allison's Appeal*, 77 Pa. St. 227); by others, from the necessity of doing complete justice as between the parties (*Nagle v. Newton*, 22 Gratt. (Va.) 821). The course of proceeding is by reference to a master, or by a quantum damnicatus. *Bird v. Railroad Co.*, 8 Rich. Eq. 56. But the reference to a master is now commonly adopted. *Story on Eq. Jur.*, § 794. An injunction to restrain the breach of a contract, however, amounts practically to a decree for specific performance. *Story on Equity Jurisprudence*, § 722a. And the rule above set forth is, of course, to be accepted with the qualification that a court of equity will not give both legal and equitable relief at the same time, or, in other words, decree the specific performance of a contract while at the same time giving damages such as would compensate for its permanent abro-

goods business, not to engage in "said business of hair dressing, or any of the branches thereof," within certain specified limits, is broken by the vendor's engaging in the business of cutting and dressing the natural hair, although at the time of sale the dressing of artificial hair was the principal item of the business, and the cutting and dressing of the natural hair merely incidental.⁴⁵

§ 2524. Injunction to restrain transfer of instruments or securities.—A court of equity will interfere by injunction to prevent the transfer of negotiable securities and stocks where legal remedies are insufficient to protect the rights of parties who seek such remedy.⁴⁶ Such a court will, for

gation. High on Inj., 1182. The compensation in question, therefore, amounts merely to reparation for the damage sustained pending the temporary breach. See *Head v. Meloney* (Pa. Sup.), 2 Atl. 195." *Patterson v. Glassmire*, 166 Pa. St. 230, 31 Atl. 40. See also, *Vulcan Detinning Co. v. American Can Co.* (N. J.), 85 Atl. 318.

⁴⁵ *Patterson v. Glassmire*, 166 Pa. St. 230, 31 Atl. 40: "Contracts in restraint of trade, if they are reasonable, and founded on a valuable consideration, and not, for any special reason, unjust or inequitable, will be enforced in equity (Bisp. on Eq., § 228), as, for instance, in the case of the sale of a business, and a covenant not to pursue it within certain prescribed limits (*McClurg's Appeal*, 58 Pa. St. 51). 'We do not see,' says *Tindall, C. J.*, in *Horne v. Graves*, 7 Bing. 743, cited in *Kerr on Inj.*, 'how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as would afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' In respect to time, the restriction may be unlimited. *Kerr on Inj.*, § 509. While the consideration should be a valuable one, its adequacy will not be inquired into, unless the inadequacy is such as to stamp the agreement as unreasonable. Bisp. on Eq., § 228. The mere

purchase of stock in trade is sufficient consideration for an agreement to restrain the purchaser from carrying it on in the locality. *Beard v. Dennis*, 6 Ind. 200. The basis of equitable intervention is that a suit at law would afford no remedy, since the damage will be continuing, and accruing from day to day, and, furthermore, that the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. *Butler v. Burleson*, 16 Vt. 176. The agreement should be certain and distinct (*High on Inj.*, § 1178); and it should be established by clear and satisfactory evidence, in order to justify the court in restraining its breach by injunction. If in writing, it must be allowed to speak for itself. *Hall's Appeal*, 60 Pa. St. 458. But it is always permissible to explain the subject-matter of an agreement by extraneous evidence. *Barnhart v. Riddle*, 29 Pa. St. 96; *Centenary Methodist Church v. Clime*, 116 Pa. St. 146, 9 Atl. 163, and cases cited. And the sale of a business must be held to include everything which pertains to such business. *Harms v. Parsons*, 32 Beav. 332."

⁴⁶ *Mason v. Jones*, 7 D. C. 247, 1 Hayw. & H. (D. C.) 329, Fed. Cas. No. 9240; *Hower v. Weiss Malting & Co.*, 55 Fed. 356, 5 C. C. A. 129; *Willcox v. Ryals*, 110 Ga. 287, 34 S. E. 575; *Zeigler v. Beasley*, 44 Ga. 56; *Thurman v. Burt*, 53 Ill. 129; *Belohradsky v. Kuhn*, 69 Ill. 547; *Hodson*

example, enjoin the negotiation of commercial paper when it was obtained through fraudulent or improper conduct and there is danger of it passing into the hands of innocent purchasers for valuable consideration and without notice, and this would deprive the maker of his legal defenses.⁴⁷ However, it has been held that the fact that the maker of a note materially altered after its execution and void as to him is apprehensive that witnesses by whom he expects to establish a defense against the note may die or move away does not entitle him to an injunction restraining a negotiation of the note, for the testimony of witnesses may be perpetuated under the statutes.⁴⁸ It is ground for enjoining the transfer of a purchase-money note that the title of the real estate has failed in part.⁴⁹ Generally, where a person has negotiable securities in his possession under a void contract and is not of sufficient responsibility to answer for the value thereof the negotiation of them may be restrained by injunction.⁵⁰ The writ is available to restrain the transfer of shares of corporate stock in proper cases.⁵¹ Thus, the transfer of shares of stock of a corporation may be enjoined at the suit of the owner when a bank of another state has wrongfully received the certificates in pledge from one not the owner thereof, and not authorized to so pledge the same, and is attempting to have the stock transferred to the

v. Eugene Glass Co., 156 Ill. 397, 40 N. E. 971; Burns v. Weesner, 134 Ind. 442, 34 N. E. 10; McDunn v. Des Moines, 34 Iowa 467; Thompson v. Flathers, 45 La. Ann. 120, 12 So. 245; Six v. Shaner, 26 Md. 415; Locke v. Locke, 166 Mass. 435, 44 N. E. 346; Delafield v. Illinois, 2 Hill (N. Y.) 159; Jones v. Diederich, 3 Daly (N. Y.) 177; Springport v. Teutonia Sav. Bank, 75 N. Y. 397; Zeiger v. Stephenson, 153 N. Car. 528, 69 S. E. 611; Bridges v. Robinson, 2 Tenn. Ch. 720; Osborn v. United States Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Chase v. Torrey, 20 Vt. 395; Dickerson v. Bankers' Loan & Co., 93 Va. 498, 25 S. E. 548.

⁴⁷ Willcox v. Ryals, 110 Ga. 287, 34 S. E. 575; Central Trust Co. v.

West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; Dickerson v. Bankers' Loan & Co., 93 Va. 498, 25 S. E. 548; Moomaw v. Fairview Cemetery Co. (Va.), 27 S. E. 489. See also, Hower v. Weiss Malting & Co., 55 Fed. 356, 5 C. C. A. 129.

⁴⁸ Erickson v. First National Bank, 44 Nebr. 622, 62 N. W. 1078, 28 L. R. A. 577n, 48 Am. St. 753.

⁴⁹ McDunn v. Des Moines, 34 Iowa 467. See also, Locke v. Locke, 166 Mass. 435, 44 N. E. 346.

⁵⁰ Delafield v. Illinois, 2 Hill (N. Y.) 159.

⁵¹ Brown v. Bracking, 11 Idaho 678, 83 Pac. 950; Curie v. Jones, 138 N. Car. 189, 50 S. E. 560; Zeiger v. Stephenson, 153 N. Car. 528, 69 S. E. 611.

bank, as the owner thereof, upon the books of the corporation.⁵²

§ 2525. Injunction to restrain transfer of negotiable paper in violation of collateral agreements.—Injunction is sometimes invoked to enjoin the violation of collateral agreements relating to notes, drafts and other forms of commercial paper. The principle is of application in cases where notes are given without consideration upon agreements for their return on the happening of a certain contingency which has occurred.⁵³ But in one of the cases where a person was induced to endorse a note for the accommodation of the maker by the assurance of the payee that it was a mere form and that he should not be troubled about it and afterwards suit was brought upon the note and judgment taken by default against the endorser, it was held that he could not claim afterwards that the judgment was without binding force.⁵⁴

§ 2526. Injunction to adjudicate titles.—The legal remedies for the adjudication of titles to property, real or personal, are so adequate as to forbid the use of the writ of injunction where the sole question involved is one of disputed title. The writ is denied where the right is doubtful.⁵⁵ Accordingly, an injunction will not issue to evict a

⁵² Reynolds v. Touzalin Imp. Co., 62 Nebr. 236, 87 N. W. 24.

⁵³ Metler v. Metler's Admrs., 19 N. J. Eq. 457; Clayton v. Lyle, 2 Jones Eq. (N. Car.) 188; Bell v. Gamble, 9 Humph. (Tenn.) 117. See also, Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467.

⁵⁴ Roberts v. Miles, 12 Mich. 297. But see, Weems v. Ventrees, 14 La. Ann. 267.

⁵⁵ Boulo v. New Orleans & C. R. Co., 55 Ala. 480; Preston v. Smith, 26 Fed. 884; Crown v. Leonard, 32 Ga. 241; Chesapeake & O. Canal Co. v. Young, 3 Md. 480; Morris Canal & C. v. Fagin, 22 N. J. Eq. 430; Storm v. Mann, 4 Johns. Ch. (N. Y.) 21; Durham v. Richmond & D. R. Co., 104 N. Car. 261, 10 S. E. 208; Pren-tiss v. Larnard, 11 Vt. 135; Cresap v.

Kemble, 26 W. Va. 603. See also, Wharton v. Hannon, 115 Ala. 518, 22 So. 287; Burnside v. United Saw-mill Co., 92 Ark. 118, 122 S. W. 98; Roy v. Moore, 85 Conn. 159, 82 Atl. 233; Tacoma Railway & C. Co. v. Pacific Traction Co., 155 Fed. 250; St. Louis, K. C. R. Co. v. Dewees, 23 Fed. 691; Vaughn v. Yawn, 103 Ga. 557, 29 S. E. 759; Beacham v. Wrightsville & C. R. Co., 125 Ga. 362, 54 S. E. 157; Kicklighter v. Rosenthal, 74 Ga. 151; White v. Williamson, 92 Ga. 443, 17 S. E. 604; Toledo, St. L. R. Co. v. St. Louis & C. R. Co., 208 Ill. 623, 70 N. E. 715; Young's Exr. v. Young, 9 B. Mon. (Ky.) 66; Louisiana Nav. Co. v. Oyster Commission, 125 La. 740, 51 So. 706; Morse v. Machias Water Power & C. Co., 42 Maine 119; Jordan v. Wood-

party from the actual possession of land where the right to the possession is disputed.⁵⁸ So, an injunction is not warranted to restrain an ordinary trespass where the title of the plaintiff is in dispute and has not been established by a legal adjudication.⁵⁷ The title is generally regarded as in dispute where the defendant in his answer denies the right or title of the complainant.⁵⁸ An injunction will not ordinarily issue to enjoin the completion nor require the removal of a fence where the determination of the issues necessarily requires the determination of the title to the land upon which the fence is located.⁵⁹ So, equity will not take jurisdiction for the sole purpose of enjoining a trespass to real estate by the cutting of timber where the title to the land is in dispute.⁶⁰ And for like reasons a street railroad company, whose right to occupy a street is being contested by a city, has been denied the right to maintain a suit to en-

ward, 38 Maine 423; *Cherry v. Stein*, 11 Md. 1; *Simmons v. Day*, 151 Mich. 1, 114 N. W. 853; *Eskridge v. Eskridge*, 51 Miss. 522; *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378; *Graham v. Womack*, 82 Mo. App. 618; *Little v. James*, 98 Mo. App. 337, 73 S. W. 287; *Echelkamp v. Schrader*, 45 Mo. 505; *Munger v. Yeiser*, 80 Nebr. 285, 114 N. W. 166; *Perkins v. Foye*, 60 N. H. 496; *Muir v. Howell*, 37 N. J. Eq. 39; *Worthington v. Moon*, 53 N. J. Eq. 46, 30 Atl. 251; *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Olmsted v. Loomis*, 6 Barb. (N. Y.) 152, revd. 9 N. Y. 423, Seld. Notes (N. Y.) 233; *Pickler v. Board of Education*, 149 N. Car. 221, 62 S. E. 902; *Baxter v. Baxter*, 77 N. Car. 118; *Kistler v. Weaver*, 135 N. Car. 388, 47 S. E. 478; *Martinson v. Margolf*, 14 N. Dak. 301, 103 N. W. 937; *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859; *In re Mammoth Vein Consol. Coal Co.'s Appeal*, 54 Pa. 183; *Bierer v. Hurst*, 162 Pa. St. 1, 29 Atl. 98; *Walker v. Haley* (Tex. Civ. App.), 147 S. W. 360; *Lockhart v. Leeds*, 195 U. S. 427, 49 L. ed. 263, 25 Sup. Ct. 76; *Alexander v. Pendleton*, 8 Cranch (U. S.) 462, 3 L. ed. 624; *Kahn v. Old Telegraph Mining Co.*, 2 Utah 13.

⁵⁸ *Vaughn v. Yawn*, 103 Ga. 557, 29 S. E. 759; *Beacham v. Wrightsville &c. R. Co.*, 125 Ga. 362, 54 S. E. 157; *Lowenthal v. New Music Hall Co.*, 100 Ill. App. 274; *Martinson v. Marzolf*, 14 N. Dak. 301, 103 N. W. 937; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. 648.

⁵⁷ *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am. St. 101; *Toledo, St. L. &c. R. Co. v. St. Louis &c. R. Co.*, 208 Ill. 623, 70 N. E. 715; *Simmons v. Day*, 151 Mich. 1, 114 N. W. 853; *Lazzell v. Garlow*, 44 W. Va. 466, 30 S. E. 171; *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532; *Curtin v. Stout*, 57 W. Va. 271, 50 S. E. 810. See also, *Hudson v. Iguam &c. Co. (W. Va.)*, 76 S. E. 797.

⁵⁹ *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585; *Attaquin v. Fish*, 5 Metc. (Mass.) 140; *Naylor v. Corson* (N. J. Eq.), 49 Atl. 529; *North Shore R. Co. v. Pennsylvania Co.*, 193 Pa. St. 641, 44 Atl. 1083. See also, *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570; *Eckelkamp v. Schrader*, 45 Mo. 505; *Shreve v. Black*, 4 N. J. Eq. 177.

⁶⁰ *Walker v. Haley* (Tex. Civ. App.), 147 S. W. 360.

⁶¹ *Pardee &c. Lumber Co. v. O'Dell (W. Va.)*, 76 S. E. 343.

join another company from occupying such street to which suit the city is not a party.⁶¹

§ 2527. Necessity of prior adjudication of title.—The authorities generally require the establishment of the title of the complainant at law before granting the writ,⁶² unless the facts on which the title is founded are admitted or otherwise clearly established,⁶³ and in cases where the United States⁶⁴ or a state appears as a party.⁶⁵ But resort to a court of law to establish title as a preliminary question would not be essential in cases where the defendant has not raised the question in his answer and the parties have argued and submitted such questions of legal right to the court.⁶⁶ It is to be noted, however, that the rule requiring judicial confirmation of title as a prerequisite to the grant of the writ is not everywhere recognized and that in some jurisdictions the writ may issue without the right of the party being first established in a suit at law.⁶⁷

⁶¹ *Tacoma R. &c. Co. v. Pacific Traction Co.*, 155 Fed. 59.

⁶² *Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 8 So. 698; *Lownsdale v. Grays' Harbor Boom Co.*, 117 Fed. 983; *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am. St. 101; *Hall v. Henninger*, 145 Iowa 230, 121 N. W. 6, 139 Am. St. 412; *Harden v. Metz*, 62 Kans. 867, 63 Pac. 1126; *Newport & L. T. P. R. Co. v. Fitzsimmons*, 9 Ky. L. 939, 7 S. W. 609, 8 S. W. 201; *Watson v. Holmes*, 5 Ky. L. (abstract) 515; *Chesapeake &c. Canal Co. v. Young*, 3 Md. 480; *Washburn v. Miller*, 117 Mass. 376; *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *Andries v. Detroit &c. R. Co.*, 105 Mich. 557, 63 N. W. 526; *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696; *Arnold v. Klepper*, 24 Mo. 273; *Malloon v. White*, 57 N. H. 152; *Hodgman v. Richards*, 45 N. H. 28; *Todd v. Staats*, 60 N. J. Eq. 507, 46 Atl. 645; *Bogey v. Shute*, 57 N. Car. 174; *Irwin v. Davidson*, 38 N. Car. 311; *Erie Canal Co. v. Walker*, 29 Pa. St. 170; *In re Patterson's Appeal*, 129 Pa. St. 109, 18 Atl. 563; *Booker v.*

Browning, 169 Pa. St. 18, 32 Atl. 85; *Irwin v. Dixon*, 9 How. (U. S.) 10, 13 L. ed. 25; *LeRoy v. Wright*, 4 Sawy. (U. S.) 530, Fed. Cas. No. 8273; *Kanawha &c. R. Co. v. Glen Jean &c. R. Co.*, 45 W. Va. 119, 30 S. E. 86.

⁶³ *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Bean v. Coleman*, 44 N. H. 539; *Black v. Delaware &c. Canal Co.*, 22 N. J. Eq. 130; *Nicoll v. Huntington*, 1 Johns. Ch. (N. Y.) 166; *Olmsted v. Loomis*, 9 N. Y. 423, Seld. Notes (N. Y.) 233; *Lyerly v. Wheeler*, 45 N. Car. 267, 59 Am. Dec. 596; *Allen v. Dunlap*, 24 Ore. 229, 33 Pac. 675; *In re Rankin's Appeal*, 1 Monag. (Pa.) 308, 16 Atl. 82, 2 L. R. A. 429; *Ensign v. Lyon*, 1 Lack. Jur. (Pa.) 102; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

⁶⁴ *United States v. Cleveland &c. Cattle Co.*, 33 Fed. 323.

⁶⁵ *Moor v. Veazie*, 31 Maine 360.

⁶⁶ *Paterson v. East Jersey Water Co.*, 74 N. J. Eq. 49, 70 Atl. 472.

⁶⁷ *Corning v. Troy Iron &c. Factory*, 40 N. Y. 191; *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804.

The rule is most often relaxed in cases of waste,⁶⁸ and where irremediable mischief is being done or threatened, going to the substance of an estate.⁶⁹

§ 2528. Injunction to enforce restrictive covenants in conveyances.—A restrictive covenant in a conveyance of real property may be enforced by injunction. The writ will issue in cases of a threatened violation of the restriction and a mandatory injunction may be issued to undo the forbidden act after it has been done.⁷⁰ It is not necessary to relief that the plaintiff should show actual damage as the result of the breach of the covenant.⁷¹ The writ may issue, it seems, though the violation of the covenant results in an increase in the value of the property.⁷² "I take it now to be the law," says a learned English judge, "that if a covenant of this character is entered into with reference to the

⁶⁸ *Kane v. Vandenburg*, 1 Johns. Ch. (N. Y.) 11; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165. But see, *Bogey v. Shute*, 57 N. Car. 174.

⁶⁹ *Palmer v. Young*, 108 Ill. App. 252; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. And the same is true where the trespass is continuing and likely to ripen into title or an easement.

⁷⁰ *Lane v. Newdigate*, 10 Ves. 192; *Storer v. Great Western R. Co.*, 2 Y. & C. Ch. 48; *Wilson v. Furness R. Co.*, L. R. 9 Eq. 28; *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625; *Bayard v. Bancroft* (Del. Ch.), 62 Atl. 6; *McDougall v. Burrows*, 154 Ill. App. 375; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Riverbank Imp. Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730n; *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37, 28 L. R. A. (N. S.) 634, 138 Am. St. 370; *Compton Hill Imp. Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159; *St. Louis Safe Deposit & C. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S. W. 474; *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048; *Hyman v. Tash* (N. J. Eq.), 71 Atl. 742; *Howland v. Andrus* (N. J. Eq.), 83 Atl. 982; *Adams v. Howell*, 58 Misc. (N.

Y.) 435, 108 N. Y. S. 945; *Walker v. McNulty*, 19 Misc. (N. Y.) 701, 45 N. Y. S. 42; *Barnett v. Vaughan Institute*, 119 N. Y. S. 45; *De Lima v. Mitchel*, 49 Misc. (N. Y.) 171, 98 N. Y. S. 811; *Electric City Land & C. Co. v. West Ridge Coal Co.*, 187 Pa. St. 500, 41 Atl. 458; *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250. Courts of equity will enforce by injunction negative covenants and clauses in deeds, restricting the use of real estate, though they do not in law constitute easements or covenants running with land; but the jurisdiction is discretionary, and is governed by the principles applicable to the enforcement of specific performance of contracts. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027.

⁷¹ *Collins v. Castle*, 36 Ch. Div. 243; *German v. Chapman*, 7 Ch. Div. 271; *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260; *Richards v. Revett*, 7 Ch. Div. 224; *Manners v. Johnson*, 1 Ch. Div. 673; *Tipping v. Eckersley*, 2 Kay & J. 264; *Leech v. Schweder*, L. R. 9 Ch. App. 463; *Peck v. Conway*, 119 Mass. 546; *Hall v. Wesster*, 7 Mo. App. 56; *Walker v. McNulty*, 19 Misc. (N. Y.) 701, 45 N. Y. S. 42.

⁷² *Barnett v. Vaughan Institute*, 119 N. Y. S. 45.

position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and, if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee."⁷³ But the courts, however, will refuse, ordinarily, to enforce restrictions where there are circumstances that render their enforcement inequitable, although it clearly appears that there has been such a violation of them as would ordinarily induce the court to interfere.⁷⁴ It is essential to relief of this character that the plaintiff should act promptly and without laches.⁷⁵ Relief may be denied where the party seeking the enforcement of the restrictive covenant has himself been guilty of a violation of the same restriction.⁷⁶ The restriction may be enforced by the grantor without showing that the restriction was intended for the benefit of premises not conveyed where the covenant is stated to be between the grantee and the grantor for himself and his heirs and assigns and that it shall be considered as running with the land.⁷⁷

§ 2529. Restrictive covenants illustrated.—The restrictive covenants that are subject to enforcement by injunction most commonly are restrictions as to the purposes for which the premises may be used,⁷⁸ the character of build-

⁷³ *Manners v. Johnson*, 1 Ch. Div. 673.

⁷⁴ *Union Trust &c. Co. v. Best*, 160 Cal. 263, 116 Pac. 737; *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84, 135 Am. St. 307; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Johnson v. Robertson (Iowa)*, 135 N. W. 585; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

⁷⁵ *Johnson v. Robertson (Iowa)*, 135 N. W. 585; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40; *Hyman v. Tash (N. J. Eq.)*, 71 Atl. 742.

⁷⁶ *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84, 135 Am. St. 307; *Loud v. Pendergast*, 206 Mass. 122, 92 N. E.

40; *Ocean City Assn. v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914; *Coates v. Cullingford*, 147 App. Div. (N. Y.) 39, 131 N. Y. S. 700. But see, *Adams v. Howell*, 58 Misc. (N. Y.) 435, 108 N. Y. S. 945.

⁷⁷ *Walker v. McNulty*, 19 Misc. (N. Y.) 701, 45 N. Y. S. 42.

⁷⁸ *Chamberlain v. Brown*, 141 Iowa 540, 120 N. W. 334; *Kraft v. Welch*, 112 Iowa 695, 84 N. W. 908; *State Bank v. Rohren*, 55 Nebr. 223, 75 N. W. 543; *Goater v. Ely (N. J. Eq.)*, 82 Atl. 611; *Riverbank Imp. Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730n (garage); *DeLima v. Mitchel*, 49 Misc.

ings to be erected,⁷⁹ and the place of the erection of buildings with reference to lot or street lines.⁸⁰ But an injunction has been denied to enjoin the breach of a restriction in the original plat of a district fixing a building line, where practically all of the owners of the adjoining lots, among whom were the complainants, had disregarded the restriction and erected their building beyond the line fixed. These facts were held to amount to an abandonment or waiver of the right.⁸¹ And generally where, through change of the character of a neighborhood, the enforcement of a restrictive covenant would be a burden, without conferring any benefit, equity will refuse relief.⁸² Like principles govern in cases where the conveyance takes the form of a lease, and a landlord may enjoin the violation by a tenant of a restriction upon the use of the demised premises.⁸³

§ 2530. Injunction to prevent removal of fixtures.—An injunction will issue to prevent the wrongful removal of fixtures if such removal would work irreparable injury and the question whether the property is or is not a fixture is in dispute. The remedy would seem peculiarly applicable in those cases where the fixtures are capable of easy

(N. Y.) 171, 98 N. Y. S. 811 (saloon); *Brown v. Huber*, 80 Ohio St. 183, 88 N. E. 322; *Ball v. Milliken*, 31 R. I. 36, 76 Atl. 789; *Ft. Worth Driving Club v. Ft. Worth Fair Assn.*, 103 Tex. 24, 122 S. W. 254 (use of premises for sale of liquor).

⁷⁹ *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195; *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37, 28 L. R. A. (N. S.) 634, 138 Am. St. 370; *Compton Hill Imp. Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159; *Goater v. Ely* (N. J. Eq.), 82 Atl. 611; *Pagenstecher v. Carlson*, 146 App. Div. (N. Y.) 738, 138 N. Y. S. 413.

⁸⁰ *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84, 135 Am. St. 307; *Loud v. Prendergast*, 206 Mass. 122, 92 N. E. 40; *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601; *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770; *Meaney v. Stork* (N. J. Eq.), 83 Atl. 492; *Zipp v. Barker*, 55 N. Y. S. 246, *affd.*

4 App. Div. (N. Y.) 1, 57 N. Y. S. 569; *Adams v. Howell*, 58 Misc. (N. Y.) 435, 108 N. Y. S. 945; *Taylor v. McAdam*, 112 N. Y. S. 50; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53.

⁸¹ *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84, 135 Am. St. 307.

⁸² *Sanford v. Keer* (N. J.), 83 Atl. 225.

⁸³ *Hovnanian v. Bedessern*, 63 Ill. App. 353; *Vinissky v. Lazovsky*, 155 Ill. App. 596; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Kraft v. Welch*, 112 Iowa 695, 84 N. W. 908; *Chamberlain v. Brown*, 141 Iowa 540, 120 N. W. 334; *Orvis v. National Commercial Bank*, 81 App. Div. (N. Y.) 631, 80 N. Y. S. 1029; *Greenblatt v. Zimmerman*, 132 App. Div. (N. Y.) 283, 117 N. Y. S. 18; *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576.

detachment and the removal would result in a loss incapable of ready computation.⁸⁴

§ 2531. Injunction to restrain foreclosure of mechanic's lien.—The holder of a junior lien can not restrain a foreclosure by an older lienholder on the mere ground that the times are hard and a better sale might be had in the future.⁸⁵ Where a party having an interest is not made a party to the proceeding to foreclose he may have the action restrained until he can come into court and set up his rights and have them protected,⁸⁶ and this has been held true, although he has an action for damages.⁸⁷ But an injunction will not ordinarily be granted to restrain proceedings where the party asking the same has had an opportunity to plead his defense and has neglected to do so,⁸⁸ or has no interest to be affected by the decree.⁸⁹

§ 2532. Injunction to restrain breach of covenants in leases.—Injunction is a proper remedy to restrain the violation of the covenants in a lease.⁹⁰ The violation of a covenant as to a particular use of the premises may be restrained without reference to the question of irreparable injury as a result of such violation.⁹¹ Neither is it essen-

⁸⁴ *Camp v. Charles Thatcher Co.*, 75 Conn. 165, 52 Atl. 953; *Trask v. Little*, 182 Mass. 8, 14 N. E. 206.

⁸⁵ *Winn v. Henderson*, 63 Ga. 365; *Aimee Realty Co. v. Haller*, 128 Mo. App. 66, 106 S. W. 588; *Wolf v. Glassport Lumber Co.*, 210 Pa. 370, 59 Atl. 1105.

⁸⁶ *Raymond v. Ewing*, 26 Ill. 329; *Garretson v. Appleton Mfg. Co.*, 61 Ill. App. 443; *Martin v. Berry*, 159 Ind. 566, 64 N. E. 912; *Gates v. Ballou*, 56 Iowa 741, 10 N. W. 258; *Aimee Realty Co. v. Haller*, 128 Mo. App. 66, 106 S. W. 588.

⁸⁷ *Hammond v. Martin*, 15 Tex. Civ. App. 570, 40 S. W. 347.

⁸⁸ *Patch v. Collins*, 158 Mass. 468, 33 N. E. 567.

⁸⁹ *Bond v. Carroll*, 71 Wis. 347, 37 N. W. 91.

⁹⁰ *Reade v. Armstrong*, 7 Ir. Ch. 375; *Howard v. Ellis*, 6 N. Y. Super.

Ct. 369; *Trenor v. Jackson*, 40 How. Pr. (N. Y.) 389, 15 Abb. Pr. (N. S.) (N. Y.) 115; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Dodge v. Lambert*, 15 N. Y. Super. Ct. 570; *Pugh v. Jayne*, 17 Leg. Int. (Pa.) 149.

⁹¹ *Clements v. Welles*, L. R. 1 Eq. 200; *Hodson v. Coppard*, 29 Beav. 4; *Altman v. Royal Aquarium Soc.*, 3 Ch. D. 228; *Tipping v. Eckersley*, 2 K. & J. 264; *Kemp v. Sober*, 1 Sim. (N. S.) 517; *Kimpton v. Eve*, 2 Ves. & B. 349; *Lambert v. Lambert*, 2 L. Eq. R. 210; *Blagrave v. Blagrave*, 1 De G. & Sm. 252; *Doran v. Carroll*, 11 I. Ch. R. 379; *Attorney-General v. Sheffield Gas & C. Co.*, 3 De G. M. & G. 304; *Hunt v. Brown, Sau. & Sc.* 179; *Fielden v. Slater*, L. R. 7 Eq. 523; *De Wilton v. Saxon*, 6 Ves. 106; *Cregan v. Cullen*, 16 Ir. Ch. R. 339; *Wilds v. Layton*, 1 Del. Ch. 226, 12

tial that the violation of the provision of the lease could amount to waste.⁹² Under this principle a lessee may be enjoined from the breach of a covenant not to sell intoxicants upon the premises.⁹³ Injunction is also the remedy in some cases to prevent the abandonment of leased property by the lessee before the expiration of his term, as in the case of the lease of railroad property where the lessee threatens to abandon its operation.⁹⁴ The remedy is likewise available where the lessee sublets the premises in violation of a provision against subletting.⁹⁵ The lessee on his part is likewise entitled to the use of the remedy against his lessor for breach of covenants in the lease which operate to the serious impairment of the enjoyment of the leased premises.⁹⁶ Thus, an injunction was held the proper remedy to restrain the owner of premises leased for a term of years from erecting a building upon a portion of the premises in such a way as to seriously impair the use of the premises by the lessee.⁹⁷

§ 2533. Injunction to restrain withdrawal of license.—

As a general rule, the writ will not lie to restrain the withdrawal of a mere license. The writ may be invoked, however, where the license is collateral to a contract based

Am. Dec. 91; *Star Brewery Co. v. Primas*, 59 Ill. App. 581, affd. 163 Ill. 652, 45 N. E. 145; *Bryden v. Northrup*, 58 Ill. App. 233; *State Bank v. Rohren*, 55 Nebr. 223, 75 N. W. 543; *Frank v. Brunnemann*, 8 W. Va. 462; *Barrow v. Richard*, 8 Paige (N. Y.) 351, 35 Am. Dec. 713; *Seymour v. McDonald*, 4 Sandf. Ch. (N. Y.) 502; *Gillilan v. Norton*, 6 Robt. (N. Y.) 546, 33 How. Pr. (N. Y.) 373; *Heidorn v. Wright*, 6 Ohio Dec. 315, 4 Ohio N. P. 235; *Rockafellow v. Hanover Coal Co.*, 12 Pa. Co. Ct. 241; *Niagara Falls International Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *Parker v. Whyte*, 1 Hen. & M. English 167.
⁹² *Walton v. Johnson*, 15 Sim. 352; *Pulteney v. Shelton*, 5 Ves. 147; *Wilkinson v. Rogers*, 12 Wkly. Rep. 284; *Pratt v. Brett*, 2 Madd. 62; *Farrant v. Lorel*, 3 Atk. 723; *Lewis v. Christian*, 40 Ga. 187; *Parker v. Gar-*

rison, 61 Ill. 250; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Frank v. Brunnemann*, 8 W. Va. 462.

⁹³ *Hall v. Solomon*, 61 Conn 476, 23 Atl. 876, 29 Am. St. 218; *Sutton v. Head*, 86 Ky. 156, 9 Ky. L. 453, 5 S. W. 410, 9 Am. St. 274.

⁹⁴ *Southern R. Co. v. Franklin & Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

⁹⁵ *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47; *Sloan v. Martin*, 54 N. Y. Super. Ct. 87; *Barrington Apartment Assn. v. Watson*, 38 Hun (N. Y.) 545; *Matthews v. Whitaker* (Tex. Civ. App.), 23 S. W. 538.

⁹⁶ *Pokegama Sugar Pine Lumber Co. v. Klamath & Co. Imp. Co.*, 96 Fed. 34; *Raband v. Frank*, 7 Mo. App. 64; *Rogers v. Danforth*, 9 N. J. Eq. 289.

⁹⁷ *Raband v. Frank*, 7 Mo. App. 64.

upon a valuable consideration and the withdrawal of the license without reasonable notice would cause irreparable injury.⁹⁸ Such relief will be granted in cases of interference with the enjoyment of the subject of the license by third persons having no rights in the premises.⁹⁹ An injunction may also issue to restrain the abuse of privileges given by license.¹ Injunction is appropriate in cases where a city without authority interferes with a so-called license granted by it by ordinance to a railroad company to operate tracks along streets.²

§ 2534. Injunction to protect easement.—Equity may be invoked to protect the due and quiet enjoyment of an easement against threatened encroachment.³ And it is not always required that the injury threatened should be irreparable by damages in an action at law, in order to secure relief in equity to prevent interference with easements. It is sufficient for such relief that the injury can not be adequately compensated in damages in a suit at law,⁴ or that the injury is a continuing one, and compensation for it at law could be had only by successive suits, when relief in equity will be granted to prevent a multiplicity of suits and vexatious litigation.⁵ A continuing interference with an easement may be perpetually enjoined in equity, although

⁹⁸ *Newby v. Harrison*, 1 J. & H. 393; *Legg v. Horn*, 45 Conn. 409.

⁹⁹ *Emerson v. Bergin*, 71 Cal. 335, 12 Pac. 242; *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

¹ *Wheelock v. Noonan*, 53 N. Y. Super. Ct. 286, *affd.* 108 N. Y. 179, 15 N. E. 67, 2 Am. St. 405. See also, *New York Cent. & C. R. Co. v. Rochester*, 49 Hun (N. Y.) 606, 17 N. Y. St. 305, 1 N. Y. S. 456.

² *Asheville St. R. Co. v. Asheville*, 109 N. Car. 688, 14 S. E. 316.

³ *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. 22; *Henry v. Koch*, 80 Ky. 391, 4 Ky. L. 282, 44 Am. Rep. 484; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Cadigan v. Brown*, 120 Mass. 493; *Nash v. New England Life Ins. Co.*, 127 Mass. 91; *Tucker v. Howard*, 122 Mass. 529; *O'Brien v. Goodrich*, 177 Mass. 32, 58 N. E. 151; *Bailey*

Agawam National Bank, 190 Mass. 20, 76 N. E. 449, 3 L. R. A. (N. S.) 98, 112 Am. St. 296; *Cook v. Ferbert*, 145 Mo. 462, 46 S. W. 947; *Miller v. Fitzgerald Dry Goods Co.*, 62 Nebr. 270, 86 N. W. 1078; *Webber v. Gage*, 39 N. H. 182; *Manbeck v. Jones*, 190 Pa. St. 171, 42 Atl. 536; *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. 845; *Berkeley v. Smith*, 27 Grat. (Va.) 892; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Flaherty v. Fleming*, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461.

⁴ *Swan v. Burlington & C. Co.*, 72 Iowa 650, 34 N. W. 457; *Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co.*, 37 N. H. 254; *Webber v. Gage*, 39 N. H. 182.

⁵ *Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co.*, 37 N. H. 254; *Webber v. Gage*, 39 N. H. 182.

an action at law might have been maintained for damages, as where, for example, there is an obstruction of a private right of way. In such a case a suit at law is an inadequate remedy because damages could be recovered only to the time of the bringing of the action and a multiplicity of suits would be necessary in case of the continuance of the obstruction.⁶ An interference with the enjoyment of an easement may be restrained, though the right to the easement has not been established at law, if it appears to be a clear and certain right, and that an injurious interruption of the right is threatened.⁷ But courts will generally be inclined to refuse the injunction in cases where the threatened injury to the easement is slight and may be compensated for by a small amount of damages.⁸ To authorize injunction it must appear that the property rights of the plaintiff will be violated and that a substantial injury and not merely a possible injury will result from such violation.⁹

§ 2535. Mandatory injunction to remove obstruction to easement.—A mandatory and perpetual injunction may issue, in a proper case, for the removal of existing obstructions to rights of way or to other rights appurtenant to land.¹⁰ But the court will not in every instance of a per-

⁶ *Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Smith v. Young*, 160 Ill. 163, 43 N. E. 486; *McCann v. Day*, 57 Ill. 101; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. 1065; *Cihak v. Kleke*, 117 Ill. 643, 7 N. E. 111; *Lockwood Co. v. Lawrence*, 77 Maine 297, 52 Am. Rep. 763; *Gerrish v. Shattuck*, 128 Mass. 571; *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Nye v. Clark*, 55 Mich. 599, 22 N. W. 57; *Wilmarth v. Woodcock*, 66 Mich. 331, 33 N. W. 400; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509; *Webber v. Gage*, 39 N. H. 182; *Appelgate v. Morse*, 7 Lans. (N. Y.) 59; *Avery v. New York Central & C. R. Co.*, 106 N. Y. 142, 12 N. E. 619; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. 405; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. 717; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

⁷ *Goodhart v. Hyett*, 25 Ch. Div. 182; *Lockwood Co. v. Lawrence*, 77 Maine 297, 52 Am. Rep. 763; *Ballou v. Hopkinton*, 4 Gray (Mass.) 324; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

⁸ *Fletcher v. Bealey*, 28 Ch. Div. 688; *Robinson v. Whittingham*, L. R. 1 Ch. 442; *Lanfranchi v. MacKenzie*, L. R. 4 Eq. 421; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Yates v. Jack*, L. R. 1 Ch. 295; *Martin v. Headon*, L. R. 2 Eq. 425; *Sutton v. Montfort*, 4 Sim. 559; *Wynstanley v. Lee*, 2 Swanst. 333; *Attorney-General v. Nichol*, 16 Ves. 338; *Clawson v. Primrose*, 4 Del. Ch. 643; *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794.

⁹ *Goodhart v. Hyett*, 25 Ch. Div. 182; *Taylor v. Brookman*, 45 Barb. (N. Y.) 106, 1 Abb. Pr. (N. S.) (N. Y.) 169.

¹⁰ *Boland v. St. John's Schools*, 163 Mass. 229, 39 N. E. 1035; *Nash v.*

manent obstruction restore that aggrieved party to his former situation. The court will exercise a sound discretion to determine in each instance whether a mandatory injunction shall issue, and it will not ordinarily be issued when it appears that it will operate inequitably, nor when it appears that there has been an unreasonable delay by the party in seeking the enforcement of his rights, nor when the injury complained of is not serious or substantial and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss.¹¹ But ordinarily a mandatory injunction will issue for the removal of an obstruction after the work has been done where the defendant has gone on after notice and without right in a wilful invasion of the plaintiff's rights, unless the removal of the obstruction would cause a damage to the defendant disproportionate to the injury to the plaintiff, in which case the court may leave the plaintiff to his remedy at law.¹²

§ 2536. Injunction to restrain violation of party-wall agreements.—Injunction is a peculiarly appropriate remedy to restrain the violation of a party-wall agreement because

New England Ins. Co., 127 Mass. 91; Creely v. Bay State Brick Co., 103 Mass. 514; Cadigan v. Brown, 120 Mass. 493; Gurney v. Ford, 2 Allen (Mass.) 576.

¹¹ Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770. And see, Krehl v. Burrell, 7 Ch. D. 551, 11 Ch. D. 146; Dent v. Auction Mart Co., L. R. 2 Eq. 238; Lewis v. Chapman, 3 Beav. 133; Aynsley v. Glover, L. R. 10 Ch. 283; Gaskin v. Balls, 13 Ch. Div. 342; McBryde v. Sayre, 86 Ala. 458, 5 So. 791, 3 L. R. A. 861; Gardner v. Stroeveer, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265; Brauns v. Glesige, 130 Ind. 167, 29 N. E. 1061; Troe v. Larson, 84 Iowa 649, 51 N. W. 179, 35 Am. St. 336; Wharton v. Stevens, 84 Iowa 107, 50 N. W. 592, 15 L. R. A. 630, 35 Am. St. 296; Royal Bank v. Grand

Junction R. &c. Co., 125 Mass. 490; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Dexter v. Beard, 53 Hun (N. Y.) 638, 25 N. Y. St. 664, 7 N. Y. S. 11, 2 Silvernail (N. Y.) 106, affd. 130 N. Y. 549, 29 N. E. 983; Dewitt v. Van Schoyk, 110 N. Y. 7, 17 N. E. 425, 6 Am. St. 342; Davis v. Lambertson, 56 Barb. (N. Y.) 480; Williams v. New York Central R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Avery v. New York Central &c. Co., 106 N. Y. 142, 12 N. E. 619.

¹² White v. Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Gawtry v. Leland, 40 N. J. Eq. 323; Rogers Locomotive & Machine Works v. Erie R. Co., 20 N. J. Eq. 379; Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. 175; Eau Claire v. Matzke, 86 Wis. 291, 56 N. W. 874, 39 Am. St. 900.

of the inadequacy of other remedies, such as ejectment and repeated actions of trespass.¹³ In a case where the violation consists in leaving openings in a wall where the agreement was for a dead wall, "it is no answer to say that the dominant owner stands ready to fill up the openings whenever the servient owner desires to use the wall as a party wall. That very statement admits that it had not meantime been a party wall, and the servitude only renders lawful occupation by an actual party wall. The occupation meantime by what is not a party wall is not the enjoyment of an easement, but is simply a trespass. The injured party is entitled, therefore, to a discontinuance of the injury, and he is entitled to relief in equity."¹⁴ In cases of this character it is not necessary to show irreparable injury in order to authorize the issuance of the writ.¹⁵ The injunction may be granted to restrain these openings in the wall without regard to whether the plaintiff intends to use the wall or not.¹⁶ As a general rule, a party wall means a solid wall without windows or openings; and in the absence of statutory regulation or express agreement between the parties neither has the right to make windows or open-

¹³ *Graves v. Smith*, 87 Ala. 450, 6 So. 308, 5 L. R. A. 298, 13 Am. St. 60; *Corcoran v. Nailor*, 6 Mackey (D. C.) 580; *Bartley v. Spaulding*, 9 Mackey (D. C.) 47; *Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946; *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287; *Sullivan v. Graffort*, 35 Iowa 531; *Normille v. Gill*, 159 Mass. 427, 34 N. E. 543, 38 Am. St. 441; *Weems v. Mayfield*, 75 Miss. 286, 22 So. 892; *Harbor v. Evans*, 101 Mo. 661, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. 646; *Traute v. White*, 46 N. J. Eq. 437, 19 Atl. 196; *Cutting v. Stokes*, 72 Hun (N. Y.) 376, 55 N. Y. St. 184, 25 N. Y. S. 365, affd. 148 N. Y. 730, 42 N. E. 722; *DeBaum v. Moore*, 32 App. Div. (N. Y.) 397, 52 N. Y. S. 1092, 6 N. Y. Ann. Cas. 132, affd. 167 N. Y. 598, 60 N. E. 1110; *St. John v. Sweeney*, 59 How. Pr. (N. Y.) 175; *Partridge v. Gil-*

bert, 15 N. Y. 601, 69 Am. Dec. 632; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Van Syckel v. Tryon*, 6 Phila. (Pa.) 401; *In re Vollmer's Appeal*, 61 Pa. St. 118; *In re Milne's Appeal*, 81 Pa. St. 54; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627; *Everly v. Driskill*, 24 Tex. Civ. App. 413, 58 S. W. 1046.

¹⁴ *Corcoran v. Nailor*, 6 Mackey (D. C.) 580.

¹⁵ *Graves v. Smith*, 87 Ala. 450, 6 So. 308, 5 L. R. A. 298, 13 Am. St. 60; *Fidelity Lodge v. Bond*, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; *Harber v. Evans*, 101 Mo. 661, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. 646; *Everly v. Driskill*, 24 Tex. Civ. App. 413, 58 S. W. 1046; *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627.

¹⁶ *Harber v. Evans*, 101 Mo. 661, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. 646.

ings in the wall and such a right is not conferred by an agreement giving either one the right "to use said party wall free of expense in the erection of any building which he may wish to erect on said lot."¹⁷

§ 2537. Injunction to restrain sale under mortgage fraudulently executed.—Where there was fraud in the execution of a mortgage an injunction may be granted to restrain a sale under the mortgage until the validity of the mortgage has been determined in the proper forum.¹⁸ The right to the writ is ordinarily confined to the parties to the mortgage and may not be had where innocent third parties are involved.¹⁹ In any case the fraud must be clearly established by the evidence. But this rule is not so strictly enforced where the parties sustain a fiduciary relation to each other.²⁰ An injunction is proper to restrain a sale under a deed absolute which is claimed to be a mortgage in fact and was so executed through fraud of the party sought to be enjoined.²¹

§ 2538. Injunction against sale under power of sale mortgage.—So long as the creditor exercises only his legal right, although this be contrary to the wishes and interest of the mortgagor, a court of equity will not interfere with a sale under a power of sale mortgage or trust deed.²²

¹⁷ *Graves v. Smith*, 87 Ala. 450, 6 So. 308, 5 L. R. A. 298, 13 Am. St. 60. But see, *Hammann v. Jordan*, 129 N. Y. 61, 29 N. E. 294.

¹⁸ *Robertson v. Norris*, 4 Jur. (N. S.) 155; *Southampton Boat Co. v. Muntz*, 12 Wkly. Rep. 330; *New England Mortgage Sec. Co. v. Powell*, 97 Ala. 483, 12 So. 55; *Struve v. Childs*, 63 Ala. 473; *Walker v. Radford*, 67 Ala. 446; *Welch v. Whittemore*, 25 Maine 86; *Brick Co. v. Robinson*, 55 Md. 410; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333, 19 Am. Dec. 329; *Montgomery v. McEwen*, 9 Gil. (Minn.) 93; *Pierson v. Ryerson*, 14 N. J. Eq. 181; *Bennett v. Wright*, 77 Hun (N. Y.) 331, 60 N. Y. St. 63, 28 N. Y. S. 453; *Foster v. Hughes*, 51 How. Pr. (N. Y.) 20; *Brown v. Cherry*, 56 Barb. (N. Y.) 635, 38 How. Pr.

(N. Y.) 352; *Ponton v. McAdoo*, 71 N. Car. 101; *Mosby v. Hodge*, 76 N. Car. 387; *Kornegay v. Spicer*, 66 N. Car. 95; *Bridgers v. Morris*, 90 N. Car. 32; *Pritchard v. Sanderson*, 84 N. Car. 299.

¹⁹ *Putney v. Kohler*, 84 Ga. 528, 11 S. E. 127.

²⁰ *MacLeod v. Jones*, 24 Ch. D. 289. ²¹ *Mallory v. Cowart*, 90 Ga. 600, 16 S. E. 658; *Peeler v. Barringer*, 1 Wins. Eq. (N. Car.) 5.

²² *Kershaw v. Kalow*, 1 Jur. (N. S.) 974; *Warner v. Jacob*, L. R. 20 Ch. Div. 220; *Struve v. Childs*, 63 Ala. 473; *Montgomery v. McEwen*, 9 Gil. (Minn.) 93; *Bedell v. McClellan*, 11 How. Pr. (N. Y.) 172; *Holland v. Citizen's Sav. Bank*, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

The sale will be enjoined only when the rights of the petitioner are clear or free from reasonable doubt. He must show a good reason for asking the interference of the court.²³ He must show by a clear preponderance of the evidence that the mortgagee is about to proceed in an improper or oppressive manner and not merely that he might adopt a different remedy;²⁴ that the mortgage creditor is claiming more than is due on the debt; that the mortgage was made without consideration; that the consideration has failed;²⁵ or that the debt has been satisfied;²⁶ or that the accounts are so complicated that the parties can not state them and ascertain the amount due.²⁷ In general, a stronger case must be presented to the court to obtain an injunction against a proposed sale under a power than to obtain a decree setting it aside after it is made.²⁸ The fact that the mortgaged property greatly exceeds the amount of the mortgage debt; that the sale will greatly injure the mortgagor, who is unable to pay the mortgage debt; and that the mortgagee threatens to sell unless a second mortgage is paid, and to thereby obtain an advantage and oppress the mortgagor—are not grounds for enjoining the sale.²⁹ And it is no ground for enjoining a foreclosure under a power that the mortgage was made for the purpose of defrauding the creditor of the mortgagor if it was in fact given to secure an actual indebtedness.³⁰ Neither is the mere fact that the mortgagor was insane at the time of the execution of the mortgage a sufficient ground for enjoining the sale, if the mortgagee took the mortgage in

²³ *Johnson Co. v. Henderson*, 83 Md. 125, 34 Atl. 835.

²⁴ *Security Loan Assn. v. Lake*, 69 Ala. 456; *Bramlett v. Reily* (Miss.), 3 So. 658; *Bedell v. McClellan*, 11 How. Pr. (N. Y.) 172.

²⁵ *VanMeter v. Hamilton*, 96 Mo. 654, 10 S. W. 71. See, for cases in which injunction has been granted for over-statement of amount in notice of sale, or the like, note to *Ekerberg v. McKay* (114 Minn. 501, 131 N. W. 787), in *Ann. Cas.* 1912C, 568, 572.

²⁶ *Frazier v. Keller*, 71 Md. 58, 20

Atl. 134; *Knight v. Jackson*, 36 S. Car. 10, 14 S. E. 982.

²⁷ *Security Loan Assn. v. Lake*, 69 Ala. 456; *Hinson v. Brooks*, 67 Ala. 491; *Muller v. Stone*, 84 Va. 834, 6 S. E. 223.

²⁸ *Kershaw v. Kalow*, 1 Jur. (N. S.) 974; *Glover v. Hembree*, 82 Ala. 324, 8 So. 251.

²⁹ *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11.

³⁰ *Devlin v. Quigg*, 44 Minn. 534, 47 N. W. 258, 10 L. R. A. 665, 20 Am. St. 592; *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74.

ignorance of the insanity in perfect good faith and without taking any advantage.³¹ Neither is it a sufficient ground for enjoining the sale that the notes secured reserve usurious interest or include it, except in those states where usury renders the contract void.³² Where usury does not invalidate the mortgage a sale under a power will not be enjoined by reason of it unless the debtor brings into court the principal and the legal interest due.³³ Generally a sale under a power will not be enjoined in order that the mortgagor may be enabled to set off a balance which may be found in his favor upon liquidated claims in controversy between him and the mortgagee;³⁴ nor to enable the mortgagor to prosecute a bill to correct an alleged error in the amount of the mortgage.³⁵

§ 2539. Injunction against sale under power of sale mortgage—Grounds in general.—There may also be an injunction against the execution of the power of sale by reason of circumstances arising after the making of the mortgage, in consequence of which its execution would be inequitable; but the court will not ordinarily interfere in such cases except upon strong reasons.³⁶ The fact that part of the principal of the debt has been paid does not warrant an injunction against the sale, unless it be in restraint of selling more than enough to pay the amount due,³⁷ but payment of the entire debt affords ground for such injunction.³⁸

³¹ *Gribben v. Maxwell*, 34 Kans. 8, 7 Pac. 584; *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *French v. Snell*, 29 N. J. Eq. 95; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Wirebach's Exr. v. First Nat. Bank*, 97 Pa. St. 543, 99 Am. Rep. 821.

³² *Norman v. Peper*, 24 Fed. 403; *Tooke v. Newman*, 75 Ill. 215.

³³ *Eslava v. Crampton*, 61 Ala. 507; *Alston v. Marshall*, 112 Ala. 638, 20 So. 850; *Mosely v. Rambo*, 106 Ga. 597, 32 S. E. 638; *Powell v. Hopkins*, 38 Md. 1; *Walker v. Cockey*, 38 Md. 75; *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727, 33 Am. St. 512.

³⁴ *Glover v. Hembree*, 82 Ala. 324, 8 So. 251; *Tate v. Evans*, 54 Ala. 16;

McDaniel v. Cowart, 109 Ga. 419, 34 S. E. 589; *Gregg v. Hight*, 6 Mo. App. 579; *Frieze v. Chapin*, 2 R. I. 429; *National Rubber Co. v. Rhode Island Hospital Trust Co. (R. I.)*, 33 Atl. 254; *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11; *Robertson v. Hogshead*, 3 Leigh. (Va.) 667; *Koger v. Kane's Admr.*, 5 Leigh. (Va.) 606.

³⁵ *Outtriv v. Graves*, 1 Barb. Ch. (N. Y.) 49.

³⁶ *Frieze v. Chapin*, 2 R. I. 429.

³⁷ *Powell v. Hopkins*, 38 Md. 1.

³⁸ *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Green v. Engelmann*, 59 Mich. 460; *James v. Withers*, 126 N. Car. 715, 36 S. E. 178.

And pending suit throwing doubt on the right of the grantor to execute a deed of trust would be a ground for enjoining a sale under such deed. It would be impossible to secure an adequate price for the property. While this relief might not be granted in favor of the grantor who had contracted to give a power of sale with full knowledge of the circumstances, it would be given for the benefit of one of his innocent creditors.³⁹ The doctrine has been distinctly recognized that a court of equity will not permit a forced sale of lands when clouds are hanging over the title.⁴⁰ It is the duty of a trustee, before making sale of the trust subject, to apply to a court of equity for its aid whenever necessary to remove any impediment in the way of a fair execution of his trust; or to remove the clouds, if any, on the title. If the trustee fails to discharge this duty, then the beneficiary may invoke the aid of a court of equity for that purpose.⁴¹ The fact that at the time of the proposed sale under a mortgage or a trust deed money is scarce, and that the terms of the sale require a large cash payment, has been held no ground for an injunction.⁴² Nor is the fact that there is a general depression in business, and that the weather is inclement at the season of the year of the proposed sale, a ground for injunction.⁴³ Neither are hard times a ground for setting aside a sale which has already been made.⁴⁴ It is a good ground for injunctive relief that a deed of trust and the remedy thereon are barred by reason of ten years' adverse possession.⁴⁵ So, an injunction was held properly issued to restrain a mortgagee who undertook to foreclose for an amount greatly in excess of that due.⁴⁶

³⁹ Lane v. Tidball, Gilmer (Va.) 130; Morgan v. Glendy, 92 Va. 86, 22 S. E. 854.

⁴⁰ Miller v. Argyle's Exr., 5 Leigh (Va.) 460; Gay v. Hancock, 1 Rand. (Va.) 72.

⁴¹ Glenn v. Augusta Perpetual Bldg. & Loan Co., 99 Va. 695, 40 S. E. 25.

⁴² Muller v. Bayly, 21 Grat. (Va.) 521; Muller v. Stone, 84 Va. 834, 6 S. E. 223.

⁴³ Anderson v. White, 2 App. D. C.

408; Caperton v. Landcraft, 3 W. Va. 540.

⁴⁴ Lipscomb v. New York Life Ins. Co., 138 Mo. 17, 39 S. W. 465.

⁴⁵ Goldwater v. Hibernia Saving & Loan Soc. (Cal. App.), 126 Pac. 861; Gardner v. Terry, 99 Mo. 523, 12 S. W. 888, 7 L. R. A. 67; Scott v. District Court, 15 N. Dak. 259, 107 N. W. 61.

⁴⁶ Carey v. Fulmer, 74 Miss. 729, 21 So. 752. See also, ante § 2538, n. 25.

§ 2540. Insolvency of trustee in deed of trust as ground for injunction.—The insolvency of the trustee in a deed of trust is not a ground for restraining a sale of the property upon the application of the grantor unless it is shown that there is danger that the trustee will misapply the moneys arising from the sale.⁴⁷ “Insolvency, or the want of a large capital, by no means implies a want of integrity or business capacity. He may have these in the highest degree and yet be poor.”⁴⁸ But upon the application of one who is interested in the disbursement of the money and the showing of sufficient cause a court of equity should require security of the trustee before allowing him to proceed with the execution of the trust.⁴⁹

§ 2541. Injunction against sale under power of sale mortgage—Powers of court where jurisdiction has been obtained.—Where a court of equity has once acquired jurisdiction of the parties and of the subject-matter in an action to enjoin a sale, it may direct a sale of the land and it is not always bound to direct such sale in strict accordance with the terms of the mortgage.⁵⁰ Having acquired jurisdiction the court may properly enjoin an action at law upon the notes secured by the mortgage.⁵¹ Where the enforcement of a sale under a trust deed has been enjoined, a sale under execution issued on the judgment of foreclosure, while the injunction is still in force, is a contempt of court and passes no title.⁵² Payment of the amount justly due under a mortgage should be tendered to entitle the person seeking the injunction to the consideration of the court.⁵³

⁴⁷ *Tooke v. Newman*, 75 Ill. 215.

⁴⁸ *Tooke v. Newman*, 75 Ill. 215.

⁴⁹ *Terry v. Fitzgerald*, 32 Grat. (Va.) 843; *Hogan v. Duke*, 20 Grat. (Va.) 244. See also, *Foster v. Goodrich*, 127 Mass. 176. And compare, *Jackson Co. v. Gardiner Inv. Co.*, 200 Fed. 113.

⁵⁰ *Manning v. Elliott*, 92 N. Car. 48.

⁵¹ *Whitley v. Dunham Lumber Co.*, 89 Ala. 493, 7 So. 810; *North Eastern R. Co. v. Barrett*, 65 Ga. 601; *Hadfield v. Bartlett*, 66 Wis. 634, 29 N. W. 639.

⁵² *Lash v. McCormick*, 14 Gil. (Minn.) 359; *Ward v. Billups*, 76 Tex. 466, 13 S. W. 308.

⁵³ *Williams v. Troy*, 39 Ala. 118; *New England Mortgage Co. v. Powell*, 97 Ala. 483, 12 So. 55; *American Freehold Land-Mortgage Co. v. Sewell*, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; *Norman v. Peper*, 14 Fed. 403; *Sloan v. Coolbaugh*, 10 Iowa 31; *Powell v. Hopkins*, 38 Md. 1; *Barber v. Levy* (Miss.), 18 So. 438; *Meysenburg v. Schlieper*, 46 Mo. 209; *Vechte v. Brownell*, 8 Paige (N. Y.) 212;

§ 2542. Injunction to prevent waste by a mortgagor.—

An injunction will lie to restrain a mortgagor or any one claiming under him from cutting timber, removing fixtures or committing other waste on the land to an extent calculated to render the security inadequate; and it is not necessary to allege or prove the insolvency of the mortgagor.⁵⁴ As a general rule, equity will not interfere to enjoin the mortgagor unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency. It is the mortgagee's right that the property shall be kept ample to secure the mortgage debt.⁵⁵ A vendee in possession under a contract of purchase occupies a like position to that of a mortgagor and may be enjoined in the same manner from committing waste.⁵⁶ The injunction may also be had upon the application of any one who stands in the relation of a surety of the mortgage debt and who is either liable personally for its payment, or whose property is liable by reason of being embraced in the mortgage. He has a right to protect the principal fund and to save himself from consequent loss.⁵⁷ It may also be had upon application by the purchaser at a

Carver v. Brady, 104 N. Car. 219, 10 S. E. 565; *Cook v. Patterson*, 103 N. Car. 127, 9 S. E. 402. See also, *Craft v. Link*, 135 Ga. 521, 69 S. E. 742; *Stanley v. Gadsby*, 10 Pet. (U. S.) 521, 9 L. ed. 518. But see, *Macleod v. Jones*, 24 Ch. Div. 289; *Lance v. Rumbough*, 150 N. Car. 19, 63 S. E. 357.

⁵⁴ *Goodman v. Kine*, 8 Beav. 379; *Usborne v. Usborne*, Dick. 75; *Hippesley v. Spencer*, 5 Madd. 422; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Bagnall v. Villar*, L. R. 12 Ch. Div. 812; *Coker v. Whitlock*, 54 Ala. 180; *Robinson v. Russell*, 24 Cal. 467; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 22 Pac. 184, 13 Am. St. 147; *Dorr v. Dudderar*, 88 Ill. 107; *Harris v. Bannon*, 78 Ky. 568, 1 Ky. L. (abstract) 259; *Collins v. Rea*, 127 Mich. 273, 86 N. W. 811; *Adams v. Corriston*, 7 Gil. (Minn.) 365; *State Saving Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Betz v. Verner*, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R.

A. 630, 19 Am. St. 387; *American Trust Co. v. North Belleville Quarry Co.*, 31 N. J. Eq. 89; *Fairbank v. Cudworth*, 33 Wis. 358; *Scott v. Webster*, 50 Wis. 53, 6 N. W. 363; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22; *Bunker v. Locke*, 15 Wis. 635. Compare also, *Whitworth v. Barnes* (Mo. App.), 153 S. W. 538.

⁵⁵ *Humphreys v. Harrison*, 1 Jac. & W. 581; *King v. Smith*, 2 Hare 239; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Vanderslice v. Knapp*, 20 Kans. 647; *Harris v. Bannon*, 78 Ky. 568, 1 Ky. L. (abstract) 259; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507.

⁵⁶ *McCaslin v. State*, 44 Ind. 151; *Thompson v. Heywood*, 129 Mass. 401; *Kimball v. Darling*, 32 Wis. 675; *Taylor v. Collins*, 51 Wis. 123, 18 N. W. 22.

⁵⁷ *Knarr v. Conaway*, 42 Ind. 260; *Johnson v. White*, 11 Barb. (N. Y.) 194.

foreclosure sale pending its confirmation.⁵⁸ If pending a preliminary injunction to restrain waste the mortgage is foreclosed, and the property purchased for enough to pay the debt and costs, the injunction should be dissolved.⁵⁹ In order to prevent a multiplicity of suits, the courts in granting an injunction to stay the commission of waste have sometimes as an incident decreed an account for waste already done.⁶⁰ However, it is not the duty of a mortgagee to enjoin waste, although it is his right, or the right of a purchaser of the equity of redemption of a part of the mortgaged property; and a subsequent mortgagee or purchaser of a part of the mortgaged property can not require an account from the mortgagee of waste committed upon other portions of the property by the mortgagor or others, and an allowance of the damage done in part satisfaction of the mortgage debt.⁶¹

§ 2543. Injunction to protect rights under chattel mortgages.—A threatened injury to the rights of a mortgagee of chattels may also be prevented by injunction in a proper case. The mortgagor or any one claiming under him will, for example, be enjoined from disposing of or carrying away any of the mortgaged property.⁶² And especially after forfeiture and after the mortgagee has filed a bill to obtain foreclosure and sale, the court will not permit the mortgagor to sell the property, but will prevent a threatened sale by injunction.⁶³ Equity will likewise protect the interest of the mortgagee in after-acquired property by restraining the mortgagor from disposing of it, especially if the threatened injury to the security would be irreparable.⁶⁴ A mortgagee may invoke the remedy to

⁵⁸ *Malone v. Marriott*, 64 Ala. 486; *Mutual Life Ins. Co. v. National Bank*, 18 Hun (N. Y.) 371.

⁵⁹ *Ellison v. Smyth*, 75 Iowa 570, 39 N. W. 898.

⁶⁰ *Jesus College v. Bloom*, 3 Atk. 262; *Garth v. Cotton*, 1 Ves. 524.

⁶¹ *Coleman v. Smith*, 55 Ala. 368; *Knarr v. Conaway*, 42 Ind. 260.

⁶² *Logan v. Slade*, 28 Fla. 699, 10

So. 25; *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357; *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *Arnett v. Trimmer*, 43 N. J. Eq. 488, 11 Atl. 487.

⁶³ *Chapman v. Hunt*, 13 N. J. Eq. 370.

⁶⁴ *Wood v. Rowcliffe*, 3 Hare 304.

prevent a loss of his security through proceedings in behalf of other creditors of the mortgagor.⁶⁵ But inasmuch as the mortgagee, after default, has the absolute legal title to the property, at least in some jurisdictions, it would seem that his legal remedy would be sufficient for his protection and that a court of equity would decline to interfere by injunction.⁶⁶ But where the property is in possession of the mortgagor the court will protect the mortgagee by enjoining a sale until the debt is paid, or a decree of foreclosure and sale is rendered. The necessity for such protection may arise in case the mortgage covers only an undivided interest in property so that the mortgagee has no right to possession as against the other part owner.⁶⁷ The mortgagee may not have the sale of the mortgaged property under execution by creditor of the mortgagor enjoined when the property was in the possession of the mortgagee at the time of its seizure, provided the property be such that its value may be measured in money, for in such case the legal remedy is adequate.⁶⁸ The removal of the mortgaged chattels beyond the jurisdiction of the court may be enjoined before default or before the mortgagee can proceed at law. The ground of jurisdiction in such a case is the prevention of injury to the present or future rights of the mortgagee for the protection of which there is no appropriate or adequate remedy at law.⁶⁹ This, of course, does not prevent a temporary removal of the property from the jurisdiction of the court where there is an honest intention to return it before the maturity of the debt.⁷⁰

§ 2544. Right of a mortgagor of chattels to enjoin mortgagee from taking possession.—The mortgagor may in a proper case have the mortgagee enjoined from taking pos-

⁶⁵ McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357; Curd v. Wunder, 5 Ohio St. 92.

⁶⁶ Adams v. Nebraska City National Bank, 4 Nebr. 370.

⁶⁷ Hall v. Bellows, 11 N. J. Eq. 333.

⁶⁸ LaMothe v. Fink, 8 Biss. (U. S.) 493, Fed. Cas. No. 8032.

⁶⁹ Logan v. Slade, 28 Fla. 299, 10 So. 25; Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Chapman v. Hunt, 13 N. J. Eq. 370.

⁷⁰ Walker v. Radford, 67 Ala. 446.

session of the mortgaged property. Thus, where the mortgagor has the right to retain possession for a stipulated period, it has been held that he may by injunction prevent the mortgagee from taking possession before the expiration of the time limited.⁷¹ But where the mortgagee has the right to take possession and sell whenever he may deem himself insecure, the mortgagor can not restrain him by an injunctive order, and require him to accept a tender of additional security for the mortgage debt. The mortgagee, under such a clause in a mortgage, has the right to assert his possession and a court of equity will not interfere.⁷²

§ 2545. Protection of corporate franchise by injunction.

—It is well settled that a corporation may resort to a court of equity for the protection of its franchise against threatened invasion or destruction. This jurisdiction is exercised to prevent irreparable injury or such injury as can not be adequately estimated in damages at law, or to avoid a multiplicity of suits, or on the theory of the abatement of annoyance in the nature of a legal nuisance.⁷³ The writ is often invoked in cases where it is sought to protect an exclusive franchise.⁷⁴ It goes without saying that a mere exercise of a corporate franchise may not be enjoined, for an injunction to restrain the exercise of a corporate power would be equivalent to saying that while corporators may retain the form, they can not exercise the functions, of a corporation.⁷⁵ The main principle is frequently invoked

⁷¹ *Ford v. Ransom*, 8 Abb. Pr. (N. S.) (N. Y.) 416, 39 How. Pr. (N. Y.) 429.

⁷² *Cline v. Libby*, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.

⁷³ *Mobile v. Louisville &c. R. Co.*, 84 Ala. 115, 4 So. 106, 5 Am. St. 342; *Moses v. Mobile*, 52 Ala. 198; *Walker v. Armstrong*, 2 Kans. 198; *Boston & L. R. Corp. v. Salem &c. R. Co.*, 2 Gray (Mass.) 1; *Croton Turnpike Road Co. v. Ryder*, 1 Johns. Ch. (N. Y.) 611.

⁷⁴ *Walker v. Armstrong*, 2 Kans. 198; *Boston & L. R. Corp. v. Salem*

&c. R. Co., 2 Gray (Mass.) 1; *St. Louis R. Co. v. Northwestern &c. R. Co.*, 69 Mo. 65; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, *affd.* 110 Mo. 557, 19 S. W. 809; *Raritan & D. B. R. Co. v. Delaware &c. Canal Co.*, 18 N. J. Eq. 546; *Newburgh &c. Turnpike Co. v. Miller*, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 274.

⁷⁵ *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971, *affd.* 56 N. J. Eq. 847, 42 Atl. 1117; *Elizabethtown Gas-Light Co. v. Green*, 46 N. J. Eq.

by railroad companies to protect their property. The right to build and operate a railroad for the use of the public is a franchise which can only be conferred by the state directly or indirectly. And when a franchise is granted for such purpose it is in its nature, and in the absence of express provision to the contrary, exclusive, except as against the sovereign granting the franchise, and it has accordingly been held that a competing railroad established without legislative authority may be enjoined and that the franchise of the first railroad will be protected.⁷⁶ And a street railroad company may have resort to the writ to protect its franchise. To entitle it to this right it is not necessary that it have an exclusive franchise, but if its franchise is simply the right to lay and operate its road in a particular street or streets, still any unauthorized encroachment or trespass upon this right may be enjoined.⁷⁷ Injunction will also lie to enjoin a railroad company from operating its road on a street or highway without authority.⁷⁸

§ 2546. Injunction to protect ferry franchise.—Injunc-

118, 18 Atl. 844, affd. 49 N. J. Eq. 329, 24 Atl. 560.

⁷⁶ *Raritan & D. B. R. Co. v. Delaware &c. Canal Co.*, 18 N. J. Eq. 546.

⁷⁷ *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 523; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223, 10 Ky. L. 125, 8 S. W. 329; *Boston & L. R. Corp. v. Salem &c. R. Co.*, 2 Gray (Mass.) 1; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 262; *Jersey City & H. H. R. Co. v. Jersey City & B. R. Co.*, 21 N. J. Eq. 550.

⁷⁸ *Columbus & W. R. Co. v. Withers*, 82 Ala. 190, 3 So. 23; *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271, 2 S. E. 636; *Georgia Southern & F. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. 311; *Cornwall v. Louisville & N. R. Co.*, 87 Ky. 72, 9 Ky. L. 924, 7 S. W. 553; *Conner v. Covington Transfer R. Co.*, 14 Ky. L. 135, 19 S. W. 597; *Bell v. Edwards*, 37 La. Ann. 475; *Riedinger*

v. Marquette &c. R. Co., 62 Mich. 29, 28 N. W. 775; *Adams v. Chicago &c. R. Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. 644; *Theobald v. Louisville &c. R. Co.*, 66 Miss. 279, 6 So. 230, 4 L. R. A. 735, 14 Am. St. 564; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547; *Heer Dry Goods Co. v. Citizens R. Co.*, 41 Mo. App. 63; *Story v. New York &c. R. Co.*, 90 N. Y. 122, 11 Abb. N. Cas. (N. Y.) 236; 43 Am. Rep. 146; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. 461; *White v. Northwestern &c. R. Co.*, 113 N. Car. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. 639; *State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434; *Barker v. Hartman Steel Co.*, 129 Pa. St. 551, 18 Atl. 553; *Dooly Block v. Salt Lake &c. Co.*, 9 Utah 31, 33 Pac. 229, 27 L. R. A. 610; *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. 142. See also, *Hart v. Buckner*, 54 Fed. 925, 5 C. C. A. 1.

tion is an appropriate remedy for the protection of an exclusive ferry franchise on the theory of irreparable injury and the prevention of a multiplicity of suits.⁷⁹ The injunction may be had at the suit of a company having a state license to operate the ferry, although the grant of the exclusive privilege was made by a board having no authority to grant the franchise in the first instance.⁸⁰ But courts will hesitate to grant the injunction in cases where the ferry company fails to perform its duties in full and this failure is owing to inadequate equipment.⁸¹

§ 2547. Injunction against ultra vires acts of corporations.—Equity has jurisdiction to prevent corporations from performing ultra vires, unauthorized or illegal acts.⁸² But courts will not enjoin a corporation from performing acts within its corporate power, merely because some of the steps taken in its organization may have been irregular or because the purpose of the corporation may have been to establish a monopoly.⁸³ It is now well settled that the courts have the power to grant an injunction at the suit of an individual injuriously affected by the ultra vires acts of a corporation.⁸⁴ Injunction may also be awarded on be-

⁷⁹ *Hazelip v. Lindsey*, 93 Ky. 14, 13 Ky. L. 913, 18 S. W. 832; *McRoberts v. Washburne*, 10 Gil. (Minn.) 8; *Midland Terminal & Co. v. Wilson*, 28 N. J. Eq. 537; *Power v. Athens*, 99 N. Y. 592; *Broadnax v. Baker*, 94 N. Car. 675, 55 Am. Rep. 633; *Laredo v. Martin*, 52 Tex. 548; *Conway v. Taylor's Exrx.*, 1 Black (U. S.) 603, 17 L. ed. 191; *Mason v. Harper's Ferry*, 17 W. Va. 396.

⁸⁰ *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

⁸¹ *Texas & P. R. Co. v. Baton Rouge*, 36 Fed. 845.

⁸² *Chicago Fair Grounds Assn. v. People*, 60 Ill. App. 488; *Binney's Case*, 2 Bland (Md.) 99. See also, *Trust Co. of Ga. v. State*, 107 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; *Louisville & C. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476; 1 *Elliott R. R.* (2nd ed.), § 376.

⁸³ *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971, aff'd. 56 N. J. Eq. 847, 42 Atl. 1117.

⁸⁴ *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; *Blakemore v. Glamorganshire Canal Nav. Co.*, 1 Myl. & K. 154; *Coates v. Clarence R. Co.*, 1 Russ. & M. 181; *Dawson v. Paver*, 5 Hare 415; *Bagshaw v. Eastern Un. Ry.*, 7 Hare 114; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *O'Brien v. Norwich & C. R. Co.*, 17 Conn. 372; *Newhall v. Galena & C. R. Co.*, 14 Ill. 273; *Rowe v. Granite Bridge Corp.*, 21 Pick. (Mass.) 344; *Newburyport Turnpike Co. v. Eastern R. Co.*, 23 Pick. (Mass.) 326; *Boston & L. R. Corp. v. Salem & C. R. Co.*, 2 Gray (Mass.) 1; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. (Md.) 479, 29 Am. Dec. 561; *Alpena v. Kelley* (Alpena Circuit Judge), 97 Mich. 550, 56 N. W. 941; *Browning v. Camden & C. Transp. Co.*, 4 N. J. Eq. 47; *Kean*

half of the state to prevent the performance of ultra vires acts that may be injurious to the rights of the public.⁸⁵ The state, proceeding in its own name or by the attorney-general, may invoke the aid of a court of equity to restrain illegal and ultra vires acts, threatened or attempted by a corporation, where such acts will result in harm to the state in its property rights or will injuriously affect the public; and the fact that the state may proceed by quo warranto will not prevent equity from exercising its jurisdiction.⁸⁶

§ 2548. Injunction at suit of individual stockholder to prevent unlawful acts.—A single stockholder may maintain an action, in a proper case, to enjoin or prevent the corporation from performing an illegal act and from the performance of continuous ultra vires acts. The courts are always

v. Johnson, 9 N. J. Eq. 401; Water Commissioner v. Hudson, 13 N. J. Eq. 420; Mohawk Bridge Co. v. Utica &c. R. Co., 6 Paige (N. Y.) 554; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 463, 7 Am. Dec. 548; McArthur v. Kelley, 5 Ohio 139; Ross v. Page, 6 Ohio 166; Moorhead v. Little Miami R. Co., 17 Ohio 340; Sandford v. Catawissa &c. R. Co., 24 Pa. St. 378, 64 Am. Dec. 667; Bell v. Ohio &c. R. Co., 25 Pa. St. 161, 64 Am. Dec. 687; Osborn v. United States Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Bonaparte v. Camden &c. R. Co., Baldw. (U. S.) 205, Fed. Cas. No. 1617; 1 Elliott R. R. (2nd ed.) §§ 372, 376.

⁸⁵ Attorney-General v. Forber, 2 Myl. & C. 123; Attorney-General v. Aspinall, 2 Myl. & C. 613; Attorney-General v. Poole Corp., 4 Myl. & C. 17; Attorney-General v. Liverpool Corp., 1 Myl. & C. 171; Spencer v. London &c. R. Co., 8 Sim. 193; Milltown v. Stewart, 8 Sim. 371; Attorney-General v. Litchfield Corp., 13 Sim. 547; Attorney-General v. Norwich Corp., 16 Sim. 225; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 216, 52 Am. St. 407; Stockton v. Central R. Co.,

50 N. J. Eq. 489, 25 Atl. 942, 17 L. R. A. 97; Buck Mountain Coal Co. v. Lehigh Coal &c. Co., 50 Pa. St. 91, 88 Am. Dec. 534.

⁸⁶ Columbus v. Jaques, 30 Ga. 506; Trust Co. v. State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; People v. St. Louis, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339; Minke v. Hopeman, 87 Ill. 450, 29 Am. Rep. 63; People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. 433; Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19; State v. Crawford, 28 Kans. 726, 42 Am. Rep. 182; Louisville & N. R. Co. v. Commonwealth, 97 Ky. 675, 17 Ky. L. 427, 31 S. W. 476, affd. 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714; State v. Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; National Trust Co. v. Miller, 33 N. J. Eq. 155; Attorney-General v. Delaware &c. R. Co., 27 N. J. Eq. 631; Stockton v. Central R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. 941; Central Transportation Co. v. Pullman Palace-Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Attorney-General v. Chicago &c. R. Co., 35 Wis. 425.

open to a stockholder to prevent, by injunction or otherwise, the corporation from the perpetration of a fraud against his individual rights.⁸⁷ A minority stockholder may prevent his corporation from effecting a consolidation with another corporation where the act of consolidation is *ultra vires*.⁸⁸ So, a single stockholder may restrain his corporation from organizing another corporation for the purpose of conveying to such new organization a part of its assets, and receiving in return all the stock of the new corporation, which the existing stockholders were required to subscribe for or lose their interest in the assets thus conveyed to the new organization.⁸⁹ So, an objecting stockholder has been held to have the right to restrain directors, though authorized by a majority of the stockholders, from issuing paid certificates of preferred stock on which part of the par value was paid in exchange for outstanding shares of preferred stock, and from placing in the treasury the remaining shares.⁹⁰ So, injunction has been held to be the proper

* *Ex parte Booker*, 18 Ark. 338; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443; *Wright v. Oroville Gold &c. Min. Co.*, 40 Cal. 20; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *Robertson v. Bucklen*, 107 Ill. App. 369; *Emerson v. South Fork Irr. &c. Co.*, 59 Kans. 778, 53 Pac. 756; *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748; *MacGinniss v. Boston &c. Min. Co.*, 29 Mont. 428, 75 Pac. 89; *March v. Eastern R. Co.*, 43 N. H. 515; *Gifford v. New Jersey &c. Transp. Co.*, 10 N. J. Eq. 171; *Elkins v. Camden &c. R. Co.*, 36 N. J. Eq. 5; *Pronick v. Spirits Dis. Co.*, 58 N. J. Eq. 97, 42 Atl. 586; *Donald v. American &c. Refining Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116; *O'Conner v. International Silver Co.*, 68 N. J. Eq. 680, 62 Atl. 408; *Reese v. Bank of Montgomery*, 31 Pa. St. 78, 72 Am. Dec. 726; *Wood v. Union Gospel &c. Assn.*, 63 Wis. 9, 22 N. W. 756. See also, *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *Bliss v. Anderson*, 31 Ala. 612, 70 Am. Dec. 511; *Sears v. Hotchkiss*, 25 Conn. 171, 65 Am. Dec. 557; *Meeker v. Winthrop Iron Co.*, 17

Fed. 48, rev'd. 122 U. S. 635, 30 L. ed. 1243; *Villamil v. Hirsch*, 143 Fed. 654; *Central R. Co. v. Collins*, 40 Ga. 582; *Alexander v. Atlanta &c. R. Co.*, 113 Ga. 193, 38 S. E. 772, 54 L. R. A. 305; *Hough v. Cook County Land Co.*, 73 Ill. 23, 24 Am. Rep. 230; *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Zabriskie v. Cleveland &c. R. Co.*, 23 How. (U. S.) 381, 16 L. ed. 488; *Stevens v. Rutland &c. R. Co.*, 29 Vt. 545; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. 867.

⁸⁸ *Botts v. Simpsonville Turnpike Co.*, 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594n; *Langan v. Francklyn*, 29 Abb. N. Cas. (N. Y.) 102, 20 N. Y. S. 404. See also, *Charlton v. New Castle &c. R. Co.*, 5 Jur. (U. S.) 1096; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

⁸⁹ *Mumford v. Ecuador Dev. Co.*, 111 Fed. 639; *Dunbar v. American Tel. &c. Co.*, 238 Ill. 456, 87 N. E. 521; *Schwab v. Potter Co.*, 194 N. Y. 409, 87 N. E. 670; *Hallenberg v. Greene*, 66 App. Div. (N. Y.) 590, 73 N. Y. S. 403.

⁹⁰ *American Alkali Co. v. Campbell*, 113 Fed. 398.

remedy at the suit of an interested party to prevent the stockholders of a corporation from violating the corporate charter by making a colorable transfer of stock.⁹¹ So, a stockholder of a mutual insurance company was held to have the right to enjoin the corporation or its officers from paying a fraudulent policy from the funds of the corporation, where such officers knew that the policy was fraudulent and where they refused to contest the claim, though requested to do so by the stockholder.⁹² So, a minority stockholder may by injunction prevent his corporation from unlawfully selling, leasing or transferring all its property.⁹³ But it has been held, however, that a stockholder could not enjoin his corporation from selling its products below cost, on the ground that it was doing so for the purpose of driving a competitor into an unlawful combination. Generally, minority stockholders have the right to restrain their corporations from acquiring the stock of a rival corporation for the purpose of preventing competition; and if the stock has been so acquired they are entitled to an injunction to prevent the voting of the stock so purchased.⁹⁴ The authorities also sustain the right of a minority stockholder to enjoin his corporation from entering into a combination, trust or monopoly.⁹⁵

⁹¹ *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559.

⁹² *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216.

⁹³ *New Albany Water Works v. Louisville Banking Co.*, 122 Fed. 776, 58 C. C. A. 576; *Small v. Minneapolis & C. Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Forrester v. Boston & C. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *Kean v. Johnson*, 9 N. J. Eq. 401; *Black v. Delaware & C. Canal Co.*, 24 N. J. Eq. 455. See also, 1 Elliott R. R. (2nd ed.), § 377.

⁹⁴ *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81; *Bigelow v. Calumet & Hecla Min. Co.*, 155 Fed. 869; *Dunbar v. American Tel. & C. Co.*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. 132; Chi-

cago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. 315; *Wheeler v. Pullman Iron & C. Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *Pearson v. Concord R. Co.*, 62 N. H. 537, 13 Am. St. 590; *Currier v. Concord R. Corp.*, 48 N. H. 321; *Fougey v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

⁹⁵ *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. 189; *Small v. Minneapolis & C. Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578. But see, *Leslie v. Lorrillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

§ 2549. **Injunction to restrain unauthorized consolidation of corporations.**—Where the charter of a corporation or the laws of the state give no authority for the consolidation of corporations, an injunction forbidding such consolidation may issue at the suit of a single nonconsenting corporation.⁹⁶ The governing principle is thus stated in one of the English cases: "I apprehend, that it has nowhere been stated, that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that railway companies have no right to enter into new trades or business not pointed out by their acts. * * * They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of parliament, and they have no power of doing anything beyond it."⁹⁷ Consolidating with another company or procuring the franchise of another company running at right angles with the one to which a public aid subscription has been made may justify an injunction to enjoin the officers of a municipal corporation from completing a contract of subscription in aid of a railroad company and issuing bonds in payment therefor.⁹⁸

§ 2550. **Injunction to restrain unauthorized lease by corporation.**—Generally speaking, a stockholder of a corporation, or other party having an interest entitled to protection, has a right to an injunction prohibiting the execution of an unauthorized lease.⁹⁹ Though such a lease is void, yet, since it may cloud titles and rights, an injunction is rightly held to be the appropriate remedy. The tendency of the modern cases is to extend the remedy by injunc-

⁹⁶ Knoxville v. Knoxville & O. R. Co., 22 Fed. 758; Botts v. Simpsonville &c. Co., 88 Ky. 54, 10 Ky. L. 669, 10 S. W. 134, 2 L. R. A. 594; Black v. Delaware &c. Canal Co., 24 N. J. Eq. 455; Young v. Rondont &c. Gas Light Co., 61 Hun (N. Y.) 619, 39 N. Y. St. 602, 15 N. Y. S. 443; Lauman v. Lebanon Val. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; 1 Elliott R. R. (2nd ed.), § 328.

⁹⁷ Colman v. Eastern Counties R. Co., 10 Beav. 1.

⁹⁸ Noesen v. Port Washington, 37 Wis. 168; Perkins v. Port Washington, 37 Wis. 177.

⁹⁹ Tippecanoe County v. Lafayette &c. R. Co., 50 Ind. 85; Pond v. Vermont &c. R. Co., 12 Blatchf. (U. S.) 280, Fed. Cas. No. 11265.

tion,¹ and there is certainly no other remedy so effective or complete in such cases as an injunction. The general doctrine is that where an act is entirely beyond and outside of the scope of the corporate powers, and is one which will injure the public or defeat public policy, an injunction will lie at the suit of the state or its representatives.²

§ 2551. Injunction to control discretion of directors of corporation.—As a general rule, courts of equity will not interfere by way of injunction to control the discretion lodged in the directors in respect to the internal management of the corporation.³ To warrant interference in this respect it must appear that the managing officers are acting in excess of their powers or that their action is fraudulent.⁴ Accordingly, in one of the cases the directors were enjoined from proceeding to collect unpaid subscriptions, where it appeared that part of such directors were insolvent, the solvency of the corporation was doubtful, and it was uncertain whether the money, if collected, would be properly applied.⁵

§ 2552. Injunction to protect corporate name and devices.—The trade name of a corporation and devices adopted by it may be protected by injunction against an unlawful use by another corporation. In the case of devices it is sufficient to sustain the writ that the resemblance is such as to mislead purchasers or those doing business

¹ *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787; *Boston, C. & M. R. Co. v. Boston & C. R. Co.*, 65 N. H. 393, 23 Atl. 529; *Watson v. Sutherland*, 5 Wall. (U. S.) 74, 18 L. ed. 580; *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210, 7 L. ed. 655; *Allen v. Hanks*, 136 U. S. 300, 34 L. ed. 414, 10 Sup. Ct. 961; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. 594; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. 554; *Morse v. Morse*, 44 Vt. 84.

² *Attorney-General v. Delaware & C. R. Co.*, 27 N. J. Eq. 631; *Attorney-General v. Chicago & C. R. Co.*, 35 Wis. 425. See also, *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *Browne*

v. Monmouthshire R. & Canal Co., 13 Beav. 32; *Attorney-General v. Forber*, 2 Myl. & C. 123; *Attorney-General v. Great Northern & C. R. Co.*, 4 De G. & S. 75.

³ *McCarthy v. McKinney* (Ga.), 73 S. E. 394 (de facto officers); *Taylor v. Scranton Poor Dist.*, 2 Lack. Leg. N. (Pa.) 205. See also, *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Ellerman v. Chicago Junct. R. Co.*, 49 N. J. Eq. 217, 23 Atl. 287.

⁴ *Leeman v. Edison Electric Illuminating Co.*, 53 N. Y. S. 302; *Coss v. Herring*, 24 Ohio C. C. 36.

⁵ *Upson v. Rocky River Stone Co.*, 4 Ohio Dec. 547.

with the corporation using the name, who are acting with ordinary caution.⁶

- *Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. 1002; Singer Mfg. Co. v. Bent, 163 U. S. 205, 41 L. ed. 131, 16 Sup. Ct. 1016; Howe Scale Co. v. Wyckoff, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. 609; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. 288; Glen Cove Mfg. Co. v. Ludeling, 23 Blatchf. (U. S.) 46, 22 Fed. 823; Estes v. Leslie, 23 Blatchf. (U. S.) 476, 27 Fed. 22; Consolidated Fruit Jar Co. v. Thomas, Fed. Cas. No. 3131. And see, Collins v. Oliver Ames & Co. Corp., 18 Fed. 561; Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co., 21 Fed. 276, revd. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. 166; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. 94; Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205; Brown Chemical Co. v. Stearns, 37 Fed. 360; Leonard v. White's Golden Lubricator Co., 38 Fed. 922; Price Baking Powder Co. v. Fyfe, 45 Fed. 799; White Co. v. Miller, 50 Fed. 277; Cuervo v. Jacob Henkell Co., 50 Fed. 471; Meyer v. Bull Vegetable Med. Co., 58 Fed. 884, 7 C. C. A. 558; New Home Sewing Machine Co. v. Bloomingdale, 59 Fed. 284; Fairbank Co. v. Central Lard Co., 64 Fed. 133; Pillsbury v. Pillsbury-Washburn Flour-Mills Co., 64 Fed. 841, 12 C. C. A. 432; Rogers Mfg. Co. v. R. W. Rogers Co., 66 Fed. 56; Chattanooga Medicine Co. v. Thedford, 66 Fed. 544, 14 C. C. A. 101; American Grocery Co. v. Sloan, 68 Fed. 539; Hoff v. Tarrant, 71 Fed. 163; Godillot v. American Grocery Co., 71 Fed. 873; Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27; Clark Thread Co. v. Armitage, 74 Fed. 936, 21 C. C. A. 178; Potter Drug & Co. Corp. v. Miller, 75 Fed. 656; Duryea v. National Starch Mfg. Co., 79 Fed. 651, 25 C. C. A. 139; Gage-Downs Co. v. Featherbone Corset Co., 83 Fed. 213; Allegritti Chocolate Cream Co. v. Keller, 85 Fed. 643; Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 89 Fed. 487, revd. 94 Fed. 667, 35 C. C. A. 237; Stuart v. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. 651; National Biscuit Co. v. Baker, 95 Fed. 135; Block v. Standard Distilling & Co., 95 Fed. 978; Petrolia Mfg. Co. v. Bell & Co. Soap Co., 97 Fed. 781; Plant Co. v. May Co., 105 Fed. 375, 44 C. C. A. 534; Wells & Richardson Co. v. Siegel, Cooper Co., 106 Fed. 77; Kosterling v. Seattle Brew. & Co., 116 Fed. 620, 54 C. C. A. 76; Ludington Novelty Co. v. Leonard (Fischer), 119 Fed. 937, affd. 127 Fed. 155, 62 C. C. A. 269; Globe-Wernicke Co. v. Brown, 121 Fed. 185; Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116; National Biscuit Co. v. Ohio Baking Co., 127 Fed. 160, affd. 127 Fed. 116, 62 C. C. A. 116; Breitenbach Co. v. Spangenberg, 131 Fed. 160; American Tin Plate Co. v. Licking Roller Mill Co., 158 Fed. 690; Dr. A. Reed Cushion Shoe Co. v. Frew, 158 Fed. 552; Rowley v. J. F. Rowley Co., 161 Fed. 94, 88 C. C. A. 258; Prest-O-Lite Co. v. Avery Lighting Co., 161 Fed. 648; Hutchinson, Pierce & Co. v. Loewy, 163 Fed. 42, 90 C. C. A. 1. See also, Kyle v. Perfection Mattress Co., 127 Ala. 39, 28 So. 545, 50 L. R. A. 628, 85 Am. St. 78n; Sperry & Co. v. Percival Milling Co., 81 Cal. 252, 22 Pac. 651; Solis Cigar Co. v. Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. 279; Holmes v. Holmes & Co. Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401n; Hygeia Distilled Water Co. v. Hygeia Ice Co., 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147; Foster v. Blood Balm Co., 77 Ga. 216, 3 S. E. 284; Allegritti v. Allegritti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487; Eckhart v. Consolidated Milling Co., 72 Ill. App. 70; Julian v. Hoosier Drill Co., 78 Ind. 408; Keller v. B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. 88; Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa 105, 78 N. W. 803; Rock Springs Distillery Co. v. Monarch, 15 Ky. L. 866, 22 S. W. 1028; Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286; Bagby v. Rivers, 87 Md. 400, 40 Atl. 171, 40 L. R. A.

§ 2553. Injunction to restrain breach of corporate contracts.—As a general proposition, when a corporate contract is one of a class which may be affirmatively and specifically enforced, a court of equity will restrain its breach by injunction if this is the only practicable mode of enforcement which its terms permit.⁷ Accordingly, where a contract between a gas company and a town provided that the company might lay pipes in the streets upon condition that it commenced furnishing gas within one year, the acquisition by the gas company of a two-year lease of gas works was held not such a compliance with the contract as would enable the company after the expiration of the year to enjoin the town from preventing it from laying its pipes in the streets. This was on the theory that the gas company had not complied with its contract to the

632, 67 Am. St. 357; Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. 875; American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. 263; Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co., 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Liggett & Myres Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. 843, 24 Am. St. 313; Plant Seed Co. v. Michel Plant & Co., 37 Mo. App. 313; Drummond Tobacco Co. v. Addison Tinsley Tobacco Co., 52 Mo. App. 10; Gaines v. E. Whyte Grocery, Fruit & Wine Co., 107 Mo. App. 507, 81 S. W. 648; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658; Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co., 69 N. J. Eq. 159, 60 Atl. 561, aff'd. 71 N. J. Eq. 300, 71 Atl. 1134; International Silver Co. v. Rogers, 72 N. J. Eq. 933, 67 Atl. 105, 129 Am. St. 722; Congress & Co. Spring Co. v. High Rock & Co. Spring Co., 45 N. Y. 291, 10 Abb. Pr. (N. S.) (N. Y.) 348, 6 Am. Rep. 82; Taendsticksfabricks Aktiebolaget Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; Button & Co. v. Cupples, 117 App. Div. (N. Y.) 172, 102 N. Y. S. 309; Laurer Brewing Co. v. Ehresman, 127 App. Div. (N. Y.) 486, 111 N. Y. S. 266; New York Cab. Co. v.

Mooney, 15 Abb. N. Cas. (N. Y.) 152; United States Mercantile Rep. Co. v. United States & Co. Rep. Assn., 21 Abb. N. Cas. (N. Y.) 115; McKenzie v. Soden Mineral Springs Co., 27 Abb. N. Cas. (N. Y.) 402, 18 N. Y. S. 240; Kinney Tobacco Co. v. Maller, 53 Hun (N. Y.) 340, 25 N. Y. St. 44, 6 N. Y. S. 389; Delong v. Delong Hook & Eye Co., 89 Hun (N. Y.) 399, 70 N. Y. St. 161, 35 N. Y. S. 509; Humphreys Homeopathic Medicine Co. v. Bell, 15 Daly (N. Y.) 6, 16 N. Y. St. 610, 2 N. Y. S. 50; Electro-Silicon Co. v. Trask, 59 How. Pr. (N. Y.) 189; India Rubber Co. v. Rubber Comb & Jewelry Co., 45 N. Y. Super. Ct. 258; Omega Oil Co. v. Weschler, 35 Misc. (N. Y.) 441, 71 N. Y. S. 983; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Backus Oil Co. v. Backus Oil & Co. Grease Co., 8 Ohio Dec. 93, 5 Wkly. L. Bul. (Ohio) 546; Simmons Med. Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165; Listman Mill Co. v. William Listman Milling Co., 88 Wis. 334, 60 N. W. 261, 43 Am. St. 907n.

⁷McCabe v. Crosier, 69 Ill. 501; Chicago, B. & Q. R. Co. v. Reno, 113 Ill. 39; Chicago Municipal Gas Light & Fuel Co. v. Lake, 130 Ill. 42, 22 N. E. 616.

extent of preparing itself permanently to supply the city with gas.⁸ As a general rule, a corporation may not be enjoined from violating contracts of its stockholders, for the corporation has such a personality of its own and is so distinct from that of its stockholders that it is not affected by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and it is not bound to discharge any personal obligations assumed by its stockholders.⁹ The principle was applied in a case where a manufacturing corporation sold its business to one of its stockholders, who thereafter transferred it to a third person under an agreement not to enter into the same business, directly or indirectly; but this agreement was not made on behalf of the corporation nor signed by it. In an action to enjoin the corporation the court held that the corporation was not bound by the agreement made by the stockholders.¹⁰ But this principle will not be applied where persons combined to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention, and have resorted to the fiction of corporate entity for the purpose of freeing themselves from some individual obligation or contract entered into by them prior to the organization of the corporation and with respect to the business to be transacted by the proposed corporation. In such a case, when justice requires it, equity will disregard and look beyond the fiction of corporate entityship and compel the alleged corporation to perform or prevent it from performing, as the case may be, the obligation of such associates, and this may be done even though some of the shareholders were not parties to the original obligation, provided they had notice of it be-

⁸ *Chicago Municipal Gas Light & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616.

⁹ *Caledonian & D. J. R. Co. v. Helensburgh*, 2 McQ. H. L. 391; *Morrison v. Gold Mountain Gold Mining Co.*, 52 Cal. 306; *Hawkins v. Mansfield Gold Mining Co.*, 52 Cal. 513; *American Preservers' Co. v. Norris*,

43 Fed. 711; *Davis Imp. Wrought Iron Wagon Wheel Co. v. Davis & Co. Wagon Co.*, 20 Fed. 699; *Gent v. Manufacturers' & Merchants' Mut. Ins. Co.*, 107 Ill. 652; *Penn Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22.

¹⁰ *American Preservers' Co. v. Norris*, 43 Fed. 711.

fore entering the corporation, and participated in an effort to avoid it.¹¹ Before an injunction will be granted to prevent a corporation from violating a contract entered into by its stockholders, it must be alleged that such stockholders fraudulently formed the corporation or formed the corporation for the fraudulent purpose of violating the contract made by its stockholders.¹²

§ 2554. Injunction to restrain manipulation of stock by a corporation.—The act of a corporation in “watering” its stock is ultra vires and may be restrained on application of a nonconsenting stockholder, but the injunction should not be so wide in its application as to affect stock legitimately issued.¹³ The right may likewise issue to prevent an illegal reduction of the capital stock.¹⁴ The injunction is also authorized in cases of a wrongful issue of preferred stock by the corporation.¹⁵

§ 2555. Injunction to restrain expulsion or suspension from clubs or associations.—Injunction is not an inappropriate remedy to prevent the carrying out of an illegal order for the expulsion or suspension of a member from a club or association.¹⁶ To authorize the writ it must be shown that the expulsion or suspension was in violation of the constitution or by-laws of the association.¹⁷ Ordinarily, there can be no reinstatement where the proceedings leading to the expulsion have conformed to the procedure laid

¹¹ Moore &c. Hardware Co. v. Towers Hdw. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23; Davis Imp. Wrought Iron Wagon Wheel Co. v. Davis &c. Wagon Co., 20 Fed. 699; Beal v. Chase, 31 Mich. 490.

¹² Moore &c. Hardware Co. v. Towers Hdw. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23; Beal v. Chase, 31 Mich. 490.

¹³ Fisk v. Chicago &c. R. Co., 53 Barb. (N. Y.) 513, 4 Abb. Pr. (N. S.) (N. Y.) 378, 36 How. Pr. (N. Y.) 20.

¹⁴ Joslyn v. Pacific Mail Steamship Co., 12 Abb. Pr. (N. S.) (N. Y.) 329.

¹⁵ Guinness v. Land Corporation, L.

R. 22 Ch. D. 349. See also, Sturge v. Eastern Union R. Co., 7 De G. M. & G. 158; Moss v. Syers, 32 L. J. Ch. 711; Kent v. Quicksilver &c. Co., 78 N. Y. 159.

¹⁶ Albers v. Merchants' Exchange, 39 Mo. App. 583; Barry v. The Players, 147 App. Div. (N. Y.) 704, 132 N. Y. S. 59; Stein v. Marks, 44 Misc. (N. Y.) 140, 89 N. Y. S. 921, 15 N. Y. Ann. Cas. 155; Powell v. Abbott, 9 Wkly. Notes Cas. (Pa.) 231. But see, Whiteside v. Noyac Cottage Assn., 142 N. Y. 585, 37 N. E. 624.

¹⁷ White v. Brownell, 2 Daly (N. Y.) 329, 3 Abb. Pr. (N. S.) (N. Y.) 318, affd. 2 Daly (N. Y.) 329, 4 Abb. Pr. (N. S.) (N. Y.) 162.

down in the laws governing the association or club.¹⁸ Where the tribunal having jurisdiction of the matter is assembled in accordance with the laws of the association or club, it may not, ordinarily, be enjoined from proceeding with a hearing of the charges against the member on trial on the ground that the tribunal is biased against the party sought to be disciplined.¹⁹

§ 2556. Injunction for and against railroad companies.—

A railroad company is subject in a court of equity to the same remedies as an individual.²⁰ As a general rule the invasion by a railroad company of the rights of others may be prevented by injunction,²¹ provided a complete remedy at law is not available.²² An injunction, however, will be refused usually where an injunction would work great injury to the defendant,²³ and the plaintiff will suffer but a slight injury for which he can readily be compensated by damages.²⁴ It has been held that an imperfectly incorporated railroad company will be enjoined where it seeks to condemn property,²⁵ and this is sometimes true where the eminent domain powers of the company are abused.²⁶ A railroad company may be enjoined at the suit of a party injured thereby from the appropriation of land for which it has failed to make compensation as required by law.²⁷ But an injunc-

¹⁸ *Fisher v. Chicago Board of Trade*, 80 Ill. 85; *Baum v. New York Cotton Exchange*, 21 Abb. N. Cas. (N. Y.) 253, 4 N. Y. S. 207.

¹⁹ *Gebhard v. New York Club*, 21 Abb. N. Cas. (N. Y.) 248.

²⁰ *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97.

²¹ *Payne v. Kansas & C. R. Co.*, 46 Fed. 546; *Chicago, M. & St. P. R. Co. v. Pullman Palace-Car Co.*, 49 Fed. 409, revd. 56 Fed. 756, 6 C. C. A. 105; and cases cited in subsequent notes to this section.

²² *Foltz v. St. Louis & C. R. Co.*, 60 Fed. 316, 8 C. C. A. 635; *Northern Pacific R. Co. v. Cannon*, 49 Fed. 517; *Chicago, R. I. & P. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. 178; *Detroit, G. H. & M. R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52;

Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. 642; *Planet Property & Co. v. St. Louis & C. R. Co.*, 115 Mo. 613, 22 S. W. 616.

²³ *Levi v. Worcester Consol. St. R. Co.*, 193 Mass. 116, 78 N. E. 853; *Scranton v. Delaware & Hudson Canal Co.*, 12 Pa. Co. Ct. 283.

²⁴ *Savannah & O. Canal Co. v. Suburban & C. R. Co.*, 93 Ga. 240, 18 S. E. 824; *Abraham v. Meyers*, 29 Abb. N. Cas. (N. Y.) 384, 23 N. Y. S. 228; *Chicago, N. W. R. Co. v. McKeigue*, 126 Wis. 574, 105 N. W. 1030.

²⁵ *Hoke v. Georgia R. & Banking Co.*, 89 Ga. 215, 15 S. E. 124.

²⁶ *Western R. Co. v. Alabama & C. R. Co.*, 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

²⁷ *Chattanooga, R. & C. R. Co. v. Jones*, 80 Ga. 264, 9 S. E. 1081; *Lake*

tion will not be granted against the use of land by railroad companies which have taken it without right, where the owner has acquiesced in the appropriation until the company has expended money thereon, and the public interest has become involved.²⁸ The railroad company on its part may have an injunction, in a proper case, to protect its rights from a threatened invasion. It may enjoin an interference with its roadbed by piling obstructions thereon,²⁹ or by tearing up its track or placing obstacles in the way of constructing its road upon a proposed route which it has located according to law.³⁰ A threatened invasion of an exclusive right granted to a street railroad company to build a road over lands of a railroad company to its depot may also be enjoined.³¹ Until a railroad company has complied with the requirements of a statute giving it authority to cross another railroad it has no right to enter upon the premises of that company to build its road,³² and an injunction may be granted to restrain it from so doing.³³

§ 2557. Injunction against railroad company at suit of abutting owner.—An abutting owner of property may en-

Erie & W. R. Co. v. Michener, 117 Ind. 465, 20 N. E. 254; *Kansas City &c. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; *Ray v. Atchison &c. R. Co.*, 4 Nebr. 439; *Spencer v. Point Pleasant &c. R. Co.*, 23 W. Va. 406.

²⁸ *Organ v. Memphis &c. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *D. M. Osborne v. Missouri Pac. R. Co.*, 35 Fed. 84; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Lexington & O. R. Co. v. Ormsby*, 7 Dana (Ky.) 276; *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336, 2 N. W. 48; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290; *Chambers v. Baltimore &c. R. Co.*, 139 Pa. St. 347, 21 Atl. 2; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1,

39 L. ed. 873, 15 Sup. Ct. 756; *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 479.

²⁹ *Henderson v. Ogden City R. Co.*, 7 Utah 199, 26 Pac. 286.

³⁰ *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263; *Rochester, H. & L. R. Co. v. New York &c. Co.*, 110 N. Y. 128, 17 N. E. 680; *Easton, S. E. &c. R. Co. v. Easton*, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. 658; *Asheville St. R. Co. v. Asheville*, 109 N. Car. 688, 14 S. E. 316; *Belington & N. R. Co. v. Alston*, 54 W. Va. 597, 46 S. E. 612.

³¹ *Ft. Worth St. R. Co. v. Queen City R. Co.*, 71 Tex. 165, 9 S. W. 94.

³² *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 116 Ind. 578, 79 N. E. 440.

³³ *Pennsylvania Co. v. Lake Erie &c. R. Co.*, 146 Fed. 446; *Pennsylvania R. Co. v. Consolidation Coal Co.*, 55 Md. 158; *Northern Pacific R. Co. v. St. Paul &c. R. Co.*, 1 McCrary (U. S.) 302, 3 Fed. 702.

join a railroad company from occupying a street or other public highway and operating its road therein without authority, upon proof of special damage,³⁴ at least where such abutter owns the fee of the land to the center of street.³⁵ It is the view of the courts of some of the states that even where the consent of the legislature and of the municipal authority has been obtained the abutting owner may enjoin the construction or operation of the railroad until his damages are assessed and paid.³⁶

³⁴ *Columbus & W. R. Co. v. Withers*, 82 Ala. 190, 3 So. 23; *Hart v. Buckner*, 54 Fed. 925, 5 C. C. A. 1; *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 271, 2 S. E. 636; *Georgia South. & F. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352, 43 Am. & Eng. R. Cas. 95; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Conner v. Covington & C. R. Co.*, 14 Ky. L. 135, 19 S. W. 597; *Cornwall v. Louisville & C. R. Co.*, 87 Ky. 72, 9 Ky. L. 924, 7 S. W. 553; *Bell v. Edwards*, 37 La. Ann. 475; *Riedinger v. Marquette & C. R. Co.*, 62 Mich. 29, 28 N. W. 775; *Charles H. Heer Dry Goods Co. v. Citizens' R. Co.*, 41 Mo. App. 63; *Story v. New York El. R. Co.*, 90 N. Y. 122, 11 Abb. N. Cas. 236, 48 Am. Rep. 146; *State v. Dayton & C. R. Co.*, 36 Ohio St. 434; *Barker v. Hartman Steel Co.*, 129 Pa. St. 551, 18 Atl. 553; *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. 142. Where a railroad has been laid in a street by authority of the legislature, an injured party who has a complete remedy by way of damages for any direct injury will not be granted an injunction. *Hyland v. Short Route R. Transfer Co.*, 10 Ky. L. 900, 11 S. W. 79. But see, *Georgia South. & F. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352, 43 Am. & Eng. R. Cas. 95. Where a company is authorized to construct and operate a railroad track in a street, a court can not restrict the number of trains to be operated as a condition precedent to the construction of the road. *Kentucky & Indiana Bridge Co. v. Krieger*, 93 Ky. 243, 14 Ky. L. 151, 19 S. W. 738. In Colorado, an abutter whose fee is not sought to be taken can not enjoin the construction and operation of a railroad merely because he does

not receive in advance compensation for the damage suffered or to be suffered by him. *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777. In West Virginia the abutting owners on a street, part of which is occupied by a railroad, whether they own the fee in the land covered by the street or not, are not entitled to enjoin excavation and construction along the street in a careful and proper manner, unless the consequent injury to them will be such as will destroy the value of their property, and therefore be equivalent to a virtual taking of it by the railroad company. *Arbenz v. Wheeling & Harrisburg R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371, 40 Am. & Eng. R. Cas. 284. See *Van Horne v. Newark Pass. R. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034; *Paquet v. Mt. Tabor St. R. Co.*, 18 Ore. 233, 22 Pac. 906.

³⁵ *Mills v. Parlin*, 106 Ill. 60; *Heath v. Des Moines & St. L. R. Co.*, 61 Iowa 11, 15 N. W. 573; *Osborne v. Missouri Pacific R. Co.*, 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. 299; *Smith v. Point Pleasant & C. R. Co.*, 23 W. Va. 451.

³⁶ *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Georgia South. & F. R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352; *Cox v. Louisville & C. R. Co.*, 48 Ind. 178; *Barber v. Saginaw Union St. R. Co.*, 83 Mich. 299, 47 N. W. 219; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Stroub v. Manhattan R. Co.*, 39 N. Y. St. 378, 59 N. Y. Super. Ct. 505, 15 N. Y. S. 135. See *In re Kemble's Appeal*, 140 Pa. St. 14, 21 Atl. 225. *Contra*, *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *O'Brien v.*

§ 2558. Injunction to restrain change of route of railroad.—A railroad company organized to build a railroad between certain named termini may be enjoined by a non-assenting stockholder from using the funds of the corporation or pledging its credit for the purpose of extending the road beyond the termini agreed upon. And this is the rule, though the extension may have been authorized by the legislature and approved by a majority of the stockholders.³⁷ This is on the theory of the well grounded principle of corporation law that any fundamental alteration of a charter, or material deviation from or extension of a road in the case of railroad companies, interferes with the rights of the corporators and that no majority, however large, can compel any individual stockholder to submit to such deviation.³⁸

§ 2559. Injunction to restrain removal of depot.—Ordinarily, the right of the public to compel a railroad company to maintain a station at a certain point is a legal one and is enforceable by mandamus and not by injunction to prevent the discontinuance of the station.³⁹ And the right, if any, which a private individual has acquired by implied contract or otherwise to compel a railroad company to maintain a station at a certain point will not be enforced by the writ restraining the discontinuance of the station. In such a case the party will ordinarily be remitted to a suit for damages.⁴⁰

Baltimore Belt R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126; Paquet v. Mt. Tabor St. R. Co., 18 Ore. 233, 22 Pac. 906; Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. 1093. See Western R. Co. v. Alabama & C. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. Abutting owners will not be granted an injunction against a railroad company to prevent its entering into a contract with the county commissioners whereby it is permitted to maintain its tracks in a street at a grade alleged to be illegal; the proper remedy is mandamus requiring the county commissioners to perform their duties under the law. Dyer v. Cincinnati & C. R. Co., 4 Ohio C. D. 584, 7 Ohio C. C. 255.

³⁷ Stevens v. Rutland & C. R. Co., 29 Vt. 545. See also, Hartford & N. H. R. Co. v. Crosswell, 5 Hill (N. Y.) 383, 40 Am. Dec. 354; McCullough v. Moss, 5 Denio (N. Y.) 580; Schenectady & Saratoga Plank Road Co. v. Thatcher, 11 N. Y. 102; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Georgia South. & F. R. Co. v. Ray, Y. 336; Bagshaw v. Eastern Un. Ry., 7 Hare 114.

³⁸ Kean v. Johnson, 1 Stock. (N. J.) 401.

³⁹ Jacquelin v. Erie R. Co., 69 N. J. Eq. 432, 61 Atl. 18.

⁴⁰ Jacquelin v. Erie R. Co., 69 N. J. Eq. 432, 61 Atl. 18.

§ 2560. Injunction to restrain breach of contract between railroad and express company.—In a case where it was shown that an express company had, under a special contract, been for many years engaged in that business over the system of roads controlled by the defendants and had built up a large and valuable business and established valuable connections, all of which would be much depreciated if the railroad company should be allowed to refuse to further allow the express company to carry on such business over its line of road, it was held that these reasons were sufficient to authorize an injunction restraining such action.⁴¹ Injunction has also been held an appropriate remedy to enjoin a railroad company from charging an express company higher rates than are charged to other specified companies by the same railroad company.⁴²

§ 2561. Injunction to restrain sale of nontransferable railroad tickets.—The writ of injunction is appropriate to restrain a breach of the contract involved in the original purchase of a nontransferable railroad ticket.⁴³ “From the nature and character of the nontransferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision, and the multiplicity of suits necessarily to be engendered if redress was sought at law—all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed, the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong

⁴¹ *Dinsmore v. Louisville &c. R. Co.*, 2 Fed. 465. See also, *Northern R. Co. v. Manchester &c. R. Co.*, 66 N. H. 560, 31 Atl. 17; *Camblos v. Philadelphia &c. R. Co.*, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411.

⁴² *Southern Exp. Co. v. Memphis &c. R. Co.*, 2 McCrary (U. S.) 570, 8 Fed. 799.

⁴³ *Kirby v. Union Pac. R. Co.*, 51 Colo. 509, 119 Pac. 1042; *Missouri,*

K. & T. R. Co. v. McCrary, 182 Fed. 401; *Louisville & N. R. Co. v. Bitterman*, 128 Fed. 176; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. 452; *Kinner v. Lake Shore & M. S. R. Co.*, 23 Ohio Cir. Ct. 294; *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. 91.

resulted from acts of the character complained of, since in those cases it was expressly held that the consequences of the legal wrong flowing from the dealing in nontransferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity."⁴⁴ The injunction is issued not so much for the protection of the railroad company as it is for the protection of the public.⁴⁵

§ 2562. Injunction to restrain payment of municipal aid to railroads.—The remedy most often resorted to by taxpayers to prevent illegal municipal aid, or the unlawful levy of a tax to pay the same, is that by way of injunction. As a general rule, any one or more taxpayers of the municipality may institute a suit in behalf of all to enjoin the unauthorized levy of a tax or the illegal issue or payment of bonds.⁴⁶ So, the payment of bonds or a subscription may be enjoined by the taxpayers, in a proper case, where the company has not performed the conditions upon which the subscription was made or the bonds issued.⁴⁷ But it has been held that injunction will not lie until after a forfeiture has been declared.⁴⁸ Where the amount of taxes

⁴⁴ *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. 91.

⁴⁵ *Missouri, K. & T. R. Co. v. McCrary*, 182 Fed. 401.

⁴⁶ *New Orleans, M. & C. R. Co. v. Dunn*, 51 Ala. 128; *Campbell v. Paris & C. R. Co.*, 71 Ill. 611; *Rutz v. Calhoun*, 100 Ill. 392; *Bittinger v. Bell*, 65 Ind. 445; *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664; *Alvis v. Whitney*, 43 Ind. 83; *Nefzger v. Davenport & C. R. Co.*, 36 Iowa 642; *State v. Hager*, 91 Mo. 452, 3 S. W. 844; *Winston v. Tennessee & C. R. Co.*, 1 Baxt. (Tenn.) 60; *Redd v. Henry County*, 31 Grat. (Va.) 695. See also, *Gregg v. Sanford*, 65 Fed. 151, 12 C. C. A. 525; *Flack v. Hughes*, 67 Ill. 384; *Finney v. Lamb*, 54 Ind. 1; *Bronenberg v. Madison*, 41 Ind. 502; *Cattell v. Lowry*, 45 Iowa 478; *Blunt v. Carpenter*, 68 Iowa 265, 26 N. W. 438; *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 8 Ky. L. 881, 2 S. W. 687; *Morris v. Merrell*, 44

Nebr. 423, 62 N. W. 865; *Metzger v. Attica & C. R. Co.*, 79 N. Y. 171; *Graves v. Moore County*, 135 N. Car. 49, 47 S. E. 134. It has been held that an allegation that the railroad company did not "legally" commence work was not equivalent to an averment that the company failed to commence work upon its road within two years from the levying of the tax. *Sellers v. Beaver*, 97 Ind. 111.

⁴⁷ *Wagner v. Meety*, 69 Mo. 150. See also, *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145; *Peed v. Millikan*, 79 Ind. 86; *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268; *Midland v. Gage*, 37 *Nebr.* 582, 56 N. W. 317. But it is held that insolvency of the company does not necessarily render a tax previously levied invalid. *Wilson v. Hamilton County*, 68 Ind. 507.

⁴⁸ *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; *Pittsburg, C., C. & St. L. R. Co. v. Harden*,

that may be voted and levied in aid of a railroad company is limited by law, no authority exists to submit to the electors the question of voting aid in excess of that amount, and taxes levied under such a vote may be enjoined.⁴⁹ But, as a general rule, injunction will not lie at the suit of taxpayers to prevent an election under legislative authority to enable the citizens of the municipality to vote to levy or not to levy a tax upon themselves in aid of a railroad.⁵⁰ And mere irregularities, which do not prejudice any substantial rights, will not be sufficient ground for an injunction.⁵¹ So, it has been held that after a tax has been voted and levied, the sufficiency of the petition or the result of the vote as declared by the canvassing board can not be collaterally assailed or inquired into in a suit by the taxpayers to enjoin the collection of the taxes.⁵² This is the general rule.⁵³ As in other cases in which an injunction is sought, the plaintiff should act promptly, and show the necessary grounds for the interposition of a court of equity.⁵⁴ If a taxpayer delays action until after the tax has been collected and the money paid over to the bondholders

137 Ind. 486, 37 N. E. 324. See also, *Demaree v. Bridges*, 30 Ind. App. 131, 65 N. E. 601.

⁴⁹ *Burlington & M. R. Co. v. Clay Co.*, 13 Nebr. 367, 13 N. W. 628. See also, *Hedges v. Dixon*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. 71.

⁵⁰ *Roudanez v. New Orleans*, 29 La. Ann. 271.

⁵¹ *Milwaukee & St. Paul R. Co. v. Kossuth*, 41 Iowa 57; *Ricketts v. Spraker*, 77 Ind. 371; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376; *Louisville & Nashville R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Texas & P. R. Co. v. Harrison*, 54 Tex. 119. See also, *Robinson v. Wilmington*, 65 Fed. 856, 13 C. C. A. 177; *Whitney v. Chicago, A. & N. R. Co.*, 133 Iowa 508, 110 N. W. 912; *Chicago, B. & Q. R. Co. v. Norton County*, 55 Kans. 386, 40 Pac. 654.

⁵² *Ryan v. Varga*, 37 Iowa 78; *Dwyer v. Hackworth*, 57 Tex. 245.

⁵³ *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124, and numerous authorities there cited; *Lawrence County v. Hall*, 70 Ind. 469; *Pittsburgh, C., C. & St. L. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Demaree v. Bridges*, 30 Ind. App. 131, 65 N. E. 601; *Citizens' Savings & Loan Assn. v. Perry County*, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. 547. But see, *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90; *Kentucky Union R. Co. v. Bourbon Co.*, 85 Ky. 98, 8 Ky. L. 881, 2 S. W. 687; *McPike v. Pen*, 51 Mo. 63; *People v. Spencer*, 55 N. Y. 1; *Deforth v. Wisconsin & R. Co.*, 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

⁵⁴ *Moulton v. Evansville*, 25 Fed. 382; *Menard v. Hood*, 68 Ill. 121; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Vickery v. Blair*, 134 Ind. 554, 32 N. E. 880; *Trustees of Com. School Dist. v. Garvey*, 80 Ky. 159; *Chamberlain v. Lyndeborough*, 64 N. H. 563, 14 Atl. 865.

of the railroad company, when he might have obtained an injunction restraining the collection of the tax by acting in time, he can not recover the amount of the tax paid by himself from the treasurer of the municipality,⁵⁵ but there are cases in which the payment of the tax to the company may be restrained even after it has been collected.⁵⁶ After bonds have been issued and a tax levied to pay them, a taxpayer can enjoin its collection in a suit against the municipality and its treasurer only upon grounds constituting a good defense on the part of the city to the payment of the bonds in the hands of the present holders.⁵⁷ The rights and remedies of a municipal corporation which has subscribed for stock in aid of a railroad are, in the main, the same as those of an individual subscriber.⁵⁸

§ 2563. Mandatory injunction to compel performance of duties by public service corporations.—Public service corporations are subject to the control of courts of equity by the writ of mandatory injunction as to the proper discharge of their duties to the public. The writ may be invoked to compel them to perform in detail all their charter requirements, and this requires an impartial performance of the service undertaken by these corporations.⁵⁹ Mandatory injunction is the remedy which is most frequently used to compel the performance of charter duties by such public service corporations as gas companies,⁶⁰ electric light com-

⁵⁵ *Butler v. Fayette County*, 46 Iowa 326.

⁵⁶ *Missouri River &c. R. Co. v. Miami County*, 12 Kans. 230.

⁵⁷ *Wilkinson v. Peru*, 61 Ind. 1.

⁵⁸ *Shipley v. Terre Haute*, 74 Ind. 297; *State v. Holladay*, 72 Mo. 499;

Pittsburg & S. R. Co. v. Allegheny County, 79 Pa. St. 210; *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. 969; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Morgan County v. Allen*, 103 U. S. 498, 26 L. ed. 498; *Noesen v. Port Washington*, 37 Wis. 168.

⁵⁹ *Fulton Irr. Ditch Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. 253;

Weimer v. Louisville Water Co., 130 Fed. 251; *Lake Erie &c. R. Co. v. Essington*, 27 Ind. App. 291, 60 N. E. 457; *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. 633.

⁶⁰ *State v. Consumers' &c. Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Simpson v. Pittsburgh Plate Glass Co.*, 28 Ind. App. 343, 62 N. E. 753; *Chappell v. Jasper County Oil & Gas Co.*, 31 Ind. App. 170, 66 N. E. 515; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744; *Graves v. Key City Gas Co.*, 83 Iowa 714, 50 N. W. 283; *Zanesville Gas-Light Co. v. Zanes-*

panies,⁶¹ telephone and telegraph companies,⁶² street railroad companies,⁶³ water companies,⁶⁴ and carriers generally.⁶⁵ In a case where the franchise of a telephone com-

ville, 47 Ohio St. 35, 23 N. E. 60; Whiteman v. Fayette-Fuel Gas Co., 139 Pa. St. 492, 20 Atl. 1062.

⁶¹ Seaton Mountain Electric Light & Co. v. Idaho Springs Inv. Co., 49 Colo. 122, 111 Pac. 834.

⁶² Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. 148; State v. Delaware & C. Tel. Co., 47 Fed. 633, affd. 50 Fed. 677, 2 C. C. A. 1; Postal Cable Tel. Co. v. Cumberland Tel. & Co., 177 Fed. 726; Mooreland Rural Tel. Co. v. Mouch (Ind. App.), 96 N. E. 193; Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; Majenica Tel. Co. v. Rogers, 43 Ind. App. 306, 87 N. E. 165; Central Union Tel. Co. v. State, 123 Ind. 113, 24 N. E. 215; Western Union Tel. Co. v. Van Cleave, 107 Ky. 464, 22 Ky. L. 53, 54 S. W. 827, 92 Am. St. 366; Reed v. Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. 609; State v. Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; People v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136, 1 Abb. Pr. (N. S.) (N. Y.) 404, 30 How. Pr. (N. S.) 87; Leavell v. Western Union Tel. Co., 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. 798; Gwynn v. Citizens' Tel. Co., 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819; Kirby v. Western Union Tel. Co., 4 S. Dak. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. 765; Commercial Union Tel. Co. v. New England Tel. & T. Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. 893; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 Supt. Ct. 468.

⁶³ Central Crosstown R. Co. v. Metropolitan St. R. Co., 16 App. Div. (N. Y.) 229, 44 N. Y. S. 752; People v. Third Ave. R. Co., 45 Barb. (N. Y.) 63, 30 How. Pr. (N. Y.) 121. Operation of branch line not compelled where financial condition of entire system would be imperiled. Vicksburg Traction Co. v. Warren County, 100 Miss. 442, 56 So. 607.

⁶⁴ Wiemer v. Louisville Water Co.,

130 Fed. 251; Griffin v. Goldsboro Water Co., 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240; Haugen v. Albina Light & Water Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424.

⁶⁵ Carton v. Bristol & E. R. Co., 1 Best & S. 112, 7 Jur. (N. S.) 1234, 9 Wkly. Rep. 734; Branley v. South Eastern R. Co., 12 C. B. (N. S.) 63, 31 L. J. C. P. 286, 9 Jur. (N. S.) 329; Nicholson v. Great Western R. Co., 5 C. B. (N. S.) 366; Baxendale v. Eastern Counties R. Co., 4 C. B. (N. S.) 63, 27 L. J. C. P. 137; Evershed v. London & N. W. R. Co., L. R. 3 Q. B. Div. 134; Mogul Steamship Co. v. McGregor, L. R. 21 Q. B. Div. 544; Bayles v. Kansas & C. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480; Hays v. Pennsylvania Co., 12 Fed. 309; McCoy v. Cincinnati & C. R. Co., 13 Fed. 3; Samuels v. Louisville & N. R. Co., 31 Fed. 57; Kinsley v. Buffalo, N. Y. & P. R. Co., 37 Fed. 181; Cowan v. Bond, 39 Fed. 54; Murray v. Chicago & C. R. Co., 92 Fed. 868, 35 C. C. A. 62; Tift v. Southern R. Co., 123 Fed. 789; Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Louisville, E. & St. L. Con. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105n; New England Express Co. v. Maine Cent. R. Co., 57 Maine 188, 2 Am. Rep. 31; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; McDuffee v. Portland & C. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. 643n; Scofield v. Lake Shore & M. S. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846n; Sharpless v. Philadelphia, 21 Pa. St. 147, 2 Am. L. Reg. (O. S.) 27, 59 Am. Dec. 759n; Ex parte Benson, 18 S. Car. 38, 44 Am. Rep. 564n; Avinger v. South Carolina R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. 716; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; Union Pac. R. Co. v. United States, 117 U. S. 355, 29 L. ed. 920, 6 Sup. Ct. 772, 21 Ct. Cl.

pany provided that it should install no party lines, an injunction was issued to enforce the provision on the ground that the remedy at law was inadequate.⁶⁶ As a general rule, the mandatory writ to compel merely the performance of a public duty will ordinarily issue only at the suit of the state.⁶⁷

§ 2564. Mandatory injunction to prevent discrimination.

—Mandatory injunction is the remedy to compel a water company to furnish water to an applicant entitled to the privilege where it clearly appears from the facts that the refusal amounts to an unlawful discrimination and that injunction is the only adequate remedy available to the complainant.⁶⁸ The remedy is available to prevent a railroad company from discrimination against stockyard companies.⁶⁹ So, a mandatory injunction has been granted to compel a railroad company to build a depot at a place designated by the railroad commissioners.⁷⁰ So, it was held in Indiana that a natural gas company, which was authorized to exercise the right of eminent domain and privileged to lay pipe lines through the streets of a city for the distribution of gas to consumers, could be compelled by mandatory injunction to supply gas to an applicant in front of whose premises its pipes were laid, although its supply of gas was not sufficient to properly supply its existing customers. It is to be noted that the injunction did not require the gas company to furnish the complainant with an

(N. S.) 502; *Texas Express Co. v. Texas & Pac. R. Co.*, 4 Woods (U. S.) 370, 6 Fed. 426; *Southern Express Co. v. Memphis & C. R. Co.*, 2 McCrary (U. S.) 570, 8 Fed. 799.

⁶⁶ *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13.

⁶⁷ *Buck Mountain Coal Co. v. Lehigh & C. Navigation Co.*, 50 Pa. St. 91, 88 Am. Dec. 534. See also, *King v. Bristol Dock Co.*, 12 East 429; *Rose v. Miles*, 4 Maule & S. 101; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281; *Greasley v. Codding*, 2 Bing. 263; *Iveson v. Moore*, 1 Ld. Raym. 486. But there are many cases in which others hav-

ing a special interest and peculiarly affected by the breach of such a duty, or the like, may maintain such a suit. This is shown by many of the authorities already referred to in this section, and by others referred to in the next section.

⁶⁸ *Wiemer v. Louisville Water Co.*, 130 Fed. 251.

⁶⁹ *Coe v. Louisville & N. R. Co.*, 3 Fed. 775; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461.

⁷⁰ *Railroad Commissioners v. Portland & C. R. Co.*, 63 Maine 269, 18 Am. Rep. 208.

abundant supply of gas, but merely that it give him the same opportunity for using gas that it did all other patrons.⁷¹ So, a gas company may be compelled by mandatory injunction to supply a city with gas at the rates fixed by an ordinance if it is to continue to exercise and enjoy its franchise.⁷² The right to this writ is especially essential and effective in cases of discrimination by carriers between shippers. "By an unjust exercise of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever."⁷³

§ 2565. Injunction to restrain breach of contracts in sale of gas.—A city has the right, in a proper case, to an injunction to protect its citizens from the breach of contracts with gas companies.⁷⁴ Thus, a city may maintain an action to enjoin a gas company from violating its contract as to the maximum rate to be charged for gas in consideration of receiving permission to place its mains in the street, although the city itself is not a consumer.⁷⁵ It is not necessary to show that the city has itself sustained damage when it sues for the benefit of its inhabitants. It is enough to show that the act tends to injure the public or the municipality.⁷⁶ On

⁷¹ *State v. Consumers' &c. Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245. But see, *Black Lick Mfg. Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448, 21 Atl. 432.

⁷² *Zanesville Gas-Light Co. v. Zanesville*, 47 Ohio 35, 23 N. E. 60.

⁷³ *Coe v. Louisville & N. R. Co.*, 3 Fed. 775.

⁷⁴ *London v. Bolt*, 5 Ve. Jr. 129; *Guelph v. Canada Co.*, 4 Grant Ch. U. C. 632; *Florida Cent. & P. R. Co. v. State*, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Greenwich v. Easton & A. R. Co.*, 24 N. J. Eq. 217, affd. 25 N. J. Eq.

565; *Watertown v. Cowen*, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; *Williams v. Smith*, 22 Wis. 594. See also, *Bridgeton v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

⁷⁵ *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

⁷⁶ *Attorney-General v. Ely &c. R. Co.*, L. R. 4 Ch. 184; *Attorney-General v. Shrewsbury Bridge Co.*, L. R. 21 Ch. Div. 752; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *Grey v. Greenville & H. R. Co.*, 59 N. J. Eq. 372, 46 Atl. 638.

such an inquiry the gas company can not question the right of the city to enter into the contract giving it the right to use the streets, for that is a matter for the state alone.⁷⁷ The question of the reasonableness of rates fixed as maximum rates for the sale of gas is one for judicial determination.⁷⁸ It has been held that on an inquiry of this character the good will of the gas company by reason of its monopoly under the franchise was not an item to be included in estimating the value of its property for the purpose of determining the reasonableness of the rates established by a city ordinance. The value of the plant as a "going concern" is proper for consideration as an element of the present physical value of the plant.⁷⁹

§ 2566. Injunction relating to telephone charges.—The writ of injunction may be invoked by the patron of a telephone company to enjoin it from charging him higher rates than those fixed by law or ordinance.⁸⁰ The remedy is likewise open to the telephone company to restrain the enforcement of an ordinance fixing rates so low as to be confiscatory.⁸¹ But courts will usually delay the issuance of the writ until the rates have been subjected to a sufficient test to show the actual effect of the ordinance and this more particularly where the evidence leaves the probable results of the working of the ordinance very close to the dividing line between the yield of a fair return and confiscation.⁸²

§ 2567. Injunction to restrain breach of contract to furnish water for irrigation.—An injunction to restrain the breach of a contract to furnish water for irrigation purposes should show injury to the complainant arising from such breach. Accordingly, it has been held proper to re-

⁷⁷ *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

⁷⁸ *Capital City Gas Co. v. Des Moines*, 72 Fed. 818; *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204.

⁷⁹ *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204.

⁸⁰ *Charles Simmons Sons Co. v. Maryland Tel. & T. Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

⁸¹ *Cumberland Tel. & T. Co. v. Louisville*, 187 Fed. 637.

⁸² *Louisville v. Cumberland Tel. & T. Co.*, 25 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. 741.

fuse an injunction on a complaint which stated that the defendant had agreed to furnish the plaintiff with a certain quantity of water for irrigation and was about to enter into other contracts for the delivery of water to other persons in excess of the capacity of his ditch. The complaint was defective for failure to show that this would result in injury to the plaintiff.⁸³

§ 2568. Injunction to restrain removal of telephone.—Injunction is a proper remedy to restrain the removal of a telephone in breach of a contract for its installation and maintenance. Thus, where a telephone company verbally agreed, in consideration of being allowed to place wires in the trees of the plaintiff, to maintain a telephone in his house, the plaintiff was entitled to an injunction to restrain the removal of the instrument, for it is clear that he was without an adequate remedy at law.⁸⁴

§ 2569. Injunction as remedy to protect rights of public.—As a general rule, a bill in equity for an injunction to protect public rights will not lie at the suit of an individual where no special injury to the complainant is shown.⁸⁵ The suit, where a purely public right is involved, must ordinarily proceed in the name of the state. Thus, where there is an attempt on the part of railroad companies to form an illegal merger, the injury is public and not individual, and is properly prosecuted in the name of the state.⁸⁶ The writ will not ordinarily issue merely to prevent the commission of crime. And, a common carrier of goods who violates no law in the transportation of intoxicating

⁸³ *Bank of California v. Fresno Canal & Irr. Co.*, 53 Cal. 201.

⁸⁴ *Anderson v. Mt. Sterling Tel. Co.*, 27 Ky. L. 866, 86 S. W. 1119.

⁸⁵ *Landers v. Walls*, 160 Ind. 216, 66 N. E. 679; *McCowan v. Whitesides*, 31 Ind. 235; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Indiana, B. & W. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; *Manufacturers' Gas & Co. v. Indiana National Gas & Co.*, 155 Ind. 566, 58 N. E. 851; *Doolittle v.*

Broome County, 18 N. Y. 155, 16 How. Pr. (N. Y.) 512; *People v. Stevens*, 5 Hill (N. Y.) 616; *State v. Lord*, 28 Ore. 498, 43 Pac. 471, 31 L. R. A. 473; *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. 27.

⁸⁶ *Louisville & C. R. Co. v. Commonwealth*, 97 Ky. 675, 17 Ky. L. 427, 31 S. W. 476, *affd.* 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714; *Pennsylvania R. Co. v. Commonwealth*, 3 Sad. (Pa.) 100, 7 Atl. 368.

liquors into a prohibition territory will not be restrained from transporting such liquors except under certain conditions, merely because the sale and use of intoxicating liquors causes a nuisance, drunkenness and debauchery.⁸⁷ It has been held proper to issue an injunction at the instance of the state to restrain the violation of a statute forbidding the establishment of private insane asylums for compensation and hire without a license from a state board of charities.⁸⁸ It has been held that the practice of medicine or surgery will not be enjoined merely because such practice is unskillful and patients may be injured rather than benefited, or because the patients are deceived by false claims of medical skill.⁸⁹ The issuance of an injunction has been sustained in cases where public contractors were using inferior material in the construction of public works.⁹⁰ This suit was prosecuted by a taxpayer and sustained on the ground that he had such an interest in the public funds as gave him a right to prevent their application to a wrongful purpose.⁹¹

§ 2570. Injunction against public corporations and officers.—The writ of injunction is the proper remedy to prevent public officers and boards from abusing their power by entering into unauthorized or illegal contracts.⁹² But

⁸⁷ *United States Exp. Co. v. State*, 99 Ark. 633, 139 S. W. 637. Compare, *Spence v. Fenchler* (Tex. Civ. App.), 151 S. W. 1094.

⁸⁸ *State v. Lindsay*, 85 Kans. 79, 116 Pac. 207, 35 L. R. A. (N. S.) 810.

⁸⁹ *Merz v. Murchison*, 30 Ohio C. C. 646.

⁹⁰ *Miller v. Bowers*, 30 Ind. App. 116, 65 N. E. 559.

⁹¹ *Miller v. Bowers*, 30 Ind. App. 116, 65 N. E. 559; *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811; *Lafayette v. Cox*, 5 Ind. 38; *Clay County v. Markle*, 46 Ind. 96; *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244; *Winamac v. Huddleston*, 132 Ind. 217, 31 N. E. 561; *Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755. See also, *Shamokin v. Shamokin &*

M. C. E. R. Co., 196 Pa. St. 166, 46 Atl. 382.

⁹² *Glasgow v. St. Louis*, 15 Mo. App. 112; *Bond v. Newark*, 19 N. J. Eq. 376; *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262; *Davis v. New York*, 8 N. Y. Super. Ct. 451, *affd.* 9 N. Y. 263, 59 Am. Dec. 536, *Seld. Notes* (N. Y.) 196; *People v. New York*, 32 Barb. (N. Y.) 102; *Place v. Providence*, 12 R. I. 1; *Coulson v. Portland, Deady* (U. S.) 481, *Fed. Cas. No. 3275*; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *East St. Louis v. New Brighton*, 34 Ill. App. 494; *Griswold v. Brega*, 160 Ill. 490, 43 N. E. 864, 52 Am. St. 350; *State v. Neodesha*, 3 Kans. App. 319, 45 Pac. 122; *Springfield R. Co. v. Springfield*, 85 Mo. 674; *People v. Dwyer*, 90 N. Y. 402; *Lumsden v. Milwaukee*, 8 Wis.

the writ will issue only where a damage threatened is irreparable by ordinary law action.⁹³ The writ will not issue to control the discretion of officers or boards where this would amount merely to the substitution of the judgment or discretion of the court for that of the officers whose duty it is to perform an act the propriety of which is questioned.⁹⁴ Neither will the writ issue to prevent the performance of the political duties devolving upon boards and councils in the absence of fraud or of a clear and unmistakable showing that an irreparable injury is about to be committed for which neither a law action nor an appeal from the action of the board or council will afford an adequate remedy.⁹⁵ A city which has not the power to take possession of a public utility plant may rightfully be enjoined from doing so by force.⁹⁶ So, injunction is a proper remedy to prevent a contractor from using inferior material in public work.⁹⁷ In a case where money had been expended by a party to avail himself of a permit to move a building within the fire limits of a city and the city attempted to unlawfully revoke the permit, an injunction was issued to prevent this interference as the only adequate and appropriate relief available to the plaintiff.⁹⁸ An injunc-

485. See also, *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571; *Chesapeake & P. Tel. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *Lerch v. Duluth*, 88 Minn. 295, 92 N. W. 1116; *Poppleton v. Moores*, 67 Nebr. 388, 93 N. W. 747; *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615, 36 Atl. 21; *Roanoke v. Bolling*, 101 Va. 182, 43 S. E. 343.

⁹³ *Anderson v. Berwyn*, 135 Ill. App. 8; *Willis v. Stapels*, 30 Hun (N. Y.) 644; *Hart v. Albany*, 3 Paige Ch. (N. Y.) 213.

⁹⁴ *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Union Steamboat Co. v. Chicago*, 39 Fed. 723; *Cordatos v. Chicago*, 129 Ill. App. 471; *Hessin v. Manhattan*, 81 Kans. 153, 105 Pac. 44, 25 L. R. A. (N. S.) 228n. *Municipality No. 1 v. Municipality No. 2*, 12 La. 49; *Andrieux v. Butte*, 44 Mont. 557, 121 Pac. 291;

Vogel v. Rawley, 85 Nebr. 600, 123 N. W. 1037; *Milhau v. Sharp*, 15 Barb. (N. Y.) 193, affd. 27 N. Y. 611, 84 Am. Dec. 314; *Parsons v. Travis*, 8 N. Y. Super. Ct. 439; *Schieffelin v. New York*, 65 Misc. (N. Y.) 609, 122 N. Y. S. 502; *Yorkville Amusement Co. v. Bingham*, 64 Misc. (N. Y.) 636, 118 N. Y. S. 753; *Newton v. Charlotte*, 158 N. Car. 186, 73 S. E. 886; *Roumfort v. Harrisburg*, 2 Pears. (Pa.) 101.

⁹⁵ *Vogel v. Rawley*, 85 Nebr. 600, 123 N. W. 1037; *Slavin v. McGuire*, 105 N. Y. 84, 98 N. E. 405; *Jeffress v. Greenville*, 154 N. Car. 490, 70 S. E. 919.

⁹⁶ *Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368, 57 Pac. 210, 571.

⁹⁷ *Miller v. Bowers*, 30 Ind. App. 116, 65 N. E. 559.

⁹⁸ *Lerch v. Duluth*, 88 Minn. 295, 92 N. W. 1116.

tion has been held properly issued in cases where the mayor and council of a city threatened to exceed their authority and adopt an ordinance prejudicial to the rights of an individual.⁹⁹ So, likewise an injunction has been held the proper remedy by one municipality against an adjacent municipality which unlawfully exercises the powers and functions of a municipal corporation in the territory of the former.¹ But an injunction will not lie to control the discretion of the board in the grant of privileges clearly within their power where no fraud is charged.² Similarly an injunction was refused against a city which sought to restrain it from cutting off a supply of water and no case of irreparable injury or injustice was made out.³ A public school book contract can not be enforced by injunction on the theory that a multiplicity of suits will thereby be prevented since the number of suits that should be brought is entirely at plaintiff's option.⁴

§ 2571. Diligence required of taxpayers in moving for injunction to restrain misappropriation of funds.—The principle requires diligence on the part of the complaining taxpayer.⁵ The cases are frequent which deny the writ to those who allow the making of municipal improvements by which their property is injured to proceed without protest and witness the expenditure of large sums of money thereon without taking any steps to enjoin the improvements.⁶

⁹⁹ *Wabaska Electric Co. v. Wymore*, 60 Nebr. 199, 82 N. W. 626.

¹ *East St. Louis v. Brighton*, 34 Ill. App. 494.

² *Vogel v. Rawley*, 85 Nebr. 600, 123 N. W. 1037.

³ *Anderson v. Berwyn*, 135 Ill. App. 8.

⁴ *Attorney-General v. Detroit*, 133 Mich. 681, 95 N. W. 746.

⁵ *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

⁶ *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 815; *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Bigelow v. Los Angeles*, 85 Cal. 614,

24 Pac. 778; *Logansport v. La Rose*, 99 Ind. 117; *Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109; *Thomas v. Woodman*, 23 Kans. 217, 33 Am. Rep. 156; *Brown v. Merrick County*, 18 Nebr. 355, 25 N. W. 356; *Jones v. Newark*, 3 Stock. (N. J.) 452; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Haight v. Price*, 21 N. Y. 241; *Goodin v. Cincinnati & White-water Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Bowman v. Wathen*, 1 How. (U. S.) 189, 11 L. ed. 97; *McQuiddy v. Ware*, 20 Wall. (U. S.) 14, 22 L. ed. 311; *Blanchard v. Doering*, 23 Wis. 200.

§ 2572. **Injunction to restrain wasting and diversion of public funds.**—Injunction is the proper remedy to enjoin an unauthorized diversion of public funds,⁷ and to prevent proceedings imposing an unconstitutional debt.⁸ But a mere allegation that the corporate authorities will misapply the funds is not sufficient.⁹ The jurisdiction is not exercised so much on the theory of loss to the public treasury as to prevent demoralization in the public administration of the municipal affairs.¹⁰ The general rule is that a wasting of public property or funds may be enjoined.¹¹ Where a valid tax for a specific purpose has been levied and collected, it is impressed with a trust, the performance of which may be enforced in equity, and the county may be enjoined from misappropriating it to any other purpose.¹² When the charter provides that in case of any excess in a particular fund it may be applied on a deficiency existing in any other fund, the deficiency means such as may arise from the nonpayment of taxes or inadequacy of a particular fund to meet reasonable demands.¹³ Where the county, its officers and contractors unlawfully attempt to expend more money for road purposes than the statute permits, in anticipation of a levy, they may be enjoined.¹⁴ The law is well established that a bill will lie to enjoin public officers

⁷ McCoy v. Briant, 53 Cal. 247; New London v. Brainard, 22 Conn. 552; Smith v. Magourich, 44 Ga. 163; Howell v. Peoria, 90 Ill. 104; Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Grant v. Davenport, 36 Iowa 396; Baltimore v. Gill, 31 Md. 375; Merrill v. Plainfield, 45 N. H. 126; Doolittle v. Broome County, 18 N. Y. 155, 16 How. Pr. (N. Y.) 512.

⁸ Flynn v. Little Falls Electric & Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

⁹ Bardrick v. Dillon, 7 Okla. 535, 54 Pac. 785.

¹⁰ Dent v. Cook, 45 Ga. 323; Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30; Springfield v. Edwards, 84 Ill. 626; Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244; Hanson v. Wm. A. Hunter Electric Light Co., 86 Iowa 722, 48 N. W. 1005, 53 N. W. 84; Peter v. Prettyman, 62 Md. 566; Baltimore v. Gill,

31 Md. 375; Sinclair v. Winona Co., 23 Minn. 404, 23 Am. Rep. 694; Matthis v. Cameron, 62 Mo. 504; Wagner v. Meety, 69 Mo. 150; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; In re Pittsburg's Appeal, 79 Pa. St. 317; Winston v. Tennessee & C. R. Co., 1 Baxt. (Tenn.) 60; Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070. See also, New London v. Brainard, 22 Conn. 552.

¹¹ Gerlach v. Brandreth, 34 App. Div. (N. Y.) 197, 54 N. Y. S. 479.

¹² Coler v. Stanley County, 89 Fed. 257; Willis v. Wyandotte, 86 Fed. 872, 30 C. C. A. 445; McKee v. Lamon, 159 U. S. 317, 40 L. ed. 165, 16 Sup. Ct. 11.

¹³ In re Taxpayers of Plattsburgh, 157 N. Y. 78, 51 N. E. 512.

¹⁴ Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. 870.

who hold funds in trust from misappropriating the funds in their charge. Courts of equity will interfere to restrain such authorities from a misuse of the funds entrusted to them or their appropriation to a purpose not warranted by the law.¹⁵

§ 2573. Injunction to restrain appropriation of public funds for unauthorized purpose.—A taxpayer is allowed to sue to enjoin a municipal corporation from appropriating money for a purpose not authorized by its charter, although the increase in the taxes of the taxpayer may not exceed a trifling amount.¹⁶ The right to the remedy is not confined to resident taxpayers, but it may be invoked by nonresident taxpayers, though aliens.¹⁷

§ 2574. Injunction to restrain enforcement of ordinance which breaches a contract.—The enforcement of an ordinance which will be in effect an impairment of a contract may be enjoined in a court of equity, where the injury threatened will be irreparable, or the damage can not be adequately compensated.¹⁸ The enforcement of a void city ordinance may be enjoined in a court of equity in order to prevent a multiplicity of suits, at the instance of a person whose rights are impaired by it. A court of equity will not, however, determine whether an ordinance has been violated, but merely whether it is void.¹⁹ Where an ordinance has been enacted by the proper authorities, a court of equity will not interfere by injunction to restrain its enforcement in appropriate courts upon the ground that it is illegal; nor will it enjoin proceedings for the enforcement

¹⁵ *Adams v. Brenan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. 222; *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160; *Beauchamp v. Kankakee*, 45 Ill. 274; *Jackson v. Norris*, 72 Ill. 364; *Livingston County v. Weider*, 64 Ill. 427; *Chestnutwood v. Hood*, 68 Ill. 132; *Wright v. Bishop*, 88 Ill. 302; *Board of Education v. Arnold*, 112 Ill. 11, 1 N. E. 163; *Stevens v. St. Marys' Training School*, 144 Ill. 336, 32 N.

E. 962, 18 L. R. A. 832, 36 Am. St. 438.

¹⁶ *Rock Island v. Huesing*, 25 Ill. App. 600, revd. 128 Ill. 465, 21 N. E. 558, 15 Am. St. 129.

¹⁷ *Goedgen v. Manitowoc County*, 2 Biss. (U. S.) 328, Fed. Cas. No. 5501.

¹⁸ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77.

¹⁹ *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. 224.

of such an ordinance in order to determine its validity where there is an adequate remedy at law.²⁰ But it is well settled that there are two exceptions to this rule: first, to prevent irreparable injury, and second, to prevent a multiplicity of suits. And so, where it appears that the plaintiff suffered a special damage different in kind and degree from that suffered by the general public, and also that plaintiff had suffered irreparable injury, equity may interfere.²¹ As a general rule, an injunction will not issue to restrain the enforcement of an ordinance on the ground that it is unreasonable and oppressive, for there is, in such a case, an adequate remedy at law.²² Where it is sought to restrain a town from enforcing an illegal ordinance, the bill must show a special injury different in kind and degree from that suffered by the general public.²³

§ 2575. Injunction to compel contract with lowest bidder.—Injunction will not lie to restrain a school board from awarding a contract to one who was not the lowest bidder, where the board reserved the right to reject any and all bids, and there is no evidence of fraud on the part of the board, and no statute requiring contracts to be awarded to the lowest bidder.²⁴ Where proposals are made and bids put in, in the usual manner in letting contracts for public work, the lowest bidder has no such fixed, absolute right that he is entitled to mandamus to compel the letting the contract to him after his bid had been in fact rejected and the contract awarded to another. The statutory provision

²⁰ *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155.

²¹ *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155; *Chicago v. Ferris Wheel Co.*, 60 Ill. App. 384; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. 566; *Rosenbaum v. Newbern*, 118 N. Car. 83, 24 S. E. 1, 32 L. R. A. 123.

²² *Field v. Western Springs*, 181 Ill. 186, 54 N. E. 929.

²³ *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Barrows v.*

Sycamore, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. 400; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. 311; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155.

²⁴ *Chandler v. Board of Education*, 104 Mich. 292, 62 N. W. 370, citing *State v. Board of Education of Fond du Lac*, 24 Wis. 683; *Talbot Paving Co. v. Detroit*, 91 Mich. 262, 51 N. W. 933.

requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public, and not of the bidder.²⁵ Even when the bid has been accepted, and the officers of the municipality refuse to enter into the contract, it is held that mandamus will not lie to compel the entering into the contract, but the remedy of the bidder, if any, is in an action at law for damages.²⁶

§ 2576. Injunction to restrain the making of public improvements.—As a general rule, equity will not interfere with such matters as making street improvements, changing street grades and vacating streets,²⁷ and this, more especially where any injury sustained may be adequately compensated in a suit for damages.²⁸ Neither is it allowed a taxpayer to enjoin the opening of a street where he does not show some special damage to himself independent of that sustained by the community at large.²⁹ The rule would be otherwise, however, in cases where the proceedings have been fraudulently conducted so that payment for the improvement would virtually amount to a fraudulent diversion of public funds.³⁰ A city has been restrained from the establishment of a grade and doing work upon a street where the improvement was so defectively planned that the street would become impassable and the place to which it ran would be inaccessible.³¹

²⁵ *State v. Board of Education of Fond du Lac*, 24 Wis. 683; *Colorado Pav. Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630; 1 *Elliott Roads & Sts.* (3d ed.) § 638.

²⁶ *People v. Campbell*, 72 N. Y. 496. See generally, 1 *Elliott Roads & Sts.* (3d ed.) § 638.

²⁷ *Meredith v. Sayre*, 32 N. J. Eq. 557; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593, 5 L. ed. 339. 1 *Elliott Roads & Sts.*, §§ 449, 450, 570, 581, 602.

²⁸ *Smith v. Weldon*, 73 Ind. 454. See also, *Cohen v. Gray*, 70 Cal. 85, 11 Pac. 508.

²⁹ *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Heller v. Atchison & C. R. Co.*, 28 Kans. 625; *In re McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237. See also, 1 *Elliott Roads & Sts.* (3d ed.) § 449.

³⁰ *Carter v. Chicago*, 57 Ill. 283; *Middleton v. Greeson*, 106 Ind. 18, 5 N. E. 755; *Covington v. Nelson*, 35 Ind. 532; *State v. Marion County*, 21 Kans. 419; *Conrad v. Smith*, 32 Mich. 429; *Armstrong v. St. Louis*, 3 Mo. App. 151; *Robertson v. Breedlove*, 61 Tex. 316.

³¹ *Armstrong v. St. Louis*, 3 Mo. App. 151.

§ 2577. Injunction to restrain city from exceeding debt limitation.—The writ of injunction may be invoked to restrain a city from incurring an indebtedness in excess of that fixed by the constitution and laws of the state and it may issue at the suit of an individual taxpayer.³² But the taxpayer must exercise diligence in demanding relief on this ground, and he may lose his right to this relief where he has waited until after contracts have been made for the improvement and work has been entered into and large expenditures made by contractors on the theory that the work was properly authorized.³³

§ 2578. Injunction to try title to public office.—It is thoroughly well settled by the authorities that injunction may not be invoked to try the title to a public office as between rival claimants. The generally accepted remedy in cases of this character is *quo warranto*.³⁴ Accordingly, payment of the salary of a *de facto* officer who has discharged the duties of his office will not be enjoined, since the remedy at law by proceedings of *quo warranto* is ample.³⁵ And where in a contest of the election the contestant has been adjudged entitled to the office contested, a court of equity may not enjoin him from taking possession of the office, and an appeal from an order dissolving the temporary injunction will not lie.³⁶ Of the right to grant an injunction in this class

³² *Hudson v. Marietta*, 64 Ga. 286; *Springfield v. Edwards*, 84 Ill. 626; *Grayville v. Gray*, 19 Ill. App. 120; *Miles v. Ray*, 100 Ind. 166; *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Putnam v. Grand Rapids*, 58 Mich. 416, 25 N. W. 330; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279.

³³ *Collings v. Camden*, 27 N. J. Eq. 293.

³⁴ *Davis v. Dawson*, 90 Ga. 817, 17 S. E. 110; *Burgess v. Davis*, 138 Ill. 578, 28 N. E. 817; *Grove v. Myles*, 109 Iowa 541, 80 N. W. 544; *Wilder v. Underwood*, 60 Kans. 859, 57 Pac. 965; *Poyntz v. Shackelford*, 107 Ky. 546, 21 Ky. L. 1323, 54 S. W. 855;

State v. Withrow, 154 Mo. 397, 55 S. W. 460; *Fort v. Thompson*, 49 Nebr. 772, 69 N. W. 110; *Jones v. Granville*, 77 N. Car. 280; *Cozart v. Fleming*, 123 N. Car. 547, 31 S. E. 822.

³⁵ *Burgess v. Davis*, 138 Ill. 578, 28 N. E. 817; *Markle v. Wright*, 13 Ind. 548; *Cochran v. McCleary*, 22 Iowa 75; *Neeland v. State*, 39 Kans. 154, 18 Pac. 165; *Goldman v. Gillespie*, 43 La. Ann. 83, 8 So. 880; *Sneed v. Bullock*, 77 N. Car. 282; *Hagner v. Heyberger*, 7 Watts & S. (Pa.) 104, 3 Pa. L. J. 370, 42 Am. Dec. 220; *Updegraff v. Crans*, 47 Pa. St. 103.

³⁶ *State v. Kearney*, 28 Nebr. 103, 44 N. W. 90.

of cases it has been said by one of the courts: "To restrain the action of the incumbent is to restrain all the functions of the office; for he being in, even if wrongfully, no one else can enter until he is removed, and he must act or no one can. And it is not at all difficult to see that in very many and most cases the public interest would require that the duties of an office should not be suspended and its functions cease until the matter of personal right between rival claimants could be determined."³⁷

§ 2579. Injunction in school matters.—As a general rule, an injunction will not be granted to control the discretion of school officers while acting within the scope of their authority,³⁸ though their action may be unwise.³⁹ This is the rule in such matters as the selection of school sites,⁴⁰ the letting of contracts for supplies,⁴¹ and for the erection of buildings.⁴² It has been held that a warrant properly issued for the payment of a teacher would not be restrained where the amount involved was small, although the contract with the teacher was void because of a failure to comply with the statute in the matter of changing the school site.⁴³ So, an injunction has been denied which sought to restrain the payment of school orders which were irregular and contrary to the statute in form, where the money on such orders had been obtained and the taxes out of which they were payable had been collected and the

³⁷ *People v. Draper*, 24 Barb. (N. Y.) 265, 4 Abb. Pr. (N. Y.) 333, 14 How. Pr. (N. Y.) 233, *affd.* 25 Barb. (N. Y.) 344, *affd.* 15 N. Y. 532.

³⁸ *Gray v. Board of School Inspectors of Peoria*, 135 Ill. App. 494; *Wiley v. Allegany County*, 51 Md. 401; *Baltimore v. Weatherby*, 52 Md. 442; *Wharton v. School Directors of Cass Township*, 42 Pa. St. 358; *Hughes v. School Directors*, 8 Luz. Leg. Reg. (Pa.) 284; *Krickbaum v. School Directors*, 3 Kulp. (Pa.) 30; *Cooney v. Gardner*, 16 Pa. Co. Ct. 547; *Young v. Dudley* (Tex. Civ. App.), 141 S. W. 116; *Board of Edu-*

cation v. Holt, 51 W. Va. 435, 41 S. E. 337.

³⁹ *Wharton v. Cass Township*, 42 Pa. St. 358.

⁴⁰ *Brasher v. Miller*, 114 Ala. 485, 21 So. 467; *Molacek v. White*, 31 Okla. 693, 122 Pac. 523; *Cooney v. Gardner*, 16 Pa. Co. Ct. 547.

⁴¹ *Baltimore v. Weatherby*, 52 Md. 442; *Krickbaum v. School Directors*, 3 Kulp. (Pa.) 30; *Tanner v. Nelson*, 25 Utah 226, 70 Pac. 984 (text books).

⁴² *Hughes v. School Directors*, 8 Luz. Leg. Reg. (Pa.) 284.

⁴³ *Brasher v. Miller*, 114 Ala. 485, 21 So. 467.

orders themselves had matured.⁴⁴ In a comparatively recent case it was held that an injunction did not lie to restrain school trustees from proceeding to try the superintendent of the school district on charges preferred as to acts committed subsequent to a decision that such superintendent had been legally employed.⁴⁵

§ 2580. Injunction to prevent the sale of articles having a special value.—On the theory of irreparable loss, courts of equity will interfere to prevent the transfer of articles having a special value, where the question of title is involved. Of this character are heirlooms and muniments of title to realty and the writ will issue to restrain the transfer of such articles by persons having possession of them without proper authority.⁴⁶

(c) *PROCEDURE TO OBTAIN INJUNCTION.*

§ 2581. Nature and form of action for injunction.—It may be stated as a general proposition that courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance where the party shows himself entitled to the issuance of the writ under the well-known rules of equity. And the growth of the principles of equity in this regard is such that they have been greatly enlarged, so that it may be said that where a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon some personal act or conduct, the court may grant the writ *pendente lite*.^{46a} In such case it can not be said that the court

⁴⁴ Gray v. Board of School Inspectors of Peoria, 135 Ill. App. 494.

⁴⁵ Young v. Dudley (Tex. Civ. App.), 141 S. W. 116.

⁴⁶ Tonnins v. Prout, 1 Dick. 387; Ximenes v. Franco, 1 Dick. 149; Johnson v. DeBary Baya Merchants' Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518; White v. Williamson, 92 Ga. 443; Pettey v. Dunlap Hardware Co., 99

Ga. 300, 25 S. E. 697; Frederick County Nat. Bank v. Shafer, 87 Md. 54, 39 Atl. 320; Church v. Haeger, 66 N. Y. St. 681, 33 N. Y. S. 47; Parsons v. Hartman, 25 Ore. 547, 37 Pac. 61, 30 L. R. A. 98, 42 Am. St. 803.

^{46a} See note in 38 L. R. A. (N. S.) 228, 234.

lacks the power, although in doubtful cases it may refrain from the exercise of such power. We have seen that equity will not interfere by injunction except to protect what may be called property rights.⁴⁷ We have seen somewhat of the growth and application of the modern doctrine of equity in granting writs of injunction. Equity not only compels, as we have seen, the specific performance of contracts, but it also, by injunction, restrains from violation, so far as this can be done, and provided that a suit at law would not furnish an adequate remedy.⁴⁸ A strong *prima facie* case should be shown in order to justify the interposition of a court of equity by an injunction.⁴⁹ But in case there is a doubt as to whether an action is one at law or in equity, injunction may issue therein as if there was no question of its being equitable.⁵⁰

§ 2582. Right of action in general.—The principle that a court of equity will not interfere where there is a complete and adequate remedy at law is as old as the earliest period of the recorded history of equity jurisprudence.⁵¹ By the terms of the rule, in order to exclude equity, the remedy at law must be plain, adequate and complete. And it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.⁵² It is clearly, then, not enough to exclude jurisdiction in equity that some remedy exists at law. The rule itself assumes that there is or may,

⁴⁷ *Chappell v. Stewart*, 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. 476; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. 678.
⁴⁸ *Chicago & A. R. Co. v. New York L. E. & W. R. Co.*, 24 Fed. 516; *Rock Island & P. R. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; *Sewickly School Dist. v. Ohio Valley Gas Co.*, 154 Pa. St. 539, 25 Atl. 868; *Singer Sew. Mach. Co. v. Union Button-Hole & Co.*, *Holmes* (U. S.) 253, Fed. Cas. No. 12904;

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. 243.

⁴⁹ *American Preservers' Co. v. Norris*, 43 Fed. 711; *Rend v. Venture Oil Co.*, 48 Fed. 248.

⁵⁰ *Ex parte Warfield*, 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. 724.

⁵¹ *Lewis v. Cocks*, 23 Wall. (U. S.) 466, 23 L. ed. 70.

⁵² *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210, 7 L. ed. 655; *Watson v. Sutherland*, 5 Wall. (U. S.) 74, 18 L. ed. 580; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. R. 731, and numerous authorities cited in the opinion.

be some remedy at law. But whenever that remedy is inadequate to meet the justice of the case, the recourse to chancery becomes justified.⁵³ It is not sufficient to confer equity jurisdiction that the evidence will be voluminous and its taking tedious.⁵⁴ Under the rule that he who seeks equity must do equity, the complainant can not restrain the defendant from the use of a party wall where the complainant's wall projects over the defendant's land.⁵⁵ Where a large number of persons are interested in a common subject, and acts are done to the injury of the common right, injunction will lie in favor of a part of such persons though the majority thereof may approve of or excuse the wrong.⁵⁶

§ 2583. Conditions precedent.—"He who seeks equity must do equity," and where part of tax, assessment, or the like is legally due and fixed, such part must be tendered before an injunction can be obtained. It has even been held that one who seeks to restrain by injunction an act for the collection of money must first determine and make an approximate tender of the amount due. Thus, a complainant who was a consumer of water was allowed to tender an approximate amount due as water rent, and then was given an injunction against the defendant company from shutting off the water.⁵⁷ Where the claims are severable, one being for liquidated and others for unliquidated damages, the debtor may tender the liquidated damages.⁵⁸ But if the creditor is seeking to enforce a usurious contract, equity may in a proper case restrain him from enforcing it, without requiring the previous payment or tender of the amount due. Thus, it has been held that in an action by the creditor to enforce the usurious con-

⁵³ *Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248; *Edsell v. Briggs*, 20 Mich. 429; *Essex v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185, revd. 48 N. J. Eq. 627, 23 Atl. 268; *In re Earley's Appeal*, 121 Pa. St. 496, 15 Atl. 602.

⁵⁴ *Bowen v. Chase*, 94 U. S. 812, 24 L. ed. 184.

⁵⁵ *Guttenberger v. Woods*, 51 Cal. 523.

⁵⁶ *Bull v. Read*, 13 Grat. (Va.) 78.

⁵⁷ *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273. See also, *Overall v. Ruenzi*, 67 Mo. 203. And see generally as to necessity for tender, 2 *Elliott Roads & Sts.* (3d ed.) § 771.

⁵⁸ *East Tennessee, V. & G. R. Co. v. Wright*, 76 Ga. 532; *Oakland Bank v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476. See also, *Nelson v. Robson*, 17 Minn. 285.

tract, the debtor may interpose usury as a defense without paying or tendering the amount of the debt.⁵⁹ Nor is tender or payment a necessary condition precedent to obtaining injunctive relief to prevent the plaintiff in an action at law from recovering more than the amount due.⁶⁰ But before the purchaser of alleged unsound or damaged personal property can enjoin the collection of the purchase-price, he must generally prove the scienter and a tender of a return of such property.⁶¹ Under the doctrine that he who seeks equity must do equity, one who has borrowed money from a bank can not have injunction against the negotiation of the securities given therefor without returning the amount of money borrowed.⁶² Also, where a party has been dispossessed of land by an abuse of process, there must be a restitution, unless some new matter has intervened in the meantime, and, until such restitution has been made, a court of equity will not grant relief by way of injunction.⁶³

§ 2584. Jurisdiction of courts in general.—Jurisdiction in its broadest sense means the power to hear and determine a cause; in other words, it is the power inherent in or conferred upon a court to deal with the general subject involved in the action. The power to grant injunctive relief is incidental to chancery jurisdiction and can be exercised only by courts clothed with general chancery powers or by virtue of legislative enactment.⁶⁴ The courts in some jurisdictions possess both common-law and chancery jurisdiction, but the fact that the court has both common-law and chancery jurisdiction in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restrictions.⁶⁵ If the statutes are silent on the subject, any court having inherent chancery jurisdiction

⁵⁹ *Blakeman v. Busby*, 61 Kans. 745, 60 Pac. 1064.

⁶⁰ *Cole v. Savage*, Clark Ch. (N. Y.) 361.

⁶¹ *Howell v. Freeman*, 24 Ky. 54.

⁶² *Elder v. First Nat. Bank*, 12 Kans. 238.

⁶³ *Perry v. Tupper*, 71 N. Car. 387.

⁶⁴ *Cummings v. Des Moines &c. R.*

Co., 36 Iowa 173; *Emporia v. Soden*, 25 Kans. 588, 37 Am. Rep. 265; *Traverse City, K. & G. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. 826; *Bailey v. Stevens*, 11 Utah 175, 39 Pac. 828.

⁶⁵ *Bailey v. Stevens*, 11 Utah 175, 39 Pac. 828.

may hear and determine applications for injunction.⁶⁶ But the grant of authority to a county judge to award an injunction in cases in the district court is a mere power to issue mesne process auxiliary to the proper jurisdiction of the district court, and is not trenching upon it.⁶⁷ Where the jurisdiction is invoked on account of the peculiar remedy which equity affords in a given case, in distinction from the remedy which a court of law can give, in all these cases, as a general rule, its jurisdiction is concurrent with that of the common law. We have seen that whenever the object of the suit is simply to recover damages in money, equity will not take jurisdiction, because the relief sought is precisely the same in quality and kind as a common-law court would give. There is consequently no necessity for appealing to a court of equity.⁶⁸ Having acquired jurisdiction to enjoin an act, however, equity will retain it, in a proper case, to award damages,⁶⁹ or to grant an account, although the right to an injunction has expired.⁷⁰ And if jurisdiction has been acquired on other grounds, the court may issue injunctions to do complete justice.⁷¹ Jurisdiction is sometimes conferred upon one court to issue injunctions in suits pending in another court, where the judge of the latter court is absent, but such jurisdiction should not be invoked, except where the delay in reaching the district judge would work irreparable injury.⁷²

§ 2585. Jurisdiction of appellate courts.—In some instances the appellate courts have original jurisdiction of certain classes of suits for injunction. Thus, it is held in Colorado that the Supreme Court of that state has juris-

⁶⁶ *People v. Davidson*, 30 Cal. 379.

⁶⁷ *Thompson v. Williams*, 6 Cal. 88; *People v. Placer County Judge*, 27 Cal. 151.

⁶⁸ *Coe v. Turner*, 5 Conn. 86; *Blackwell v. Oldham*, 4 Dana (Ky.) 195; *Woodman v. Freeman*, 25 Maine 531; *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. 556.

⁶⁹ *Cobia v. Ellis*, 149 Ala. 108, 42 So. 751.

⁷⁰ *Carnegie Steel Co. v. Colorado Fuel & Co.*, 165 Fed. 195.

⁷¹ *Alton Water Co. v. Brown*, 166 Fed. 840, 92 C. C. A. 598.

⁷² *McLean v. Farmers' Highline Canal & Co.*, 44 Colo. 184, 98 Pac. 16; *Renshaw v. Cook*, 33 Ky. L. 860, 111 S. W. 377.

diction to issue, in the first instance, an injunction to restrain the carrying out of a conspiracy to do acts which would result in the fraudulent perversion of the elective rights of citizens and the casting and counting of illegal votes at an election.⁷³ However, there are a number of well considered cases holding the contrary.⁷⁴ In a few states the power to grant injunction has been conferred on the Supreme Court by constitutional provision. But in most jurisdictions where the question has arisen, it has been decided that the Supreme Court is without this power.⁷⁵ It has been held in Oklahoma that the Supreme Court of that state is essentially a court of appeals and is without original jurisdiction to issue writs of injunction in cases where the relief prayed for is purely injunctive.⁷⁶ It has also been held that a judge of the court of appeals in Kentucky has not the power to grant injunctions in any case.⁷⁷

§ 2586. Jurisdiction of federal courts.—The federal constitution vests the judicial power of the United States in one Supreme Court and in such inferior courts as congress may from time to time establish; and it provides that this judicial power shall extend to all cases in law and equity arising under the constitution and laws of the United States, or between the parties therein designated.⁷⁸ Thus, the federal courts have been invested with full equity powers since the origin of the federal government. And being courts of equity, as well as of law, a party to a suit at law in a federal court can have full relief in equity in

⁷³ *People v. Tool*, 25 Colo. 225, 86 Pac. 224, 6 L. R. A. (N. S.) 822, 117 Am. St. 198. See also, *Davis v. Tusculum*, C. & D. R. Co., 4 Stew. & P. (Ala.) 421; *Cooper v. Mineral Point*, 34 Wis. 181.

⁷⁴ *Cubbedge v. Adams*, 42 Ga. 124; *Campbell v. Campbell*, 22 Ill. 664; *Lane v. Charles*, 5 Mo. 285.

⁷⁵ *Jones v. Littlerock*, 25 Ark. 284; *Bryant v. People*, 71 Ill. 32; *Reed v. Murphy*, 2 G. Greene (Iowa) 568; *Traverse City, K. & G. R. Co. v.*

Seymore, 81 Mich. 378, 45 N. W. 826; *State v. Wilson*, 49 Mo. 156; *Pittsburg, Ft. W. & C. R. Co. v. Hurd*, 17 Ohio St. 144. But see as to jurisdiction where it is auxiliary to appeal, *Elliott's App. Proc.*, §§ 506, 507.

⁷⁶ *State v. Kenner (Okla.)*, 97 Pac. 258.

⁷⁷ *Kelley v. Pulaski Stave Co.*, 31 Ky. L. 942, 105 S. W. 153.

⁷⁸ *Con. U. S. Art. III, Sec. 1, 2.*

the same court.⁷⁹ But by a United States statute passed in 1793, the federal courts were prohibited from enjoining suits or proceedings pending in any state court except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.⁸⁰ This statute, however, applies only to pending suits, and does not apply to a threatened suit.⁸¹ Federal courts have exclusive jurisdiction of suits to enjoin matters arising under the laws of the United States.⁸² Jurisdiction of a federal court to enjoin a proceeding in such a court does not depend on diverse citizenship of the parties, the proceeding to enjoin not being an original suit, but ancillary and dependent, or supplementary merely to the suit out of which it arose.⁸³ Federal courts also have jurisdiction to enjoin the enforcement of void or unconstitutional state statutes,⁸⁴ and for that purpose may enjoin officers empowered to enforce them.⁸⁵

§ 2587. Jurisdiction of inferior courts.—The jurisdiction to hear and determine an application for relief by injunction is very largely a matter of statutory regulation under constitutional provisions authorizing it. And if the statutes are silent on the subject, any court having inherent chancery powers may hear and determine applications for injunctions.⁸⁶ Courts of inferior or limited jurisdiction can only exercise their powers in such cases and in such manner as prescribed by statute, and the powers granted such court can not be enlarged by implication.⁸⁷ A court of general

⁷⁹ *Logan v. Lucas*, 59 Ill. 237; *Chapin v. James*, 11 R. I. 86, 23 Am. Rep. 412.

⁸⁰ United States Rev. Stats. (1793) § 720, p. 136. See also, *Whitney v. Wilder*, 54 Fed. 554, 4 C. C. A. 510; *Smith v. Jones Lumber &c. Co.*, 200 Fed. 647 (under act of 1887 as amended by act of Aug. 13, 1888).

⁸¹ *Texas & Pac. R. Co. v. Kuteman*, 54 Fed. 547.

⁸² *Frank v. Leopold & Feron Co.*, 169 Fed. 922; *Schalkenbach v. Nat. Ventilating Co.*, 129 App. Div. (N. Y.) 389, 113 N. Y. S. 352.

⁸³ *Bradshaw v. Miners' Bank*, 81 Fed. 902, 26 C. C. A. 673; *Krippen-*

dorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. 27; *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749.

⁸⁴ *Consolidated Gas Co. v. New York*, 157 Fed. 849; *Fleischman Co. v. Murray*, 161 Fed. 152; *St. Louis & S. F. R. Co. v. Hadley*, 161 Fed. 419.

⁸⁵ *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441.

⁸⁶ *People v. Davidson*, 30 Cal. 379; *Green v. Huey*, 23 La. Ann. 704; *Stein v. Frieberg*, 64 Tex. 271; *Rosenberger v. Bowen*, 84 Va. 660, 5 S. E. 697.

⁸⁷ *Cummings v. Des Moines, W. & S. W. R. Co.*, 36 Iowa 173; *Clarke v. Holmes*, 1 Doug. (Mich.) 390;

jurisdiction at the place of domicile of a corporation is the proper tribunal for injunction against its directors to restrain the disposal of corporate products, and receipt of debts due the corporation, or the carrying on of its business.⁸⁸ It has been held that injunction against pending proceedings may be granted in the county where such proceedings are pending, although the persons enjoined do not reside there, provided no relief is prayed for not included in the litigation sought to be enjoined.⁸⁹ A stipulation by the parties to a suit in equity for injunctive relief can not give a court jurisdiction over the subject to hear and determine the application.⁹⁰ By statute, in some jurisdictions, writs of injunction to stay proceedings in a suit or execution on a judgment of the court where such suit is pending or such execution issued, and, generally, a suit to enjoin another action must be brought in the county where such suit is pending; but where the injunctive relief is merely incidental, the venue is determined with reference to the main relief sought.⁹¹

§ 2588. Jurisdiction of persons.—A court of equity deals with individuals; and where a defendant is within the jurisdiction of the court so that its process can be served upon him, it will compel him to do his duty in the specific case. And it does this, as it may do, without reference to situs of the subject-matter in controversy.⁹² This peculiar equitable authority of the court over the person of the defendant extends to restrain him from the bringing of inequitable suits or the making of inequitable defenses at law.⁹³ Courts of

Thompson v. Cox, 53 N. Car. 311; McKenzie v. Ramsay, 1 Bailey (S. Car.) 457.

⁸⁸ Moneuse v. Riley, 40 Misc. (N. Y.) 110, 81 N. Y. S. 325.

⁸⁹ Crawley v. Barge, 132 Ga. 96, 63 S. E. 819.

⁹⁰ Daly v. Smith, 49 How. Pr. (N. Y.) 150, 38 N. Y. Super. Ct. 158.

⁹¹ Worthy v. Day, 143 Ill. App. 274; Wheeler v. Powell (Tex. Civ. App.), 114 S. W. 689; Turner v. Patterson (Tex. Civ. App.), 118 S. W. 565.

⁹² McGregor v. MacGregor, 9 Iowa

65; Carver v. Peck, 131 Mass. 281; Great Falls Mfg. Co. v. Worster, 23 N. H. 462; Wood v. Warner, 15 N. J. Eq. 81; Penn v. Hayward, 14 Ohio St. 302; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Davis v. Morris' Exrs., 76 Va. 21.

⁹³ McKibbin v. Bristol, 50 Mich. 319, 15 N. W. 491; Ferrin v. Errol, 59 N. H. 234; Hall v. Piddock, 21 N. J. Eq. 311; Becker v. Church, 115 N. Y. 562, 22 N. E. 748; Thompson's Appeal, 107 Penn. St. 559; Atlantic Delaine Co. v. Tredick, 5 R. I. 171.

equity do not proceed upon any claim or right to interfere with or control the cause or proceeding in other tribunals or to prevent them from adjudicating on the rights of parties when drawn into controversy and duly presented for their determination; but the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will work wrong and injury to others and are therefore contrary to equity and good conscience. A decree of the court in such cases is pointed solely at the party, and does not extend to the tribunals where the suit or proceeding is pending. Thus, a court of equity has jurisdiction to grant injunction in cases where the parties reside within the jurisdiction.⁹⁴ When a court of equity has once acquired jurisdiction over receivership matters, it may, in order to render such jurisdiction effective, issue an injunction against any of the parties.⁹⁵ Joint wrongdoers residing in different counties, who threaten to commit trespass, and are insolvent, may be restrained in one petition brought in the county of the residence of one of them.⁹⁶ And a court with jurisdiction in personam may restrain the prosecution of a subsequent suit in another county, which will take from the court first obtaining jurisdiction part of the subject-matter of the suit.⁹⁷

§ 2589. Venue.—It is a well settled rule that jurisdiction over a given subject-matter can not be created by contract.⁹⁸ Where the county in which a suit for injunction

⁹⁴ *Hawley v. State Bank*, 134 Ill. App. 96; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185.

⁹⁵ *Whilden v. Chapman*, 80 S. Car. 84, 61 S. E. 249.

⁹⁶ *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420.

⁹⁷ *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. 932.

⁹⁸ *Schatcherd Lumber Co. v. Rike*, 113 Ala. 555, 21 So. 136, 59 Am. St. 147; *Feillett v. Engler*, 8 Cal. 76; *Whipple v. Stevenson*, 25 Colo. 447,

55 Pac. 188; *Olds Wagon Works v. Benedict*, 67 Fed. 1, 14 C. C. A. 285; *O'Brien v. Harris*, 105 Ga. 732, 31 S. E. 745; *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806; *Rocheport Bank v. Doak*, 75 Mo. App. 332; *Crawford County v. Hathaway*, 61 Nebr. 317, 85 N. W. 303; *Batchelder v. Carrier*, 45 N. H. 460; *Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753; *Wheelock v. Lee*, 74 N. Y. 495, 5 Abb. N. Cas.

shall be brought is designated by statute, a suit for an injunction can not be brought in any other county than that designated.⁹⁹ It is very commonly provided that in case an injunction is granted to stay a suit or judgment at law, the proceeding must be in the county where the judgment is obtained or the suit is pending.¹ Injunctions against pending proceedings are usually brought in the court where the proceedings are pending, and the execution of a writ may be enjoined wherever it is to be performed.² A suit in equity to enjoin the enforcement of a judgment should be brought in the county and court where the judgment was rendered, unless rendered in the Supreme Court, and not in a county where a transcript has been filed.³ But a stranger to a judgment, standing upon his rights and not seeking to attack the judgment, may bring suit to enjoin its execution in the county where levy is to be made and need not proceed in the county of the judgment.⁴

§ 2590. Time to sue—In general.—Where the plaintiff in an action for injunction is guilty of improper delay in filing his suit, the relief will usually be denied.⁵ But there are some cases holding that the plaintiff is entitled to injunctive relief, even though he be guilty of improper delay.⁶ Where an application for injunction is prematurely made, a court can not grant an injunction to take effect in futuro, but will dismiss the complaint.⁷ Where a court of law

(N. Y.) 72, 54 How. Pr. (N. Y.) 402; *Torbet v. Coffin*, 6 Ohio 33; *Baker v. Mitchell*, 105 Tenn. 610, 59 S. W. 137; *Sanders v. Pierce*, 68 Vt. 468, 35 Atl. 377; *Yates v. Taylor* County Court, 47 W. Va. 376, 35 S. E. 24.

⁹⁹*Gorham v. Toomey*, 9 Cal. 77.
¹*Garretson v. Appleton Mfg. Co.*, 61 Ill. App. 443; *Phelan v. Johnson*, 80 Iowa 727, 46 N. W. 68; *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kans. 270; *Norfolk & W. R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 14 S. E. 689.

²*Kirk v. United States*, 124 Fed. 324, affd. 130 Fed. 112, 64 C. C. A. 446; *Meeks v. Roan*, 117 Ga. 865, 45

S. E. 252; *Little v. Griffin*, 33 Tex. Civ. App. 515, 77 S. W. 635.

³*Brunk v. Moulton Bank*, 121 Iowa 14, 95 N. W. 238.

⁴*Seeligson v. Gifford* (Tex. Civ. App.), 103 S. W. 416.

⁵*Higgins v. Bullock*, 73 Ill. 205; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Chapman v. Mad River & Lake Erie R. Co.*, 6 Ohio St. 119; *Morris v. Edwards*, 62 Tex. 205; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265.

⁶*Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Hoyt v. Hoyt*, 2 Pa. Co. Ct. 152.

⁷*Porter v. Speno*, 13 Idaho 600, 92

is powerless to deal with the subject-matter, delay in filing a suit to enjoin an action at law will not deprive the complainant of his rights to an injunction. So, it is said that there seems to be no reason for applying the general doctrine of laches where the right of a complainant is clear and the injury is of a character which would entitle him to apply to a court of equity without resorting to law in the first instance.⁸ The question as to whether the defendant in a suit for injunction has been prejudiced by delay must be taken into consideration in determining whether the right to an injunction is barred by laches.⁹ Mere delay in bringing suit for an injunction until the right is actually invaded is no ground for refusing the relief where the injury inflicted is serious and permanent in its nature, such as would continue to operate in future time.¹⁰ It has been held that the fact that no injury could result to the defendant from the granting of injunction, as the bond given by the plaintiff would indemnify the defendant against loss, is no ground for granting an injunction.¹¹

§ 2591. **Necessary parties to a suit—In general.**—A court of equity has two objects in view in every case; its first object is, so far as possible, to hear and determine the whole controversy relating to the subject-matter before it, once for all, in a single suit, in order that a multiplicity of suits may thus be prevented. The other object is that no decree shall be given affecting the rights of one who has not had an opportunity to be heard. There is an important distinction between what is known as proper parties and necessary parties. Proper parties are those who are interested in the subject-matter of the controversy and who are within the jurisdiction of the court, but whose presence is not indispensable.¹² Necessary parties are those imme-

Pac. 367; *Mason v. Independence*, 61 Kans. 188, 59 Pac. 272.

⁸ *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758.

⁹ *Henwood v. Jarvis*, 27 N. J. Eq. 247.

¹⁰ *Davis v. Londgreen*, 8 Nebr. 43;

Pyle v. Richards, 17 Nebr. 180, 22 N. W. 370.

¹¹ *Parsons v. Weller*, 24 Ky. L. 1770, 72 S. W. 273.

¹² *Smith v. Chapman*, 4 Conn. 334; *Farmers' & Mechanics' Bank v. Polk*, 1 Del. Ch. 167; *Jerome v. McCarter*,

diately concerned in the object of the suit, as distinguished from its subject-matter, without whose presence no hearing or decree can be had.¹³ Necessary and proper parties are all who have an interest in the subject and object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit.¹⁴ Injunction can not be granted in a case where an indispensable party is not joined.¹⁵ Where parties are very numerous and can not without great inconvenience and oppressive delay be all brought before the court, it may in its discretion dispense with making them all parties, but the decree in such cases is usually without prejudice to the rights of all absent parties.¹⁶ Any person in interest may enjoin an unlawful act which operates to his prejudice, and the wrongdoer can not complain that another having a joint or common interest has not been joined as a party plaintiff.¹⁷

§ 2592. Plaintiffs or complainants.—Whenever a suit in equity is based upon a joint title or interest, all the persons sharing in the title or interest should unite as plaintiffs in the suit.¹⁸ But where the parties jointly interested are very numerous, the court, as a matter of convenience, will permit a suit to be brought by one or more in behalf of all.¹⁹ However, it must appear by the complaint that the parties have a common interest and that the suit is brought in behalf of all of them. Where the parties are not numerous, but some of them, having a common interest with the

94 U. S. 734, 24 L. ed. 136; *Weed v. Beebe*, 21 Vt. 495.

¹³ *Jessup v. Illinois Cent. R. Co.*, 36 Fed. 735; *Howell v. Foster*, 122 Ill. 276, 13 N. E. 527; *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. 422.

¹⁴ *Sipe v. Columbia Refining Co.*, 171 Fed. 295; *Farmer v. Behmer*, 9 Cal. App. 773, 100 Pac. 901; *Risley v. Utica*, 173 Fed. 502; *Delaware, L. & W. R. Co. v. Jersey City*, 168 Fed. 128.

¹⁵ *McConnell v. Dennis*, 153 Fed. 547, 82 C. C. A. 501; *Tacoma R. & Power Co. v. Pacific Traction Co.*, 155 Fed. 259.

¹⁶ *Spaulding v. Evenson*, 149 Fed. 913.

¹⁷ *Pennsylvania Co. v. Lake Erie & C. R. Co.*, 146 Fed. 446; *Police Jury of Lafourche v. Robichaux*, 116 La. 286, 40 So. 705.

¹⁸ *Ferris v. Montgomery Land & Imp. Co.*, 94 Ala. 557, 10 So. 607, 33 Am. St. 146; *Trades Sav. Bank v. Freese*, 26 N. J. Eq. 453.

¹⁹ *New London Bank v. Lee*, 11 Conn. 112, 27 Am. Dec. 713; *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*, 113 Mass. 179; *Hazard v. Durant*, 11 R. I. 195.

others, refuse to join in a suit for the protection of the common right, the suit may be brought by the others, and in that case those who refuse to join as plaintiffs must be made defendants.²⁰ Where a nuisance sought to be enjoined is of a public nature, the suit should be brought by the appropriate public officer, but if private persons suffer some special injury aside from the injury to the general public, they may maintain such a suit. Thus, an officer of a town, who is liable for the obstruction of highways, has an interest entitling him to enjoin such obstruction,²¹ but an individual can not enjoin an obstruction without showing special damage aside from that sustained by the general public.²² However, suits involving only public rights can not usually be maintained by private individuals.²³ Parties seeking relief against the same injury on the same ground may join as complainants, though their interests are several. Thus, the owners in severalty of property abutting on the street may join as plaintiffs in a suit to restrain interference with the street.²⁴

§ 2593. Persons who must be made defendants.—The rule as to defendants is, that where a person will be affected directly by the decree, he is an indispensable party, and the court will not entertain jurisdiction of the suit without him.²⁵ And a party is directly affected by a decree whenever its operation is to charge him with any liabilities.²⁶ All persons against whom relief must be obtained in order to accomplish the object of a suit for injunction, and all persons combining to carry out the threatened act are properly joined as defendants.²⁷ Thus, where a pub-

²⁰ Lovell v. Farrington, 50 Maine 239; Freeman v. Scofield, 16 N. J. Eq. 28.

²¹ Williams v. Riley, 79 Nebr. 554, 113 N. W. 136.

²² Brown v. Rea, 150 Cal. 171, 88 Pac. 713; Robbins v. White, 52 Fla. 613, 42 So. 841; Tise v. Whitaker-Harvey Co., 144 N. Car. 507, 57 S. E. 210.

²³ Thompson v. Haskell, 24 Okla. 70, 102 Pac. 700. But see, Moore v. Hupp, 17 Idaho 232, 105 Pac. 209.

²⁴ Nichols v. Sadorus, 120 Ill. App. 70. See, as to injunction by trustee, City of Denver v. Mercantile Trust Co., 201 Fed. 790.

²⁵ Herrington v. Hubbard, 2 Ill. 569, 33 Am. Dec. 426.

²⁶ Lyman v. Bonney, 101 Mass. 562; Busby v. Littlefield, 31 N. H. 193.

²⁷ Sipe v. Columbia Refining Co., 171 Fed. 295; Ralston v. Wichita Natural Gas Co. (Kans.), 105 Pac. 430.

lisher of a list purporting to contain names of all persons engaged in a certain business was induced by competitors to omit the plaintiff's names, they may be joined with the publisher in a suit for injunction.²⁸ Also, all persons contributing to a nuisance may be joined as defendants in a suit to enjoin such nuisance.²⁹ In a suit to restrain the exercise of public functions, a public officer may be a proper party by reason of his statutory relations to the subject-matter.³⁰ But it is not necessary to join a municipal corporation as a party defendant where relief is sought against one of its servants threatening an unlawful or unauthorized act, nor when the officers who alone have power to do the acts sought to be enjoined are made parties.³¹ The officers of a labor union who organize, counsel, advise and support a strike are proper parties defendant to a suit for an injunction.³² A complaint to enjoin the enforcement of a statute must be brought against one clothed with the duty of enforcing it, and not against an officer whose duty is merely to determine whether or not the statute applies to the complainant.³³ It has been held that a corporation with whom a contract is made by a city which will create a debt beyond the constitutional limit of the city is not an indispensable defendant to a suit for injunction by a taxpayer to prevent performance of the contract.³⁴ In an action to restrain enforcement of a judgment against land owned by the debtor at the time of rendition of the judgment, a subsequent transferee of such land is a proper party defendant.³⁵

§ 2594. Notice of application, process and appearance.—

As a rule, an injunction will not be granted without rea-

²⁸ *Davis v. New England R. Pub. Co.*, 203 Mass. 470, 89 N. E. 565, 25 L. R. A. (N. S.) 1024, 133 Am. St. 318.

²⁹ *Norton v. Colusa Parrot Mining & Smelting Co.*, 167 Fed. 202.

³⁰ *Borden's Condensed Milk Co. v. Baker*, 168 Fed. 111.

³¹ *Quinn v. Schneider*, 118 Mo. App. 39, 94 S. W. 742; *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638.

³² *Piano & Organ Workers' International Union v. International Piano & Organ Supply Co.*, 124 Ill. App. 353.

³³ *Grand Trunk Western R. Co. v. Curry*, 162 Fed. 978.

³⁴ *City Water Supply Co. v. Ottumwa*, 120 Fed. 309.

³⁵ *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687.

sonable notice to the defendant or his attorney.³⁶ But the want or insufficiency of notice or service of process is cured by the appearance and plea of defendant.³⁷ The granting or refusing of a temporary injunction without notice to the defendant rests largely in the discretion of the trial court.³⁸ But before granting an injunction without notice, a clear case should be made by the complaint, and it should also clearly appear that it is a case of urgent necessity and one in which irreparable injury will be produced if the relief is denied.³⁹ Great care, however, should be exercised lest the grant of the writ cause irreparable injury to those affected instead of saving the applicant from such injury,⁴⁰ and hence the issuance of an injunction without notice must be predicated upon facts from which irreparable injury to the complainant is clearly manifest.⁴¹

§ 2595. Bill, complaint or petition.—A bill or complaint in equity should state the plaintiff's case with such fullness and accuracy as to show upon its face that he is entitled to relief against the defendant.⁴² The rule does not require the plaintiff to set forth in his bill the evidence by which he expects to sustain his case; but he must set forth all the facts and circumstances which, taken together, constitute his case, that is, the grounds upon which he prays for relief.⁴³ If no facts are alleged upon which injunctive or

³⁶ Gregory v. Pike, 79 Fed. 520, 25 C. C. A. 48; Kehler v. G. W. Jack Mfg. Co., 55 Ga. 639; Jackson v. Byne, 56 Ga. 525; State v. Ruff, 6 Ind. App. 38, 33 N. E. 124; Hallenberg v. Greene, 73 N. Y. S. 403; Horne v. Cumberland County, 122 N. Car. 466, 29 S. E. 581; New York v. Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715.

³⁷ Harris v. Gwin, 18 Miss. 563; Parker v. Williams, 4 Paige (N. Y.) 439; Hyre v. Hoover, 3 W. Va. 11.

³⁸ Anderson v. Hultberg, 117 Ill. App. 231; State v. Nicoll, 40 Wash. 517, 82 Pac. 895; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225n. But see recent act of Congress.

³⁹ Savage v. Parker, 53 Fla. 1002,

43 So. 507; Builders Supply Co. v. Acton, 56 Fla. 756, 47 So. 822; Sanganois Club v. Lane, 145 Ill. App. 475; Ebann v. Brown, 139 Ill. App. 213.

⁴⁰ McLean v. Farmers' High Line Canal & Reservoir Co., 44 Colo. 184, 98 Pac. 16.

⁴¹ Goldberg v. Laughlin, 137 Ill. App. 283.

⁴² Huntington v. Saunders, 14 Fed. 907, aff'd. 120 U. S. 78, 30 L. ed. 580, 7 Sup. Ct. 356; Fox v. Pierce, 50 Mich. 500, 15 N. W. 880; Perry v. Carr, 41 N. H. 371; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881. See also, Harris v. Smiley (Okla.), 128 Pac. 276.

⁴³ Marshall v. Turnbull, 34 Fed. 827; Weisman v. Heron Mining Co.,

other equitable relief should be granted, the bill or complaint should be dismissed, but where the defect may easily be cured by amendment, it is not available on a motion to dismiss.⁴⁴ The complaint must be frank in its statement of facts and the bill should not be multifarious.⁴⁵ A bill or complaint must allege facts and not opinions or legal conclusions;⁴⁶ thus, a bare allegation that the doing of a threatened act will work an irreparable injury to the complainant is insufficient.⁴⁷ A mere general averment that the damages resulting from a wrongful act would be irreparable, being only a conclusion of the pleader, is generally not sufficient; it is necessary that the pleadings set forth the facts so that the court may determine whether the damages would be of that character.⁴⁸ So, too, an allegation that the complainant will be driven to a multiplicity of suits unless an injunction is granted which is not supported by facts stated in the complaint is a mere conclusion.⁴⁹

§ 2596. Plea or answer.—The purpose of a plea is to present a single issue of fact which will operate as a bar to the plaintiff's right to recover. The fact put in issue by the plea should constitute in itself a complete defense to the complaint, or to that part of the complaint to which it is

57 N. Car. 112; *St. Louis v. Knapp Co.*, 104 U. S. 658, 26 L. ed. 883.

⁴⁴ *Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 So. 274, 20 L. R. A. (N. S.) 848n, 131 Am. St. 20n; *Metcalf Co. v. Martin*, 54 Fla. 531, 45 So. 463, 127 Am. St. 149.

⁴⁵ *Simonson v. Cain*, 138 Ala. 221, 34 So. 1019; *Dastervignes v. United States*, 122 Fed. 30, 58 C. C. A. 346; *Moffat v. Calvert County*, 97 Md. 266, 54 Atl. 960; *Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44, 56 Atl. 861; *New York Cent. & H. R. Co. v. Reeves*, 41 Misc. (N. Y.) 490, 85 N. Y. S. 28.

⁴⁶ *Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co.*, 147 Ala. 359, 40 So. 981; *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597; *Quinn v. Schneider*, 118 Mo. App. 39, 94 S. W. 742; *Hicks v.*

Murphy (Tex. Civ. App.), 151 S. W. 845.

⁴⁷ *Merced Falls Gas & Electric Co. v. Turner*, 2 Cal. App. 720, 84 Pac. 239; *Bailey v. Simpson*, 57 Ga. 523; *Rabinovich v. Reith*, 120 Ill. App. 409; *Otis v. Sweeney*, 48 La. Ann. 940, 20 So. 229; *Roman v. Strauss*, 10 Md. 89; *Whitman v. St. Paul & R. Co.*, 8 Gil. (Minn.) 90; *Thompson v. Williams*, 54 N. Car. 176; *Van Wert v. Webster*, 31 Ohio St. 420; *Leitham v. Cusick*, 1 Utah 242; *Moore v. Steelman*, 80 Va. 331; *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Cresap v. Kemble*, 26 W. Va. 603.

⁴⁸ *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439; *Jennings-Heywood Oil Syndicate v. Heywood Oil Co.*, 117 La. 536, 42 So. 126.

⁴⁹ *Bishop v. Owens*, 5 Cal. App. 83, 89 Pac. 844.

pleaded. The advantage of a plea, if sustained, is that it relieves the defendant from making a full answer to the complaint. The defense to a complaint may take either one of two different forms: it may consist in the denial of the existence of some one fundamental fact without which the plaintiff can not maintain his complaint, although all the other allegations in it may be true; or the defense may consist in some extraneous fact, not alleged in the complaint, which constitutes in itself a complete answer to the plaintiff's case by way of confession and avoidance.⁵⁰ Hence, pleas may be divided into two classes: pure pleas, and anomalous or negative pleas. A pure plea is one which sets up some extraneous fact as a defense to the complaint, by way of confession and avoidance. A negative or anomalous plea is one which negatives or denies some essential fact stated in the complaint, without which the complaint can not be maintained; and, therefore, by denying the existence of such fact, the plea raises a complete defense to the whole suit.⁵¹ All pleas, whether pure or negative, must present but one issue of fact or law. If a plea raises two or more issues, it is tainted with duplicity and is fatally defective.⁵² If the defendant does not demur or plead to the complaint, he must answer or disclaim. The answer may be an admission or denial of the matters alleged in the plaintiff's complaint; or it may set forth new matter constituting a special defense to the plaintiff's case. Usually, an answer to a complaint in equity must be under oath, and ordinarily signed by the defendant.⁵³ Concerning facts which are alleged to have been done by the defendant personally, or to his personal knowledge, he must answer positively, and not merely as to his remembrance or belief. As to facts not within his personal knowledge, he must

⁵⁰ *Garden v. Watson*, 18 Brad. (Ill.) 386, *affd.* 119 Ill. 312, 10 N. E. 192.

⁵¹ *Gilder v. Gilder*, 1 Def. Ch. 331; *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. 534; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. 458.

⁵² *McCloskey v. Barr*, 38 Fed. 165; *Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 210, 10 L. ed. 423. See also, *Daniell's Ch. Pl. & Pr.* 607.

⁵³ *Howes v. Downing*, 72 Mich. 41, 40 N. W. 50; *Collard v. Smith*, 13 N. J. Eq. 43.

answer to his information and belief.⁵⁴ But the effect of an allegation on information and belief may be destroyed by an antagonistic, positive allegation.⁵⁵ Where the answer is responsive and denies the allegations of the complaint, the burden is on the complainant to establish his allegations.⁵⁶ A defense not pleaded in the answer to a complaint for injunction can not be set up.⁵⁷ As in other equity suits, the answer to a complaint for injunction must be responsive thereto.⁵⁸ The defense of an adequate remedy at law must be raised before the trial on the merits;⁵⁹ and it must be raised by answer, if it does not appear on the face of the complaint.⁶⁰ An answer in a suit to restrain the cutting of timber, alleging that on a certain day the plaintiff conveyed to another all his interest in the timber described, will avail only to limit the plaintiff's recovery as a partial defense.⁶¹

§ 2597. Cross-bills.—A cross-bill is a bill brought by the defendant in a suit in equity against the plaintiff in the same suit, or against other defendants in the same suit, or against such defendants and the plaintiff, touching the matters in question in the original suit. It may be brought for two purposes: 1, to obtain a discovery from the plaintiff or from codefendant in aid of the defense to the original bill; or, 2, to obtain some relief as to the matters in issue in the original bill. A cross-bill can not be filed to prevent the complainant from exercising the rights he seeks to establish by the bill, where they must necessarily be determined in deciding the issues on the complaint and answer.⁶² Since, formerly, parties could not be examined or compelled to testify by the opposite party, a defendant

⁵⁴ *Devereaux v. Cooper*, 11 Vt. 103.

⁵⁵ *Clark v. Peck*, 79 Vt. 275, 65 Atl.

14.

⁵⁶ *Cain v. Simonson* (Ala.), 39 So. 571, 3 L. R. A. (N. S.) 205.

⁵⁷ *Hatton v. Gregg*, 4 Cal. App. 542, 88 Pac. 594.

⁵⁸ *Thomas v. Borden*, 222 Pa. 184, 70 Atl. 1051.

⁵⁹ *Driscoll v. Smith*, 184 Mass. 221, 68 N. E. 210.

⁶⁰ *Corscadden v. Haswell*, 88 App. Div. (N. Y.) 158, 84 N. Y. St. 597, revd. 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664.

⁶¹ *Houck v. Patty*, 100 Mo. App. 302, 73 S. W. 389.

⁶² *Sunset Tel. Co. v. Eureka*, 122 Fed. 960.

in equity was allowed to file his cross-bill for discovery against the plaintiff, compelling him to disclose any facts within his knowledge material to the defense.⁶³ And such a bill might also be filed against a codefendant where the defendant's interests were not joint, but several and adverse to one another.⁶⁴ The second purpose of a cross-bill is to ask for some relief in relation to the matters at issue under the original bill.⁶⁵ A defendant can not, by means of a cross-bill, introduce any new or distinct subject-matter not embraced in the original bill,⁶⁶ introduce new parties in a cause,⁶⁷ nor set up the matters in the cross-bill inconsistent with those alleged in the answer.⁶⁸ And the defendant is not allowed to file a cross-bill until he has filed an answer to the original bill.⁶⁹

§ 2598. **Demurrer.**—A demurrer is in effect an objection or assertion by the defendant that, owing to some defect in the form or substance of the complaint, the plaintiff is not entitled to any relief. A demurrer admits the truth of other facts well pleaded in the complaint,⁷⁰ but it does not admit the accuracy of any statements or inferences of law.⁷¹ Thus, the demurrer does not admit the legal construction given by the complaint to an instrument referred

⁶³ *Howe v. South Park*, 119 Ill. 101, 7 N. E. 333; *Kidder v. Barr*, 35 N. H. 235.

⁶⁴ *Evans v. Staples*, 42 N. J. Eq. 584, 8 Atl. 528.

⁶⁵ *Armstrong v. Chemical Nat. Bank*, 37 Fed. 466; *Howe v. South Park*, 119 Ill. 101, 7 N. E. 333; *Schulz v. Schulz*, 138 Ill. 665, 28 N. E. 808.

⁶⁶ *Andrews v. Hobson's Admr.*, 23 Ala. 219; *Fidelity Trust Co. v. Mobile St. R. Co.*, 53 Fed. 850, revd. 57 Fed. 80, 6 C. C. A. 253; *McMullen v. Ritchie*, 57 Fed. 104; *Stonemetz Printers' Machinery Co. v. Brown Folding-Machine Co.*, 46 Fed. 851; *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97; *Slater v. Cobb*, 153 Mass. 22, 26 N. E. 410; *Andrews v. Kibbie*, 12 Mich. 94.

⁶⁷ *Glenn v. Clark*, 53 Md. 580; *Beck v. Beck*, 43 N. J. Eq. 39, 10 Atl. 155; *Richman v. Donnell*, 53 N. J. Eq. 32, 30 Atl. 533. But this rule has

been changed in some jurisdictions, and the whole scope of a cross-bill has been considerably enlarged.

⁶⁸ *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540; *Jackson v. Grant*, 18 N. J. Eq. 145.

⁶⁹ *Neal v. Foster*, 13 Sawy. (U. S.) 236, 34 Fed. 496; *Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327. But see, *Christmas Gold Min. Co. v. Milliken*, 200 Fed. 316.

⁷⁰ *Gage v. Bailey*, 115 Ill. 646, 4 N. E. 777; *Pearson v. Tower*, 55 N. H. 215.

⁷¹ *Cornell v. Green*, 43 Fed. 105; *Thompson v. National Bank of Redemption*, 106 Mass. 128; *Pearson v. Tower*, 55 N. H. 36; *Missouri Pac. R. Co. v. Pullman Palace-Car Co.*, 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. 194; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. 695.

to therein and annexed thereto,⁷² nor are conclusions admitted by the demurrer. Thus, allegations in a complaint to restrain orders of a railroad commission as to rates before the same have gone into effect, that the new rate is unreasonable, and if enforced will result in a loss of revenue, are not admitted by the demurrer.⁷³ A demurrer must be based entirely upon the facts stated in the complaint. It can not invoke in its support any fact whatever which is not contained in the bill, excepting those facts of which the court takes judicial notice. Demurrers are either general or special. A general demurrer is one which merely states in broad terms that the bill presents no cause for relief in equity, without particularly assigning special grounds. A special demurrer is one which assigns the special objections to the bill, and such special objections will not be considered or noticed under a general demurrer.⁷⁴ If the allegations of the complaint fail to show that the court has jurisdiction of either of the parties or subject-matter, the proper mode of objecting to the want of it is by demurrer, and if there has been an omission of any party necessary as plaintiff or defendant, or if there has been any misjoinder by uniting as plaintiff or defendant one who is not a proper party, in each case the correct mode of raising the objection is by demurrer, provided that the error is apparent on the face of the bill.⁷⁵ The principal formal objection to a complaint besides those objections arising out of nonjoinder or misjoinder is that of multifariousness, by which is meant the improper joining in one bill of distinct and independent matters. Thus, where several defendants join in an action to enjoin a nuisance and to recover damages, there is a misjoinder of causes of

⁷² *Dillon v. Barnard*, 21 Wall. (U. S.) 430, 22 L. ed. 673.

⁷³ *Central of Georgia R. Co. v. McLendon*, 157 Fed. 961. See also, *Taylor v. Taylor* (Fla.), 60 So. 116.

⁷⁴ *Billing v. Mann*, 156 Mass. 203, 30 N. E. 1136; *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097; *Stewart v. Flint*, 57 Vt. 216. This is especially

true where the objection goes merely to form.

⁷⁵ *Chambers v. Wright*, 52 Ala. 444; *Lyman v. Bonney*, 101 Mass. 562; *Case v. Minot*, 185 Mass. 577, 33 N. E. 700, 22 L. R. A. 536; *Dwight v. Central Vermont R. Co.*, 20 Blatchf. (U. S.) 200, 9 Fed. 785.

action precluding recovery.⁷⁶ But a complaint is not necessarily multifarious because of uniting a demand for relief and a demand for damages.⁷⁷ Laches, to be a ground for demurrer, must appear on the face of the complaint. Thus, a complaint alleging plaintiff's ownership since 1868, but not alleging when the structure thereon complained of was erected, does not show laches on its face.⁷⁸ A complaint for injunction that seeks to join and deal with interests as a whole which are not joint and have no such relation to each other as would justify a court of equity in adjudicating upon them in one action is bad on demurrer.⁷⁹ The fact that a complaint for injunction is not sworn to has been held to be no ground for a demurrer.⁸⁰

§ 2599. Amended and supplemental pleadings.—A supplemental complaint is a pleading brought by the complainant in the original suit in order to introduce some material fact affecting the case, which has occurred since the beginning of the suit, and usually such pleading can not be filed without leave of the court.⁸¹ A supplemental complaint, whether for the purpose of introducing new facts or of bringing in new parties, should be filed promptly.⁸² The new matter introduced by a supplemental complaint must be in respect to the same title or interest as that stated in the original bill.⁸³ Where some fact material to the defense has occurred since the filing of the answer, the proper mode of introducing it is not by amendment of the answer, nor by a supplemental answer, but by means of a cross-bill.⁸⁴ It is within the discretion of a court of equity to allow

⁷⁶ *Burghen v. Erie R. Co.*, 123 App. Div. (N. Y.) 204, 108 N. Y. S. 311.

⁷⁷ *Burghen v. Erie R. Co.*, 123 App. Div. (N. Y.) 204, 108 N. Y. St. 311. Multifariousness is held not ground for general demurrer. *Snover v. Boynton* (Mich.), 139 N. W. 266.

⁷⁸ *Porter v. Armour & Co.*, 241 Ill. 145, 89 N. E. 356.

⁷⁹ *Williams v. Harper*, 127 Ill. App. 619.

⁸⁰ *Hancock v. Walsh*, 3 Woods (U. S.) 351, Fed. Cas. No. 6012.

⁸¹ *Mackintosh v. Flint &c. R. Co.*, 34 Fed. 582; *Buckingham v. Corning*, 29 N. J. Eq. 238.

⁸² *Henry v. Travelers' Ins. Co.*, 45 Fed. 299; *Mason v. Sanford*, 137 N. Y. 497, 33 N. E. 546.

⁸³ *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; *Bannon v. Cornegys*, 69 Md. 411, 16 Atl. 129; *Hanley v. Henritze*, 85 Vt. 177.

⁸⁴ *Banque Franco-Egyptienne v. Brown*, 24 Fed. 106.

amendments at any stage of the cause, and it is exercised with great liberality.⁸⁵ After the trial on the merits, and even after an interlocutory decree, amendments may be allowed to make the pleadings conform to the case which the parties intended to present, and which has in fact been heard.⁸⁶ Amendments will not, ordinarily, be allowed to a sworn complaint for injunction.⁸⁷ And a party having obtained permission to amend will not be allowed to present a new case different from that stated originally. The court will help by amendment a defective statement, but it will not permit a plaintiff to change his ground, and under the pretense of amendment to state a new case.⁸⁸ An amendment to a sworn answer will not be allowed except upon clear proof of mistake or accidental omission;⁸⁹ nor can a complaint for injunction which has been sworn to be amended by striking out material and substantive matter, but it must be corrected, if at all, in substance, by the addition of explanatory or supplementary statements.⁹⁰ Where no answer has been filed to a complaint for injunction, an amendment thereto touching matters occurring after the filing thereof has been held allowable.⁹¹ But to justify an amendment to such complaint after answer, without prejudice to the injunction, a sufficient excuse must be shown by affidavit for the defectiveness of the original complaint.⁹²

§ 2600. Issue, proof and variance.—In a suit in equity for injunction, proof of the allegations of the complaint

⁸⁵ *Perry v. Perry*, 65 Maine 399; *Foster v. Knowles*, 42 N. J. Eq. 226, 7 Atl. 290; *Shipman's Eq. Pl.* 99, 100.

⁸⁶ *Byers v. Franklin Coal Co.*, 106 Mass. 131; *Dodson v. McKelvey*, 93 Mich. 263, 53 N. W. 517; *Thompson v. Maxwell*, 95 U. S. 391, 24 L. ed. 481. See also, *Clark v. Society*, 46 N. H. 272.

⁸⁷ *Parker v. Grant*, 1 Johns. Ch. (N. Y.) 434; *Clark v. Judson*, 2 Barb. (N. Y.) 90. But see, *Marble v. Bonhotel*, 35 Ill. 240.

⁸⁸ *Jones v. Davenport*, 45 N. J. Eq.

77, 17 Atl. 570, revd. 46 N. J. Eq. 237, 19 Atl. 22; *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. ed. 158.

⁸⁹ *Campbell v. Powers*, 139 Ill. 128, 28 N. E. 1062; *Smith v. Babcock*, 3 Sumn. (U. S.) 583, Fed. Cas. No. 13008.

⁹⁰ *Carey v. Smith*, 11 Ga. 539; *Layton v. Ivans*, 2 N. J. Eq. 387; *Verplank v. Insurance Co.*, 1 Edw. Ch. (N. Y.) 46.

⁹¹ *Luft v. Grossrau*, 31 Ill. App. 530.
⁹² *Jackson v. Philadelphia, W. & B. R. Co.*, 3 Del. Ch. 512.

may be rendered unnecessary by the admissions of the answer. Thus, in an action to enjoin the cutting of timber where the answer admits many allegations of the complaint as to title, etc., it is not necessary for the plaintiff to prove the things admitted, and where the averment of new matter as to the defendant's rights is not sufficiently established, and the burden of proof is not cast on the plaintiff, he is entitled to a decree.⁹³ Otherwise, the complainant must prove the material allegations of his complaint substantially as stated,⁹⁴ the burden of proof being upon the plaintiff to make out his case, and it being the defendant's right to insist on proof of every material allegation controverted by the answer;⁹⁵ but the defendant has the burden of proving an affirmative defense.⁹⁶ Under special circumstances courts will settle the question of damages incidental to injunctive relief.⁹⁷ Where it is alleged in a suit to restrain the cutting of timber on plaintiff's land that the deeds under which the defendant claimed were shams and manufactured to prevent criminal prosecution for taking timber, facts invalidating the conveyances can be shown on the trial.⁹⁸ A court of equity is entitled to consider all the circumstances and is not bound by denial of an intention to violate a covenant, the breach of which is sought to be enjoined.⁹⁹ Also, in a suit in equity to restrain the cutting of timber on plaintiff's land, it has been held that the defendant could not prove a license in justification under a general denial.¹

§ 2601. Evidence.—After a cause is at issue, either on

⁹³ Griffith v. Henderson, 55 Fla. 625, 45 So. 1003.

⁹⁴ Williams v. Hicks, 129 Ga. 785, 59 S. E. 897; Epps v. Thomas, 131 Ga. 64, 61 S. E. 1117; Fouts v. Boring Junction Lumber Co., 50 Ore. 298, 92 Pac. 811, 94 Pac. 182; Caus-ten v. Barnette, 49 Wash. 659, 96 Pac. 225.

⁹⁵ Crescent Feather Co. v. United Upholsterers' Union, Local No. 20, 153 Cal. 433, 95 Pac. 871; Alamoso Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112.

⁹⁶ Swinhart v. St. Louis & S. R. Co., 207 Mo. 423, 105 S. W. 1043; Spokane Stamp Works v. Ridpath, 48 Wash. 370, 93 Pac. 533.

⁹⁷ Reese v. Wright (Md.), 56 Atl. 976.

⁹⁸ Houck v. Patty, 100 Mo. 302, 73 S. W. 389.

⁹⁹ Fleckenstein Bros. Co. v. Fleckenstein (N. J. Eq.), 53 Atl. 1043.

¹ Watson v. Adams, 32 Ind. App. 281, 68 N. E. 696.

complaint and plea, or upon complaint, answer and replication, the next step is usually the taking of the testimony. Evidence which is sufficient to authorize a preliminary injunction or its denial will not necessarily authorize a like decision at the final trial on the merits.² Proof of defendant's insolvency on a hearing for injunction must be strict and positive and not on information or belief.³ A complaint for an injunction is not *prima facie* evidence of the facts alleged, as it only makes proof of the allegations made for the injunctions.⁴ An answer under oath, so far as it is responsive to the complaint, is evidence for the defendant.⁵ If the answer sets up any new matter in defense, it is, as to such new matter, no evidence in favor of itself, and it must be proved by independent testimony.⁶ So, also, if the answer is evasive or equivocal, or to the effect that the defendant has no personal knowledge or recollection, then only one witness is necessary to maintain the bill.⁷ In an action for injunction to restrain a city and its council from proceeding under an award of printing to a newspaper, evidence of the average price paid in the city for printing of that character, showing the bid accepted to be reasonable, is immaterial where the ground was that the bid of the successful paper greatly exceeded that of the other.⁸ On the final submission of a suit for an injunction, it has been held that affidavits can not be used as evidence to determine the question of making or refusing a perpetual injunction.⁹ Where the evidence in a suit for an injunction

² Colusa Parrot Mining & Smelting Co. v. Barnard, 28 Mont. 11, 72 Pac. 45.

³ Doke v. Peek, 45 Fla. 244, 34 So. 896, 110 Am. St. 70.

⁴ Mutual Nat. Bank v. Moore, 104 La. 150, 29 So. 103.

⁵ Fenno v. Sayre, 3 Ala. 458; Riegel v. American Life Ins. Co., 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166; Blaisdell v. Bowers, 40 Vt. 126. See also, Johnson v. Criffen, 62 Misc. 597; Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215; Shipman's Eq. Pl. 133.

⁶ Ingersoll v. Stiger, 46 N. J. Eq. 511, 19 Atl. 842; Wells v. Houston, 37 Vt. 245.

⁷ Slater v. Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796. See also, Duluth v. Coursault, 5 Cranch. (U. S.) 349, Fed. Cas. No. 4206; Lawrence v. Lawrence, 21 N. J. Eq. 317.

⁸ Puget Sound Pub. Co. v. Times Printing Co., 33 Wash. 551, 74 Pac. 802.

⁹ May v. Williams, 109 Ky. 682, 22 Ky. L. 1328, 60 S. W. 525.

is conflicting as to the material questions in the case the relief may be properly refused.¹⁰

§ 2602. **Dismissal.**—It often happens that a complaint for injunction is dismissed for reasons aside from the merits of the case, and when a case is thus disposed of without an adjudication upon its merits, the rule is to dismiss the complaint “without prejudice.” The meaning of this phrase is, that the dismissal shall not be a bar, and shall not prejudice the plaintiff’s right to bring another proper complaint or to maintain a suit at law for the same cause of action, as the case may be.¹¹ Without this qualification, a final decree, whether for plaintiff or for defendant, after a hearing upon the merits, is a bar to any subsequent suit between the same parties, either at law or in equity, for the same subject-matter. Thus, when the record reads “bill dismissed,” without any qualification, and nothing more appears it is conclusively presumed that the decree was passed after a hearing upon the merits and that it was a final determination of the controversy.¹² But when the record shows that no hearing was had, as where the record states that the complainant failed to appear, but that the bill was dismissed upon his own motion, a decree “bill dismissed,” although without qualification, is not a bar to another suit. A plaintiff may ordinarily dismiss his bill, at any time before final hearing, upon payment of costs.¹³ But if any decree or order has been passed affecting the rights of the defendant, he can not do so.¹⁴ A complaint for injunction should not be dismissed on refusal of

¹⁰ *Bank of Commerce v. McAfee*, 110 Ga. 302, 34 S. E. 1037; *Blats v. Blats*, 117 Ga. 165, 43 S. E. 437.

¹¹ *Magill v. Mercantile Trust Co.*, 81 Ky. 129, 4 Ky. L. 127; *Weigley v. Coffman*, 144 Pa. St. 489, 22 Atl. 919, 27 Am. St. 667; *Richards v. Allis*, 82 Wis. 509, 52 N. W. 593; *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 109.

¹² *Union Pac. R. Co. v. Harmon*, 54 Fed. 29, 4 C. C. A. 165; *Foot v. Gibbs*, 1 Gray (Mass.) 412; *Jones v. Turner*, 81 Va. 709; *Richards v. Allis*,

82 Wis. 509, 52 N. W. 593. See also, *Durant v. Essex Co.*, 7 Wall. (U. S.) 107; *Thurston v. Thurston*, 99 Mass. 39; *Edgar v. Buck*, 65 Mich. 356, 32 N. W. 644.

¹³ *Western Union Tel. Co. v. American Bell Tel. Co.*, 50 Fed. 662, revd. 69 Fed. 666, 16 C. C. A. 367; *Evans v. Sheldon*, 69 Ga. 100; *Kempton v. Burgess*, 136 Mass. 192.

¹⁴ *Moriarty v. Mason*, 47 Conn. 436; *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 27 L. ed. 1081, 3 Sup. Ct. 594.

an order granting a preliminary injunction, where complainant had no opportunity before hearing below to inspect or rebut the defendant's affidavits.¹⁵ And where a defendant moves only for the dissolution of an injunction it is error to dismiss the complaint.¹⁶ But it is not error to dismiss in such case where the complaint on its face shows no right to equitable relief.¹⁷ A suit for an injunction, being ancillary to another action which has been decided against complainant, may properly be dismissed.¹⁸

§ 2603. Hearing or trial.—After a cause is at issue, either on complaint and plea, or upon complaint, answer and replication, the next step is the hearing or trial. Formerly all testimony in a chancery suit was taken by deposition. Witnesses were seldom, if ever, examined orally in the presence of the court, as in a court of law, but it is now the rule in most jurisdictions that evidence in equity may be taken in the same manner as in suits at law. The complainant should be allowed, in general, to show everything relevant under his pleading reasonably tending to entitle him to an injunction.¹⁹ As in the case of suits in equity generally, when a case is set down for hearing on complaint and answer, all the facts well pleaded in the answer are taken as true, whether responsive to the complaint or not, but where it is set down for hearing on complaint, answer and replication, only those averments of the answer which are responsive are taken as true, and all allegations in avoidance or justification, denied by the replication, are taken as untrue.²⁰ The mere fact that a preliminary injunction has been granted during the pendency of an action in no way

¹⁵ *Brill v. Peckham Motor Truck &c. Co.*, 189 U. S. 57, 47 L. ed. 706, 23 Sup. Ct. 562.

¹⁶ *Johnston v. Alexander*, 6 Ark. 302; *Walters v. Fredericks*, 11 Iowa 181; *Dorsey v. Hagerstown Bank*, 17 Md. 408; *Maury v. Smith*, 46 Miss. 81.

¹⁷ *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Merriman v. Norman*, 9 Heisk. (Tenn.) 269. See also, *McConnell v. Hampton*, 164 Ind. 547, 73 N. E. 1092.

¹⁸ *West v. East Coast Cedar Co.*, 110 Fed. 727, *affd.* 113 Fed. 742, 51 C. C. A. 416.

¹⁹ *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921. See as to hearing witnesses in open court, the new U. S. Equity rules of 1912, Eq. Rules 46, 47.

²⁰ *People's United States Bank v. Gilson*, 161 Fed. 286, 88 C. C. A. 332; *Elliott v. Ferguson* (Tex.), 107 S. W. 51.

affects the decision upon the merits at the trial.²¹ The peculiarity of a court of chancery, and one which distinguishes it from a court of law, is that in the former neither party has a right to a trial by jury, and that, as a rule, all questions of fact, as well as of law, are determined by the court. But it is now a common practice, in some instances, for a court having jurisdiction of a suit in equity to give questions of fact to a jury. When this course is pursued, the verdict of the jury is reported to the court, but it is not binding upon his conscience; and unless he is satisfied that it is according to the evidence in the case, and just, he will disregard it.²² Where the only relief sought is equitable, the case can not be transferred to the law docket and tried by a jury, but in a suit for a mandatory injunction, the disputed issues of fact are properly submitted to a jury.²³ The right to open or close on the trial for injunction belongs to the plaintiff.²⁴

§ 2604. Object and nature of preliminary injunction.—

We have seen that injunctions are divided into preliminary and perpetual injunctions. Preliminary injunctions are those which are frequently issued upon the filing of a complaint or soon after, and before the case has been heard and decided upon its merits. A preliminary injunction is not a matter of right, but rests in the sound discretion of the court, and the exercise of such discretion will not be disturbed on appeal unless clearly erroneous.²⁵ The terms "preliminary injunction" and "restraining order" are often used synonymously,²⁶ but a distinction is sometimes made which limits the meaning of the term "restraining order"

²¹ *Hale v. Jenkins*, 55 Misc. (N. Y.) 119, 106 N. Y. S. 282.

²² *Brundage v. Deschler*, 131 Ind. 174, 29 N. E. 921; *Metcalf v. Metcalf*, 85 Maine 473, 27 Atl. 457; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. 298.

²³ *Hall v. Henninger*, 145 Iowa 230, 121 N. W. 6, 139 Am. St. 412; *Santa Fé Townsite Co. v. Norvell* (Tex. Civ. App.), 118 S. W. 762.

²⁴ *Richardson v. Dinkgrave*, 26 La. Ann. 651.

²⁵ *Southern R. Co. v. Simon*, 153 Fed. 234; *Central of Georgia R. Co. v. McLendon*, 155 Fed. 974; *Montgomery Ward & Co. v. South Dakota Retail Merchants' &c. Assn.*, 150 Fed. 413; *Shaw v. Palmer*, 54 Fla. 490, 44 So. 953; *Savage v. Parker*, 53 Fla. 1002, 43 So. 507; *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011; *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 267.

²⁶ *State v. Johnston*, 78 Kans. 615, 97 Pac. 790.

to such orders as are operative only until a hearing can be had upon the merits,²⁷ and of the term "preliminary injunction" to orders operative usually until the final hearing is had of, or a further order made in, the case.²⁸ But there is little if any distinction between a preliminary restraining order and a preliminary injunction except in regard to notice and time of hearing or point of duration, and in any aspect, the only purpose of a preliminary injunction is to preserve the status quo pending final hearing.²⁹ Hence, a preliminary injunction will not issue where the thing complained of has already been done,³⁰ and it should not issue in such form as to amount to a final determination of the issues.³¹ And a strong prima facie case should be shown in order to justify the interposition of the court by an injunction before the rights of the parties have been determined by a full trial.³² Where it appears that the writ of injunction is necessary for the purpose of preserving the status quo pending final hearing, it will issue,³³ but in granting a preliminary injunction the court will go no further than necessary to preserve and protect existing rights pending the litigation.³⁴ A temporary injunction may usually issue either at term time or in vacation.³⁵ A mandatory injunction will not usually be granted on a complaint for preliminary injunction only.³⁶

²⁷ *State v. Johnston*, 78 Kans. 615, 97 Pac. 790; *State v. Graves*, 82 Nebr. 282, 117 N. W. 717. See also, *Terre Haute &c. R. Co. v. St. Joseph &c. R. Co.*, 155 Ind. 27, 30, 57 N. E. 530.

²⁸ *State v. Werner*, 80 Kans. 222, 101 Pac. 1004.

²⁹ *F. W. Cook Brew. Co. v. Garber*, 168 Fed. 942; *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667; *Wilmington City Ry. Co. v. Taylor*, 198 Fed. 159; *Chicago, G. W. R. Co. v. Iowa Cent. R. Co.*, 142 Iowa 459, 119 N. W. 261; *Snodgrass v. McDaniel*, 144 Iowa 674, 123 N. W. 336; *Schneider v. Miller*, 132 App. Div. (N. Y.) 852, 117 N. Y. S. 287.

³⁰ *Hatch v. Raney*, 9 Cal. App. 716, 100 Pac. 886.

³¹ *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667; *Barzilay v.*

Loewenthal, 134 App. Div. (N. Y.) 612, 119 N. Y. S. 612.

³² *Rend v. Venture Oil Co.*, 48 Fed. 248; *American Preservers' Co. v. Norris*, 43 Fed. 711.

³³ *Benzinger v. Steinhäuser*, 154 Fed. 151; *Unity Cotton Mills v. Dunson*, 131 Ga. 258, 62 S. E. 179; *Freemans v. Ammons*, 91 Miss. 672, 46 So. 61; *Eau Claire Dells Imp. Co. v. Eau Claire*, 134 Wis. 548, 115 N. W. 155.

³⁴ *Gates v. Detroit & M. R. Co.*, 151 Mich. 548, 115 N. W. 420; *Miles v. Samuels*, 111 N. Y. S. 537; *Evans v. Mayes*, 81 S. Car. 188, 62 S. E. 207.

³⁵ *Smith v. Nelson*, 131 Ill. App. 145.

³⁶ *Thomas v. Hawkins*, 20 Ga. 126; *Washington University v. Green*, 1 Md. Ch. 97. A mandatory injunc-

§ 2605. **When preliminary injunction denied.**—As a rule, a preliminary injunction will be denied in case the complainant's right to the relief asked is doubtful;³⁷ nor is he, ordinarily, entitled to the writ when the legal right on which he rests his claim depends upon a disputed question of law.³⁸ If it is plainly apparent that the complaint in a suit for injunction is without equity, the writ should not be granted in the first instance.³⁹ A preliminary injunction, which is purely ancillary, should not be granted where it is apparent that the principal relief sought can not be granted.⁴⁰ Thus, where a preliminary injunction is sought in aid of a suit for specific performance of an agreement to convey land, the writ will be refused if the agreement relied upon is one made by an agent without authority to bind his principal, or if for other reasons the agreement is clearly unenforceable.⁴¹ Also, where it appears that the right to the writ is quite doubtful, and that as much injury would result to the defendant from the granting of the injunction as to the complainant from a failure so to do, the application should be refused.⁴² It is not sufficient cause for granting a temporary injunction merely that it will do no harm.⁴³ The probable result of the final hearing, and the probable effect of a temporary restraining order on the respective rights of the parties are proper matters for consideration by the court in determining the question of issuing or refusing a temporary injunction.⁴⁴ A preliminary injunction will not

tion may be granted in the first instance in extreme cases. *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061; *Robinson v. Byron*, 1 Bro. C. C. 588.

³⁷ *Home Ins. Co. v. Nobles*, 63 Fed. 642; *Wallace v. McVey*, 6 Ind. 300; *Cheshire Mills v. Gowing*, 62 N. H. 618; *National Docks & C. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 10, 33 Atl. 219; *Fredericks v. Mayer*, 14 N. Y. Super. Ct. 227; *Scranton v. Delaware & S. Canal Co.*, 12 Pa. Co. Ct. 283.

³⁸ *Newark & H. R. Co. v. New Jersey Traction Co.* (N. J. Eq.), 33 Atl. 475; *Citizens' Coach Co. v. Cam-*

den Horse R. Co., 29 N. J. Eq. 299; *Noonan v. Grace*, 49 N. Y. Super. Ct. 116. See also, *Mammoth Vein Coal Co.'s Appeal*, 54 Pa. St. 183.

³⁹ *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597.

⁴⁰ *Taylor v. Florida East Coast R. Co.* (Fla.), 45 So. 574; *Hazard v. Hope Land Co.* (R. I.), 69 Atl. 849.

⁴¹ *Campbell v. Hough*, 73 N. J. Eq. 601, 68 Atl. 759.

⁴² *Richards v. Heissner*, 158 Fed. 109; *Marino v. Williams*, 30 Nev. 360, 96 Pac. 1073.

⁴³ *Weir v. Winnett*, 155 Fed. 824.

⁴⁴ *Conley v. Fleming*, 14 Kans. 381. Compare, *Jackson Co. v. Gardiner*

be granted where the complainant knowingly suffered the supposed injury to continue for an unreasonable length of time without applying for relief.⁴⁵

§ 2606. Proceedings to procure preliminary injunction.

—A suit in equity for injunction is begun by a bill or petition addressed to the chancellor, stating the case and asking for the appropriate relief. And it has been held that a motion for a temporary injunction to prevent the plaintiff from being embarrassed by a multiplicity of suits can not be entertained where no demand therefor is made in the plaintiff's complaint.⁴⁶ But a temporary injunction may be granted, though a permanent one is not prayed for in the complaint.⁴⁷ The granting or refusing of a temporary injunction without notice to the party sought to be enjoined rests largely in the discretion of the trial court.⁴⁸ Whether a court has abused its discretion in issuing a temporary injunction without notice to the party sought to be enjoined must, of course, be determined from the circumstances of the particular case.⁴⁹ Ordinarily, a temporary injunction will issue without notice only where the exigency is extreme or the giving of notice would accelerate the doing of the threatened injury before the court would be able to act.⁵⁰ Before granting a temporary injunction without notice a clear case should be made by the complaint, and it should also clearly appear that it is a case of urgent necessity and one in which irreparable injury will be produced if the relief is denied.⁵¹ The petition or motion for

Inv. Co., 200 Fed. 113; *Wilmington City Ry. Co. v. Taylor*, 198 Fed. 159.

⁴⁶*Levi v. Schoenthal*, 57 N. J. Eq. 244, 41 Atl. 105.

⁴⁷*Ragsdale v. Green*, 28 Civ. Proc. (N. Y.) 229, 29 Civ. Proc. (N. Y.) 50, 55 N. Y. S. 760. See also, *Kahn v. Kahn*, 15 Fla. 400; *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

⁴⁸*Hamilton v. Wood*, 55 Minn. 482, 57 N. W. 208.

⁴⁹*State v. Nicoll*, 40 Wash. 517, 82 Pac. 895. See U. S. Eq. Rules of 1912, Rule 73, now requiring notice

in the federal courts, but providing how a temporary restraining order may be obtained until notice can be given.

⁵⁰*Anderson v. Hultberg*, 117 Ill. App. 231. Unless it is settled by statute.

⁵¹*Chicago v. Farson*, 118 Ill. App. 291; *Wingert v. Snouffer* (Iowa), 108 N. W. 1035.

⁵²*Savage v. Parker*, 53 Fla. 1002, 43 So. 507; *Builders Supply Co. v. Acton*, 56 Fla. 756, 47 So. 822; *Sanganois Club v. Lane*, 145 Ill. App. 475.

a temporary injunction is usually accompanied by affidavits in support of the allegations, but where a complaint fails to state a cause for injunctive relief, the temporary injunction can not be granted on equities set up in such affidavits.⁵² It has been held that affidavits in rebuttal can not be filed except by leave of the court, which will be granted under special circumstances.⁵³

§ 2607. Bond in proceeding for preliminary injunction.—

In the early stages of equity jurisprudence the giving of a bond was not a necessary condition precedent to the granting of a temporary injunction, and the only relief for injury sustained by the defendant on account of a wrongful writ of injunction was an action, as in other cases for malicious prosecution, to sustain which it was necessary to allege and prove that the injunction was sought through malice and without probable cause.⁵⁴ At the present time, however, independently of any statutory provision on the subject, a court of equity has power, on application for a preliminary injunction, to require from the complainant a bond to indemnify the defendant against whom the injunction is sought.⁵⁵ By statute in many states complainants are required to give such bond, and such statutes are held mandatory, both as to the necessity of the bond and as to its conditions.⁵⁶ In some instances, injunction may be allowed without bond, in some jurisdictions at least, especially if public interests are involved.⁵⁷ The statutes requiring bonds apply only to temporary injunctions. Final injunc-

⁵² *Landes v. Walls*, 160 Ind. 216, 66 N. E. 679; *Heine v. Rohner*, 51 N. Y. S. 427; *Glascow v. Willard*, 89 N. Y. S. 791.

⁵³ *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.*, 132 Fed. 614.

⁵⁴ *Harless v. Consumers Gas Co.*, 14 Ind. App. 540, 43 N. E. 456; *St. Louis v. St. Louis Gas-Light Co.*, 82 Mo. 349; *Teasdale v. Jones*, 40 Mo. App. 243.

⁵⁵ *Tobey Furn. Co. v. Colby*, 35 Fed. 592; *Lowenfeld v. Curtis*, 72 Fed. 105; *Wagner v. Shank*, 59 Md. 313; *Foster v. Goodrich*, 127 Mass. 176.

⁵⁶ *Reed v. New York National Exch. Bank*, 131 Ill. App. 434; *Lindberg v. Thomas*, 137 Iowa 48, 114 N. W. 562; *Alexander v. Gardner*, 130 Ky. 785, 113 S. W. 906; *Castleman v. State*, 94 Miss. 609, 47 So. 647; *Howley v. Press*, 111 N. Y. S. 1080; *Paine v. Carpenter*, 51 Tex. Civ. App. 191, 111 S. W. 430.

⁵⁷ *Cumberland Tel. & T. Co. v. Railroad Commission*, 156 Fed. 834; *Kerz v. Galena Water Co.*, 139 Ill. App. 598; *Shea v. Bergen*, 59 Misc. (N. Y.) 294, 110 N. Y. S. 572.

tions conclusively settle the rights of the parties and, ordinarily, leave no question of future damages.⁵⁸ As a general rule, where the giving of a bond is a condition precedent, an injunction should not take effect until the bond is executed.⁵⁹ An injunction bond is designed to indemnify against immediate and actual losses, but not against remote injuries.⁶⁰

§ 2608. Restraining order pending hearing.—The term “restraining order” is usually limited in its operation, and extends only to such time as may be necessary to notify a party sought to be enjoined of the filing of the application, and to obtain a hearing thereon.⁶¹ And the fact that an unauthorized restraining order is made in a notice of the hearing of an application for an injunction does not make it error to issue a temporary injunction on the hearing.⁶² The temporary injunction must be in aid of some other litigation, and is for the purpose of preserving the present status until the final judgment, in order that the judgment may be effectual. Such orders are therefore made not as final orders, but until the further order of the court, and may be modified or annulled at any time, on motion, if the court deems it proper to modify or annul them. They are issued at the time the action is commenced or at any time afterward before judgment in that proceeding.⁶³ If facts constituting a cause for a temporary injunction arise after the beginning of an action a supplemental complaint may be filed setting up such facts.⁶⁴ In New York, when it appears in the complaint at the commencement of the action,

⁵⁸ *Lake Erie & W. R. Co. v. Clugish*, 143 Ind. 347, 42 N. E. 743; *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117.

⁵⁹ *Carter v. Mulrein*, 82 Cal. 167, 22 Pac. 1086, 16 Am. St. 99; *Van Fleet v. Stout*, 44 Kans. 523, 24 Pac. 960; *Davis v. Hoopes*, 33 Miss. 173; *Marlatt v. Perrine*, 17 N. J. Eq. 49.

⁶⁰ *Hibbard v. McKindley*, 28 Ill. 240; *Brown v. Gorton*, 31 Ill. 416.

⁶¹ *College Corner & R. Gravel Road Co. v. Moss*, 77 Ind. 139; *Terre Haute & C. R. Co. v. St. Joseph & C. R. Co.*, 155 Ind. 27, 30, 57 N. E. 530.

⁶² *Lemmon v. Guthrie Center*, 113 Iowa 36, 84 N. W. 986, 86 Am. St. 361.

⁶³ *Lake Erie & W. R. Co. v. Clugish*, 143 Ind. 347, 42 N. E. 743.

⁶⁴ *Bloomfield v. Snowden*, 2 Paige (N. Y.) 355; *Dailey v. Wynn*, 33 Tex. 614.

or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property, that is, a restraining order or temporary injunction may be granted (1) in case where a permanent injunction is sought as a final judgment, and it appears that the relief sought is the restraining of the commission or continuance of some act, the commission or continuance of which, during litigation, would be injurious to the plaintiff, (2) when the final relief sought is the restraining of proceedings in execution or enforcement of some final order or judgment, (3) when necessary to prevent removal of property pending litigation, to enable the plaintiff to collect his judgment in case he procures one.⁶⁵

§ 2609. Modifying restraining order.—In order to do exact justice between the parties to a suit for injunction it sometimes becomes necessary to modify or partially dissolve a preliminary injunction.⁶⁶ And this power to modify is in no way affected by the fact that the court in granting the injunction may have discussed the merits of the case.⁶⁷ The order of modification of an injunction will not be disturbed unless it appears that there has been an abuse of discretion by the court granting it.⁶⁸ A preliminary injunction may be modified at any time when the ends of justice require it,⁶⁹ and where an injunction has been granted pending the determination of another action, it should be modified to conform to the judgment in such action.⁷⁰ Also, a

⁶⁵ *Orvis v. Nat. Commercial Bank*, 81 App. Div. (N. Y.) 631, 80 N. Y. S. 1029.

⁶⁶ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; *Hobbs v. Amador & Canal Co.*, 66 Cal. 161, 4 Pac. 1147; *Westerly Waterworks v. Westerly*, 77 Fed. 783; *Savannah, A. & M. R. Co. v. Fort*, 84 Ga. 300, 10 S. E. 1014; *Walker v. Ayres*, 1 Iowa 449; *Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891; *Hill v. Billingsly*, 53 Miss. 111; *Hugg v.*

Fath, 37 N. J. Eq. 46; *Parker v. Williams*, 4 Paige (N. Y.) 439; *Mason v. Cromwell*, 3 Okla. 240, 41 Pac. 82.

⁶⁷ *Westerly Waterworks v. Westerly*, 77 Fed. 783.

⁶⁸ *Hobbs v. Amador & Canal Co.*, 66 Cal. 161, 4 Pac. 1147; *Hollis v. Williams*, 43 Ga. 214.

⁶⁹ *In re Arkansas R. Rates*, 168 Fed. 720.

⁷⁰ *Miller v. Madera Canal & Irr. Co.*, 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391n.

preliminary injunction partly proper and partly improper need not be dissolved, but may be modified accordingly.⁷¹ Thus, where a restraining order is in form a grant of a permanent injunction, but the writ is for a temporary injunction until the hearing, the order may be modified to operate as a temporary injunction only.⁷²

§ 2610. Dissolving restraining order.—If the defendant answers under oath denying every material allegation of the complaint, it has been held that the court should dismiss the temporary restraining order or dissolve the injunction.⁷³ But this rule does not apply if the complaint is supported by affidavits.⁷⁴ The power vested in a court of equity to grant an injunction necessarily implies the power of the same court to dissolve it, and if dissolving power is to be exercised by any court other than the one who made the order, statutory authority therefor is necessary.⁷⁵ Like the granting of an injunction, the dissolution thereof is largely within the discretion of the court, to be determined by the facts in each particular case.⁷⁶ It has been held that a temporary injunction once granted can not be arbitrarily dissolved,⁷⁷ especially where the complainant will be injured by a dissolution and the defendant will not be injured by refusal to dissolve, though the case made by the complainant is contradicted by that made by

⁷¹ *Graham v. Consolidated Naval Stores Co.*, 57 Fla. 418, 48 So. 743.

⁷² *Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716.

⁷³ *Ogle v. Dill*, 55 Ind. 130; *Rayle v. Indianapolis &c. R. Co.*, 32 Ind. 259.

⁷⁴ *Spicer v. Hoop*, 51 Ind. 365; *Cheek v. Tilley*, 31 Ind. 121.

⁷⁵ *Sanders v. Plunkett*, 40 Ark. 507.

⁷⁶ *Planters' &c. Bank v. Lauchheimer*, 102 Ala. 454, 14 So. 776; *Efford v. South Pacific Coast R. Co.*, 52 Cal. 277; *Norton v. Hood*, 12 Fed. 763; *Hayden v. Thrasher*, 20 Fla. 715; *Taylor v. Harp*, 37 Ga. 358; *Clark v. American Coal Co.*, 86 Iowa 451, 53 N. W. 281; *Pineo v. Heffelfinger*, 29

Minn. 183, 12 N. W. 522; *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. Rep. 728; *Klein v. Davis*, 11 Mont. 155, 27 Pac. 511; *Dellett v. Kemble*, 23 N. J. Eq. 58; *Paul v. Munger*, 47 N. Y. 469; *Hyatt v. DeHart*, 140 N. Car. 270, 52 S. E. 781; *Wilder v. Alderman & Sons Co.*, 74 S. Car. 178, 53 S. E. 950; *Huron Water Works Co. v. Huron*, 3 S. Dak. 610, 54 N. W. 652; *Friedlander v. Ehrenworth*, 58 Tex. 350; *Leitham v. Cusick*, 1 Utah 242; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660; *Koeffler v. Milwaukee*, 85 Wis. 397, 55 N. W. 400.

⁷⁷ *Humphry v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296.

the defendant;⁷⁸ and that a dissolution should not be granted on the answer which is evasive as to any material allegations of the complaint, nor where the facts on which the right to a dissolution is based are disputed.⁷⁹ An injunction will always be dissolved where the court by which it was granted was for any reason without jurisdiction to grant it.⁸⁰ So, also, as a general rule, where an injunction has been issued through some mistake or misapprehension of the court it may be dissolved.⁸¹

§ 2611. Continuance of injunction.—The continuance, modification or dissolution of a temporary injunction is largely within the discretion of the court issuing it.⁸² It is a settled rule that a reviewing court will not interfere with the action of a trial judge in continuing an injunction unless there has been abuse of discretion.⁸³ Where, upon the whole case there is probable cause to believe that the complainant will succeed at the hearing, the injunction should be continued.⁸⁴ Also, where the dissolution of a temporary injunction would be practically a denial of the relief to which the complainant might show himself entitled on final hearing, the injunction should be continued.⁸⁵ If upon the hearing of a motion to dissolve the injunction it develops that a dissolution might work an irreparable injury to the complainant, the injunction should be continued to the hearing.⁸⁶

⁷⁸ *Pekin Tel. Co. v. Farmers' Tel. Co.*, 120 Ill. App. 292.

⁷⁹ *Ford v. Taylor*, 140 Fed. 356; *Carthage v. Central New York Tel. & T. Co.*, 110 App. Div. (N. Y.) 625, 96 N. Y. S. 919, revd. 185 N. Y. 448, 78 N. E. 165, 113 Am. St. 932.

⁸⁰ *Adams v. Lamar*, 8 Ga. 83; *Hall v. Davis*, 5 J. J. Marsh (Ky.) 290; *Shields v. Pipes*, 31 La. Ann. 765.

⁸¹ *Mobile School Comrs. v. Putnam*, 44 Ala. 506; *Perrine v. Marsden*, 34 Cal. 14; *Howard v. Lowell Mach. Co.*, 75 Ga. 325; *Lake Shore & M. S. R. Co. v. Taylor*, 134 Ill. 603, 25 N. E. 588; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

⁸² *Bryan v. Curtis*, 26 App. D. C. 95; *Suwannee & S. P. R. Co. v. West Coast R. Co.*, 50 Fla. 609, 39 So. 538;

McKenzie v. McCrory, 88 Miss. 86, 40 So. 483; *Hyatt v. DeHart*, 140 N. Car. 270, 52 S. E. 781; *Wilder v. Alderman & Sons Co.*, 74 S. Car. 178, 53 S. E. 950.

⁸³ *Jewell v. McKinley*, 54 Cal. 600; *Edwards v. Banks Smith*, 35 Ga. 213; *Fleischman v. Young*, 9 N. J. Eq. 620.

⁸⁴ *Huffman v. Hummer*, 17 N. J. Eq. 263; *Sherill v. Herrell*, 36 N. Car. 194.

⁸⁵ *Alcorn v. Sadler*, 66 Miss. 221, 5 So. 694; *Simon v. Townsend*, 27 N. J. Eq. 302; *Lowe v. Davidson County*, 70 N. Car. 532; *Owen v. Brien*, 2 Tenn. Ch. 295; *Shonk v. Knight*, 12 W. Va. 667.

⁸⁶ *Scholze v. Steiner*, 100 Ala. 148, 14 So. 552; *Porter v. Jennings*, 89

§ 2612. **Reinstatement or revival of injunction.**—The statutes in some states make provision for a motion to reinstate a temporary injunction which may have been dissolved, but such motion can amount to nothing more nor less than a new application in the same case for a temporary injunction where the first has been dissolved.⁸⁷ If, after dissolution of an injunction on an answer denying the equity of the bill, testimony afterward taken and filed shows the right to such relief, the injunction may be reinstated.⁸⁸ While the suit remains undetermined, a preliminary injunction may be reinstated on a showing that the dissolution thereof was irregularly or improperly obtained, and it may be reinstated on an application to the court dissolving it,⁸⁹ or by the appellate court.⁹⁰ Even after an injunction has ceased to exist, the court has power to reinstate it on a proper showing.⁹¹ But reinstatement of an injunction is not a matter of course; the cause therefor must be shown by further evidence.⁹²

§ 2613. **Damage on modification or dissolution of restraining order.**—The decisions are not entirely uniform as regards the assessment and award of damages on the dissolution of an injunction. The weight of authority seems to hold that the rights and liabilities of the parties under the bond are cognizable only in courts of law.⁹³ On the other hand, it has been held that a court of chancery has inherent power to assess damages upon the dissolution of

Cal. 440, 26 Pac. 965; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *New Orleans Water-Works v. Joseph Oser*, 36 La. Ann. 918; *Jones v. Brandon*, 60 Miss. 556; *Huron Water-Works Co. v. Huron*, 3 S. Dak. 610, 54 N. W. 652.

⁸⁷ *Ogle v. Dill*, 55 Ind. 130.

⁸⁸ *Staley v. Big Sandy &c. R. Co.*, 63 W. Va. 119, 59 S. E. 946.

⁸⁹ *Hicks v. Michael*, 15 Cal. 107; *Peck v. Spencer*, 26 Fla. 23, 7 So. 642; *Baldwin v. Bellocq*, 35 La. Ann. 982; *Penny v. Holberg*, 53 Miss. 567.

⁹⁰ *Baldwin v. Bellocq*, 35 La. Ann. 982.

⁹¹ *Parker v. Judges of the Circuit*

Court, 12 Wheat. (U. S.) 561, 6 L. ed. 729.

⁹² *Livingston v. Gibbons*, 5 Johns. Ch. (N. Y.) 250; *Tucker v. Carpenter, Hempst.* (U. S.) 440, Fed. Cas. No. 14217; *North's Exr. v. Perrow*, 4 Rand. (Va.) 1; *Gallagher v. Moundsville*, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. 942.

⁹³ *Phelps v. Foster*, 18 Ill. 309; *Spencer v. Sherwin*, 86 Iowa 117, 53 N. W. 86; *Easton v. New York &c. R. Co.*, 26 N. J. Eq. 359; *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232; *Avery v. Stewart*, 60 Tex. 154; *Bein v. Heath*, 12 How. (U. S.) 168, 13 L. ed. 939.

an injunction, and that where the injunction has been dissolved the sounder and safer rule is for the court to go on and assess the damages sustained by the party against whom the injunction is issued.⁹⁴ But where damages are assessed by the court upon the dissolution of an injunction there must be some evidence supporting such assessment.⁹⁵ Defendants are entitled to damages for injunctions wrongfully obtained, the measure thereof being the injury caused and the expense incurred.⁹⁶ The damages arising from the granting of an injunction pendente lite, in the absence of statute or rule of the court, are *damnum absque injuria*.⁹⁷ It may be laid down, as a general rule, that upon the dissolution of an injunction nothing can be included in the damages which is not the actual and proximate result of the injunction.⁹⁸ The failure of a plaintiff to prosecute his suit for an injunction, where a temporary restraining order has been granted and bond given, is a confession by him that he has no cause to try and that his interference with the rights of the defendant by injunction was without warrant, and the surety is liable, whether the action is dismissed at the request of the plaintiff or by the court on its own motion.⁹⁹

§ 2614. Permanent injunction, nature and scope of relief.

—The nature or effect of a permanent injunction is perpetually to restrain the defendant from the commission of an act contrary to equity and good conscience. Permanent

⁹⁴ *Alwood v. Mansfield*, 81 Ill. 314; *Lothrop v. Southworth*, 5 Mich. 436; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060.

⁹⁵ *Lengfelder v. Smith*, 69 Ill. App. 238; *Packer v. Nevin*, 67 N. Y. 550.

⁹⁶ *Cortelyou v. Houghton*, 27 App. D. C. 188; *Hutchins v. Munn*, 28 App. D. C. 271; *Dempster v. Lansingh*, 128 Ill. App. 388; *Stull v. Beddeo*, 78 Nebr. 119, 112 N. W. 315.

⁹⁷ *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 158 Fed. 171; *United States v. Lewis Pub. Co.*, 160 Fed. 989; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N. E. 133, 126 Am. St. 436.

⁹⁸ *Rise v. Cook*, 92 Cal. 144, 28

Pac. 219; *Belmont Mining & Co. v. Costigan*, 21 Colo. 465, 42 Pac. 650; *Cummings v. Burleson*, 78 Ill. 281; *Hibbs v. Western Land Co.*, 81 Iowa 285, 46 N. W. 1119; *Riggs v. Bell*, 42 La. Ann. 666, 7 So. 787; *Banks v. State*, 62 Md. 88; *Wabash R. Co. v. McCabe*, 118 Mo. 640, 24 S. W. 217; *Brown v. Jones*, 5 Nev. 374; *State v. Concord R. Corp.*, 62 N. H. 375; *Edmison v. Sioux Falls Water Co.*, 10 S. Dak. 440, 73 N. W. 910.

⁹⁹ *Machold v. Pittsburg, C., C. & St. L. R. Co.*, 4 Ohio N. P. (N. S.) 273. Unless by agreement. *St. Joseph & Co. Power Co. v. Graham*, 165 Ind. 16, 74 N. E. 498.

injunctions are awarded, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court.¹ In order to entitle a complainant to a permanent injunction on the merits of the case, it is not a prerequisite that a temporary injunction should have been applied for and granted.² And when a permanent injunction is granted in the final decree, the preliminary injunction is merged therein.³ But where the relief sought is purely preventive, a court of equity will not continue or make permanent an injunction after the cause for which it was granted has been removed,⁴ or where the complainant has parted with his interest in the subject-matter of the suit.⁵ The final decree in an injunction suit should be definite and certain in its description of the acts inhibited.⁶ And the decree must be sufficiently complete to adjust all the matters and rights affected by the injunction, and should always be definite and certain.⁷

§ 2615. Writ, order or decree.—A decree is the judgment and order of the court upon the issues presented to and heard by it. A final decree is the one which terminates the suit, and conclusively fixes the rights of the parties thereto.⁸ It has been held that a writ of injunction may lawfully issue on Sunday in order to prevent irreparable injury to property.⁹ The contents of the writ should be broad enough and definite enough to clearly apprise the defendant as to what he is restrained from doing.¹⁰ Upon

¹ Jackson v. Bunnell, 113 N. Y. 216, 21 N. E. 79.

² Nicholson v. Campbell, 15 Tex. Civ. App. 317, 40 S. W. 167.

³ Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439.

⁴ Witwell v. First Cong. Church, 14 Ohio St. 31; Reynolds v. Everett, 67 Hun (N. Y.) 294, 50 N. Y. St. 889, 22 N. Y. S. 306, affd. 144 N. Y. 189, 39 N. E. 72.

⁵ Piedmont & C. R. Co. v. Speelman, 67 Md. 260, 10 Atl. 77, 293.

⁶ Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079; United States v. Atchison, T. & S. F. R. Co., 142 Fed. 176.

⁷ Kneip v. Schroeder, 144 Ill. App.

620; Cronin v. Payne, 157 Mich. 104, 121 N. W. 290; State v. City Club, 83 S. Car. 509, 65 S. E. 730; Deeters v. Clarke, 23 S. Dak. 298, 121 N. W. 788; Morison v. American Assn., 110 Va. 91, 65 S. E. 469.

⁸ Forbes v. Tuckerman, 115 Mass. 115; Gerrish v. Black, 109 Mass. 474; Lewisburg Bank v. Sheffey, 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. 755.

⁹ Langabier v. Fairbury, P. & N. W. R. Co., 64 Ill. 243, 16 Am. Rep. 550.

¹⁰ St. Louis Min. & Mill. Co., v. Montana Min. Co., 58 Fed. 129; Lyon v. Botchford, 25 Hun (N. Y.) 57.

the granting of an injunction, such terms and conditions may be imposed upon the party obtaining it as may be deemed equitable. The relief must not be broader than is reasonably necessary for the plaintiff's protection, or broader than the plaintiff is entitled to, and should protect the defendant's rights.¹¹ An order of injunction will bind every person and officer restrained from the time he is informed thereof.¹² But the parties and their attorneys should be promptly served with notice of the injunction order if it is desired to bind them.¹³

§ 2616. Service and enforcement of decree.—Where a court of equity has issued an injunction, it has power to enforce it, not only by punishing persons violating its terms, but by making such additional remedial orders as may be necessary to give full effect to the injunction.¹⁴ But a person is not ordinarily bound to obey an injunction until after due service thereof on him.¹⁵ An injunction and subpoena may be served upon the defendant at the same time,¹⁶ but service of an injunction order prior to the service of the summons in the action is irregular.¹⁷ Where a person has actual notice of an injunction, though it may not be yet served, the order is operative from that time.¹⁸ Thus, where a party is in court, and hears an order of injunction pronounced, he will be bound by it.¹⁹

¹¹ *Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293; *Kansas Natural Gas Co. v. Harris*, 79 Kans. 167, 100 Pac. 72; *Atchison, T. & S. F. R. Co. v. O'Leary*, 79 Kans. 664, 100 Pac. 628; *Marshall Engine Co. v. New Marshall Engine Co.*, 203 Mass. 410, 89 N. E. 548; *Wilhite v. Billings & Eastern Montana Power Co.*, 39 Mont. 1, 101 Pac. 168; *Francisco v. Furry*, 82 Nebr. 754, 118 N. W. 1102; *State v. Columbia Water Power Co.*, 82 S. Car. 181, 63 S. E. 884, 22 L. R. A. (N. S.) 435n, 129 Am. St. 876.

¹² *Sidway v. Missouri Land & Live Stock Co.*, 116 Fed. 381. See also as to persons with actual notice though not made defendants, *Ex parte Len-*

non, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658; *Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100, 72 N. E. 277.

¹³ *In re Cary*, 10 Fed. 622.

¹⁴ *People v. Tool*, 35 Colo. 225, 86 Pac. 229, 117 Am. St. 198.

¹⁵ *Elliott v. Osborne*, 1 Cal. 396. Yet the parties should take notice. *Hawkins v. State*, 126 Ind. 294, 26 N. E. 43.

¹⁶ *Thebaut v. Canova*, 11 Fla. 143.

¹⁷ *Leffingwell v. Chave*, 19 How. Pr. (N. Y.) 54, 10 Abb. Prac. 472, 18 N. Y. Super. Ct. 703.

¹⁸ *Wenger v. Fisher*, 55 W. Va. 13, 46 S. E. 695.

¹⁹ *Milne v. Van Buskirk*, 9 Iowa 558.

§ 2617. **Disobeying order—Consequences.**—The disobedience of an injunction by one bound to observe it is a contempt of court for which punishment may be inflicted.²⁰ Such contempt is an indirect contempt, to which the court's attention must be called by a proper affidavit sufficient to constitute a *prima facie* case and to clearly apprise the defendant of the nature of the charge against him.²¹ But disobedience of an injunction, void for want of jurisdiction in the court or judge awarding it, is not a contempt.²² Yet, although the injunction may be erroneously granted, it is not void, and until set aside or reversed on appeal, it must be obeyed.²³ It may be contempt to violate the spirit as well as the letter of an injunction, but the violation of the injunction must be a substantial one, and the defendant will not be punished for a violation by mistake of a decree modified by an agreement.²⁴

²⁰ *Saal v. South Brooklyn R. Co.*, 106 N. Y. S. 996; *People v. Tool*, 35 Colo. 225, 86 Pa. 224, 6 L. R. A. (N. S.) 822, 117 Am. St. 198; *Stollenwerk v. Board* (Wis.), 139 N. W. 203.

²¹ *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 149 Fed. 577; *Aaron v. United States*, 155 Fed. 833, 84 C. C. A. 67; *Flannery v. People*, 225 Ill. 62, 80 N. E. 60; *State v. Sieber*, 49 Ore. 1, 88 Pac. 313. Compare *Anderson v. Indianapolis Drop*

Forging Co., 34 Ind. App. 100, 72 N. E. 277.

²² *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225n.

²³ *Barnes & Co. v. Chicago Typographical Union No. 16*, 232 Ill. 402, 83 N. E. 932, 122 Am. St. 129; *Hatlestad v. Hardin County Dist. Ct.*, 137 Iowa 146, 114 N. W. 628.

²⁴ *Encyclopaedia Britannica Co. v. Werner Co.*, 173 Fed. 1012.

CHAPTER LV.

LAPSE OF TIME—STATUTES OF LIMITATIONS.

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† § 2640. **Laches—Introduction.**—A court of equity is a court of conscience. It demands that he who seeks equity must do equity, and it offers the balm of equitable relief to the vigilant only—not to those who sleep on their rights; hence, the doctrine of laches or stale demands.¹

¹"A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." *Smith v. Clay, Amb. 645*, quoted in *Oehmich v. Hedstrom*, 251 Ill. 481, 96 N. E. 256; *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806, 24 L. ed. 324. "But there is a defense peculiar to

§ 2641. **Meaning of term.**—"Laches is a neglect to do something that by law a man is obliged or in duty bound to do."² In other words, it is inexcusable or unreasonable delay in asserting a right.³ Thus, it appears that "laches"

courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." Quoted without definite citation in *Badger v. Badger*, 2 Wall. (U. S.) 87, 17 L. ed. 836. "Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to an adverse party, and when it would be inequitable to enforce the right." *Leathers v. Stewart*, 108 Maine 96, 79 Atl. 16. See further, *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516; *Walther v. Null*, 233 Mo. 104, 134 S. W. 993.

² *Anderson v. Northrop*, 30 Fla. 612, 12 So. 318, citing *Sebag v. Abitbol*, 4 Maule & S. 462; *Willmott v. Barber*, 15 Ch. Div. 96; *Weldon v. Dicks*, 10 Ch. Div. 247; *Murray v. Palmer*, 2 Schoales & L. 474. "The term 'laches' involves the idea of negligence—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time." *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143. "Negligence is but another name for laches." *United States v. Winona & St. P. R. Co.*, 67 Fed. 969, 15 C. C. A. 117, affd. 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. 381.

³ "The term 'laches,' in its broad legal sense, as interpreted by courts of equity, signifies such un-

reasonable delay in the assertion of and attempted securing of equitable rights as should constitute in equity and good conscience a bar to recovery. The doctrine is founded upon the universally conceded justice and paramount importance of the proposition that the repose of titles and the security of property are manifestly promoted by fully acting upon the maxim, 'Vigilantibus, non dormientibus, jura subveniunt.' A learned judge has aptly and beautifully said that this power, as exercised by courts of equity, is well symbolized by the emblem of time, 'who is depicted as carrying a scythe and an hourglass; that, while with one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed.'" *Graff v. Portland Town & Mineral Co.*, 12 Colo. App. 106, 54 Pac. 854. "Laches is defined as 'inexcusable delay in asserting a right.'" *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304. The court in *United States v. Beebe*, 4 McCrary (U. S.) 12, 17 Fed. 36, affd. 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. 1083, has apparently failed to arrive at a proper conception of the meaning of the word "laches." First declaring that lapse of time alone will frequently bar equitable relief, it then proceeds to announce under what circumstances delay may be pleaded and thereby in effect states the proposition that lapse of time which induces prejudice will oust the jurisdiction of equity. In other words, it first affirms and then denies the potency, as a defense, of time alone. See further, *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100, revd. 24 Colo. 71, 49 Pac. 139; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Morse v. Seibold*, 147 Ill. 318, 35 N. E. 369; *Lloyd v. Simons*, 97 Minn. 315, 105 N. W. 902; *Treadwell v.*

is not, by reason of loose usage, to be confounded either with "acquiescence" or mere "delay," regardless of circumstances. "Acquiescence" carries with it the idea of an active assent—"laches" of merely a passive one.⁴ So, while "laches" may be an inferior form of "acquiescence,"⁵ or at least, when taken with other facts, evidence of "acquiescence,"⁶ the two words are not technically synonymous. Again, until the name of an ingredient can be effectively employed as the name of the entire compound, the words "delay"⁷ and "laches" will not be interchangeable.⁸

§ 2642. **Element of delay.**—Lapse of time has been indicated as being an element of laches.⁹ This element, however, must not be magnified and thus, singly and alone, caused to attain the dignity of an unfailing bar. It is delay unreasonable, unconscionable, unexplained, which equity abhors,^{9a} and which it will recognize as the basis for a charge of laches.¹⁰ Equitable relief must be sued for

Clark, 73 App. Div. (N. Y.) 473, 77 N. Y. S. 350; Babb v. Sullivan, 43 S. Car. 436, 21 S. E. 277; Updike's Admr. v. Lane, 78 Va. 132; Cole's Admr. v. Ballard, 78 Va. 139; Wissler v. Craig's Admr., 80 Va. 22; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804, revd. 30 Wash. 622, 71 Pac. 190; Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582; 5 Pomeroy, Equity Juris. (3d ed.) § 21, quoting Wilson v. Wilson, 41 Ore. 459, 69 Pac. 923, cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Demuth v. Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. 322; Snyder v. Charleston &c. Bridge Co., 65 W. Va. 1, 63 S. E. 616, 131 Am. St. 947.

⁴ Wood, Lim. of Actions (3d ed.) § 62.

⁵ Wood, Lim. of Actions (3d ed.) § 62.

⁶ Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

⁷ Post § 2642.

⁸ For a lengthy consideration of this subject, see, Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

⁹ Ante § 2641.

^{9a} See post § 2650.

¹⁰ "The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence, in failing to institute proceedings before he did." Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. 258, quoted in Old Colony Trust Co. v. Dubuque Light &c. Co., 89 Fed. 794. "The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, * * * and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years." Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. 873; First Nat. Bank v. Nelson, 106 Ala. 535, 18 So. 154; Essex v. Day, 52 Conn. 483, 1 Atl. 620; Stansbury v. Inglehart, 9 Mackey (20 D. C.) 134, 19 Wash. L. 594; Cooksey v. Bryan, 2 App.

within a reasonable time after the vesting of the right from which benefit is sought to be derived. So much for a general statement. What constitutes a reasonable time must depend, in great part, upon the circumstances of the particular case.¹¹

§ 2643. Ordinary effect of long delay may be nullified.—

Delay may have been unavoidable; it may have been caused by facts beyond the control of the individual; excuses may be offered which will nullify its otherwise dis-

D. C. 557; *Speidell v. Henrici*, 15 Fed. 753, *affd.* 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. 610; *In re McKinney*, 15 Fed. 912; *McClaskey v. Barr*, 47 Fed. 154, *revd.* 70 Fed. 529, 530, 17 C. C. A. 251; *Rosenthal v. Renick*, 44 Ill. 202; *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Ill. 350; *Gibbons v. Hoag*, 95 Ill. 45; *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114; *Boyce v. Danz*, 29 Mich. 146; *Sanborn v. Hamline Univ.*, 38 Minn. 211, 36 N. W. 338; *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458; *Bollinger v. Chouteau*, 20 Mo. 89; *Kelly v. Hurt*, 61 Mo. 463; *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938, 24 Am. St. 399; *Fitzgerald v. Fitzgerald & Co.* Const. Co., 44 Nebr. 463, 62 N. W. 899; *Oliver v. Lansing*, 48 Nebr. 338, 67 N. W. 195; *Obert v. Obert*, 12 N. J. Eq. 423; *Smith v. Drake*, 23 N. J. Eq. 302; *Cawley v. Leonard*, 28 N. J. Eq. 467; *Culver v. Pierson* (N. J. Ch.), 15 Atl. 269; *People v. Scannell*, 27 Misc. (N. Y.) 662, 59 N. Y. S. 679; *Platt v. Platt*, 58 N. Y. 646, *affg.* *Platt v. Platt*, 2 Thomp. & C. (N. Y.) 25; *Fabs v. Taylor*, 10 Ohio 104; *Larrowe v. Beam*, 10 Ohio 498; *Paschall v. Hinderer*, 28 Ohio St. 568; *Tompkins v. Merriam*, 6 Kulp (Pa.) 543; *Hellams v. Prior*, 64 S. C. 296, 42 S. E. 106; *Allen v. Urquhart*, 19 Tex. 480; *Johnson v. Atlantic & C. Transit Co.*, 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. 520; *United States v. Alexandria*, 4 Hughes (U. S.) 545, 19 Fed. 609; *Oliver v. Piatt*, 3 How. (U. S.) 333, 11 L. ed. 622; *Gunton v. Carroll*, 101 U. S. 426, 25 L. ed. 985; *Williams v. Boston &*

A. R. Co., 17 Blatchf. (U. S.) 21, Fed. Cas. No. 17716; *Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769; *Lockwood v. White*, 65 Vt. 466, 26 Atl. 639; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Aylett's Exr. v. King*, 11 Leigh (Va.) 486; *Mulliday v. Machir's Admr.*, 4 Grat. (Va.) 1; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371; *Butler v. Mitchell*, 17 Wis. 52. And compare, *Rider v. White*, 3 Mackey (D. C.) 305; *Chew v. Farmers' Bank*, 9 Gill (Md.) 361; *Tate v. Conner*, 17 N. Car. 224; *Taylor v. McDaniel*, 4 Heisk. (Tenn.) 545; *Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. 610; *Scott v. Evans*, 1 McLean (U. S.) 486, Fed. Cas. No. 12529; *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90, Fed. Cas. No. 17181; *Copen v. Flesher*, 1 Bond (U. S.) 440, Fed. Cas. No. 3211; *United States v. Tichenor*, 8 Sawy. (U. S.) 142, 12 Fed. 415; *United States v. Beebee*, 4 McCrary (U. S.) 12, 17 Fed. 36, *affd.* 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; *Anderson v. Burwell's Exrs.*, 6 Grat. (Va.) 405.

¹¹ *Darlington v. Turner*, 24 App. D. C. 573, *revd.* on another point 202 U. S. 195, 50 L. ed. 992, 26 Sup. Ct. 630; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Schradski v. Albright*, 93 Mo. 42, 5 S. W. 807; *Pike v. Martindale*, 91 Mo. 268, 1 S. W. 858; *People v. Scannell*, 27 Misc. (N. Y.) 662, 59 N. Y. S. 679; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Trowbridge v. Stone's Admr.*, 42 W. Va. 454, 26 S. E. 363.

astrous effect. Thus, it seems that a plea of infancy may, upon occasion, be accepted in justification of what would ordinarily be deemed tardiness.¹² Likewise, coverture has been declared to be a mitigatory circumstance.¹³ So, too, an unsound condition of mind may preclude the defense of fatal delay.¹⁴ Thus, where the guardian of a person of unsound mind by his fraud and misconduct disqualified himself as guardian to sue or act for his ward and this condition existed at the time the cause of action arose, and at the time he was, on his own application, appointed guardian, it was held that the ward was, in effect, without a guardian to protect his interest and that the former might, fifteen

¹² *McMillen v. Rushing*, 80 Ala. 402; *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. 17; *Smith v. Sackett*, 5 Gil. (Ill.) 534; *Miles v. Wheeler*, 43 Ill. 123; *Hart's Devisees v. Hawkins' Heirs*, 3 Bibb (Ky.) 502, 6 Am. Dec. 666; *Carr v. Bob*, 7 Dana (Ky.) 417; *Breckinridge v. Floyd*, 7 Dana (Ky.) 456; *Walker's Assignee, v. Walker*, 21 Ky. L. 1521, 55 S. W. 726; *Tiernan v. Hammond*, 41 Md. 548; *Burns v. Thayer*, 115 Mass. 89; *Kroenung v. Goehri*, 112 Mo. 641, 20 S. W. 661; *Napton v. Seaton*, 71 Mo. 358; *Tate v. Greenlee's Admrs.*, 9 N. Car. 486; *Carter v. Chattanooga (Tenn. Ch. App.)*, 48 S. W. 117; *Robinson v. Kampmann*, 5 Tex. Civ. App. 605, 24 S. W. 529; *Griffin v. Towns (Tex. Civ. App.)*, 25 S. W. 968; *Cole v. Grigsby (Tex. Civ. App.)*, 35 S. W. 680; *Wells v. Morse*, 11 Vt. 9; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869; *Robinett v. Robinett's Heirs (Va.)*, 19 S. E. 845, revd. 92 Va. 124, 22 S. E. 856; *Knight v. Watt's Admrs.*, 26 W. Va. 175; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Israel v. Silsbee*, 57 Wis. 222, 15 N. W. 144. Compare *Morgan v. Herrick*, 21 Ill. 481; *Wright v. Leclaire*, 3 Iowa 221; *Wood v. Chetwood*, 33 N. J. Eq. 9; *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657, 9 Atl. 742; *Garrett v. Scouten*, 3 Denio (N. Y.) 334;

Bedilian v. Seaton, 3 Wall. (U. S.) 279, Fed. Cas. No. 1218; *Copen v. Flesher*, 1 Bond (U. S.) 440, Fed. Cas. No. 3211.

¹³ *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Napton v. Seaton*, 71 Mo. 358; *Wichita Land &c. Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128; *Wells v. Morse*, 11 Vt. 9; *Baker v. Morris' Admr.*, 10 Leigh (Va.) 284. Compare *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589, 29 Am. St. 17; *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568; *Warner v. Jackson*, 7 App. D. C. 211; *Steins v. Manhattan Life Ins. Co.*, 34 Fed. 441; *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071; *Wood v. Chetwood*, 33 N. J. Eq. 9; *Harrison v. Gibson*, 23 Grat. (Va.) 212; *Blackwell's Admr. v. Bragg*, 78 Va. 529; *Phillips v. Piney Coal &c. Co.*, 53 W. Va. 543, 44 S. E. 774, 97 Am. St. 1040.

¹⁴ *Norris v. Haggin*, 28 Fed. 275, affd. 136 U. S. 386, 34 L. ed. 424, 10 Sup. Ct. 942; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Sundy v. Seymour*, 55 N. J. Eq. 1, 35 Atl. 893; *Kidder v. Houston (N. J. Ch.)*, 47 Atl. 336; *Wells v. Morse*, 11 Vt. 9; *Knight v. Watt's Admrs.*, 26 W. Va. 175; *Trowbridge v. Stone's Admr.*, 42 W. Va. 454, 26 S. E. 363; *Heyl v. Goelz*, 97 Wis. 327, 72 N. W. 626. Compare *Doughty v. Doughty*, 7 N. J. Eq. 643.

years after the execution of a fraudulent conveyance by his guardian, sue to have the same set aside.¹⁵

§ 2644. Delay through ignorance of fact.—Manifestly, it can not be said that a person should assert a right before he has knowledge, or is chargeable with knowledge of the same.¹⁶ He must usually have had such opportunity to ascertain his position as would be sufficient in the case of a man of ordinary intelligence and prudence. He can not presume a certain status and, subsequently finding that a contrary one obtained, declare that the time within which he might have pursued his right should date from the moment of its actual discovery. He must be diligent in informing himself upon the true state of affairs, culpable ignorance being fully as offensive in equity as in law.¹⁷

¹⁵ *Bradley v. Singletary* (Ala.), 59 So. 58.

¹⁶ "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." *Halstead v. Grinnan*, 152 U. S. 412, 38 L. ed. 495, 14 Sup. Ct. 641, quoted in *Ritchie v. Sayers*, 100 Fed. 520. Ignorance may be that of fact. *Holt v. Wilson*, 75 Ala. 58; *Cowan v. Sapp*, 74 Ala. 44; *Martin v. Martin*, 35 Ala. 560; *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Hart v. Kimball*, 72 Cal. 283, 13 Pac. 852; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278; *Stedwell v. Anderson*, 21 Conn. 139; *Fellows v. Hyman*, 33 Fed. 313; *Bowman v. Patrick*, 36 Fed. 138, revd. 149 U. S. 411, 37 L. ed. 790, 13 Sup. Ct. 811; *Hodge v. Palms*, 68 Fed. 61, 15 C. A. 220; *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. 214; *Moneta v. Hoffman*, 249 Ill. 56, 94 N. E. 72; *Carnes v. Mitchell*, 82 Iowa 601, 48 N. W. 941; *Dice v. Brown*, 98 Iowa 297, 67 N. W. 253; *Keedy v. Nally*, 63 Md. 311; *Hathaway v. Thayer*, 8 Allen (Mass.) 421; *Metropolitan Lumber Co. v. Lake Superior Ship Canal, R. & C. Co.*, 101 Mich. 577, 60 N. W. 278; *Holterhoff v. Mead*, 36 Minn. 42, 29 N. W. 675; *Massey v. Smith*, 64

Mo. 347; *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719; *Bosley v. National Mach. Co.*, 15 Daly (N. Y.) 267, 25 N. Y. St. 575, 6 N. Y. S. 4, affd. 123 N. Y. 550, 25 N. E. 990; *Collins v. Collins*, 59 Hun (N. Y.) 620, 31 N. Y. St. 591, affd. 131 N. Y. 648, 30 N. E. 863, 13 N. Y. S. 28; *Howe's Heirs v. Rogers*, 32 Tex. 218; *Moore v. Crawford*, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. 447; *Veazie v. Williams*, 8 How. (U. S.) 134, 12 L. ed. 1018. But compare, *Fowle v. Park*, 48 Fed. 789; *Smith v. Schweigerer*, 129 Ind. 363; 28 N. E. 696; *Chew v. Farmers' Bank*, 9 Gill (Md.) 361, or that of law, *Lasher v. McCreery*, 66 Fed. 834; *Baltimore & O. R. Co. v. Trimble*, 51 Md. 99; *Pairo v. Vickery*, 37 Md. 467; *Platt v. Platt*, 58 N. Y. 646; *Cranmer v. McSwords*, 24 W. Va. 594. But compare, *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568; *Breit v. Yeaton*, 101 Ill. 242; *Wright v. Leclair*, 3 Iowa 221; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. 418.

¹⁷ "It is undoubtedly an essential element of laches that the party to be charged with it should have knowledge of the matter involved, or, after notice, have failed or omitted to obtain knowledge where

This principle has been announced and applied in a multitude of cases.^{17a} Where concealment is accomplished by

it might be found, or that there must have been circumstances which should have induced an inquiry from such party." *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688. "Ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it.' * * * This principle measures the knowledge which the law imputes to those who are charged with laches." *Swift v. Smith*, 79 Fed. 709, 25 C. C. A. 154. Doubt should result in inquiry. *Beaver v. Trittipio*, 24 Fed. 212, 8 C. C. A. 100, affg. *Fuller v. Montague*, 53 Fed. 204; *Kessler v. Ensley Co.*, 123 Fed. 546; *Reavis v. Reavis*, 103 Fed. 813, *Gorman v. McAuliffe*, 93 Ga. 295, 20 S. E. 330; *Cline v. Richards*, 68 Ill. App. 399; *Belinski v. National Brwg. Co.*, 109 Ill. App. 647; *Kellogg v. Wilson*, 89 Ill. 357; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. 401; *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39; *Jarboe v. Kepler*, 4 Ind. 177; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737, 98 N. W. 606; *Spalding v. St. Joseph's Indus. School*, 107 Ky. 382, 21 Ky. L. 1107, 54 S. W. 200; *Marion County v. Louisville & C. R. Co.*, 25 Ky. L. 1600, 78 S. W. 437; *Hite's Heirs v. Hite's Exrs.*, 1 B. Mon. (Ky.) 177; *Kirby v. Jacobs*, 13 B. Mon. (Ky.) 435; *Whaley v. Eliot's Heirs*, 1 A. K. Marsh. (Ky.) 343, 10 Am. Dec. 737; *Simrall v. Williamson*, 18 Ky. L. 135, 35 S. W. 632; *Potter v. Titcomb*, 11 Maine 157; *McCoy v.*

Poor, 56 Md. 197; *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. 501; *McCrickett v. Wilson*, 50 Mich. 513, 15 N. W. 885; *McEacheran v. Western Transp. & C. Co.*, 97 Mich. 479, 56 N. W. 860; *Corby v. Trombley*, 110 Mich. Ind. 41. Five years is not an unreasonable time to take to discover that the provisions of an insurance policy, so obscure in its terms as to be interpretable only by experts, do not correspond with representations made. *Knauer v. Globe Mut. Life Ins. Co.*, 48 N. Y. Super. Ct. 454. Although the case of *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170, seems to relieve an assignee from inquiry as to whether, in a mortgage, a statutory requirement, essential to his particular purposes, has been met, and to allow him to proceed as to innocent third persons, upon the assumption that it has been, it certainly can not be announced as a general rule that a person may passively rely upon his "belief" that the one with whom he has contracted has, in executing the evidentiary instrument, taken account of the statutes with the idea of conferring a peculiar right upon him, and, in consequence, defer the assertion of a different right which he might otherwise possess. Carried to its logical conclusion, this "rule" would be absurd. For example, the grantee in a deed to realty might repose calmly upon the assumption, contrary to fact, that his conveyance had been acknowledged and, after the rights of third persons have intervened, demand that he be decreed to be the owner of the land.

^{17a} See in addition to the cases cited in the last preceding note, *McKneely v. Terry*, 61 Ark. 627, 33 S. W. 953; *Vigoureaux v. Murphy*, 54 Cal. 346; *Wood v. Perkins*, 64 Fed. 817; *Johnson v. Florida & C. R. Co.*, 18 Fed. 821; *Norris v. Hoggins*, 28 Fed. 275, affd. 136 U. S. 386, 34 L. ed. 424, 10 Sup. Ct. 942; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483; *Bangs v. Lovelidge*, 60 Fed. 963; *Wetzel v. Minnesota R. Trans. Co.*, 65 Fed. 23, 12

fraud, deceit, treachery and the like, discovery is frequently attended with great difficulty, and negligence in uncovering his right will not be readily imputed to the victim. Allowance will be made for circumstances whereby the latter was misled and the court will be slow to declare that the right was not discovered, or sought to be enforced, at the earliest possible moment.¹⁸

C. C. A. 490, *affd.* 169 U. S. 237, 42 L. ed. 730, 18 Sup. Ct. 307; *Fletcher v. McArthur*, 117 Fed. 393, 54 C. C. A. 567; *Thornton v. Natchez*, 129 Fed. 84, 63 C. C. A. 526; *Eifert v. Craps*, 58 Fed. 470, 7 C. C. A. 319; *Fuller v. Montague*, 59 292, 68 N. W. 139; *Myrick v. Edmundson*, 2 Gil. (Minn.) 221; *Marcotte v. Hartman*, 46 Minn. 202, 48 N. W. 767; *Kroenung v. Gochri*, 112 Mo. 641, 20 S. W. 661; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976; *Chouteau v. Allen*, 70 Mo. 290; *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1009; *Barton v. Long*, 45 N. J. Eq. 841, 14 Atl. 566, 568; *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657, 9 Atl. 742; *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652; *Bruce v. Child*, 11 N. Car. 372; *Loomis v. Rosenthal*, 34 Ore. 585, 57 Pac. 55; *Krug v. Keller*, 8 Pa. Super. Ct. 78; *Morrell v. Trotter*, 15 Phila. (Pa.) 201, 39 Leg. Int. (Pa.) 256; *Underhill v. Nelson*, 1 Lea (Tenn.) 98; *Dean v. Crenshaw*, 47 Tex. 10; *Wetzel v. Minnesota R. Trans. Co.*, 169 U. S. 237, 42 L. ed. 730, 18 Sup. Ct. 307; *McQuiddy v. Ware*, 20 Wall. (U. S.) 14, 22 L. ed. 311; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. 1192; *Amory v. Amory*, 6 Biss. (U. S.) 174, Fed. Cas. No. 335, 6 Chi. Leg. News 349; *Leavenworth County v. Chicago & C. R. Co.*, 5 McCrary (U. S.) 508, 18 Fed. 209; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. 594; *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548, 14 Sup. Ct. 671; *Ware v. Galveston City Co.*, 146 U. S. 102, 36 L. ed. 904, 13 Sup. Ct. 33; *Lamar's Exr. v. Hale*, 79 Va. 147; *Hannon v. Hannihan*, 85 Va. 429. 12 S. E. 157; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. 726; *Wallace v. Richmond*, 26

Grat. (Va.) 67; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869; *Trowbridge v. Stone's Admr.*, 42 W. Va. 454, 26 S. E. 363; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660; *In re Holden's Estate*, 37 Wis. 98; *Melms v. Pabst Brwg. Co.*, 93 Wis. 153, 66 N. W. 518, 57 Am. St. 899; *Saladin v. Kraayvanger*, 96 Wis. 180, 70 N. W. 1113.

"Where the fraud is clearly proved the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay." *McIntire v. Pryor*, 173 U. S. 38, 43 L. ed. 606, 19 Sup. Ct. 352. "Where actual fraud is proved the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud * * * we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence." *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 45 L. ed. 60, 93 O. G. 940, 21 Sup. Ct. 7, *revg.* *Saxlehner v. Eisner & Mendelson Co.*, 91 Fed. 536, 33 C. C. A. 291. Notice can not be predicated of suspicions quieted by explanations. *Salsbury v. Ware*, 183 Ill. 505, 56 N. E. 149, *revg.* *Ware v. Salsbury*, 80 Ill. App. 485. Persons upon whom rest the obligation to reveal without inquiry can not accuse the one entitled to the facts of negligence in failing to seek information of others. *Krohn v. Williamson*, 62 Fed. 869; *McKneely v. Terry*, 61 Ark. 627, 33 S. W. 953; *Duff v. Duff*, 87 Cal. 104, 23 Pac. 874, 25 Pac. 265; *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015; *Arkins v. Arkins*, 20 Colo. App. 123, 77 Pac. 256; *Caldwell v. Davis*, 10 Colo.

§ 2645. Delay caused by poverty, nonresidence, etc.—

The consensus of opinion appears to be that poverty is not

- 481, 15 Pac. 696, 3 Am. St. 599; Great West. Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. 204; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Alger v. Anderson, 78 Fed. 729; Ritchie v. Sayers, 100 Fed. 520; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Anthony v. Campbell, 112 Fed. 212, 50 C. C. A. 195; Horner v. Perry, 112 Fed. 906; Lee v. Patten, 34 Fla. 149, 15 So. 775; Wilson v. Augur, 176 Ill. 561, 52 N. E. 289; Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Middaugh v. Fox, 135 Ill. 344, 25 N. E. 584; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; Henry County v. Winnebago Swamp-Drainage Co., 52 Ill. 299; Brake v. Payne, 137 Ind. 479, 37 N. E. 140; Brayley v. Ross, 33 Iowa 505; Baker v. Grundy's Heirs, 1 Duv. (Ky.) 281; Frost v. Walls, 93 Maine 405, 45 Atl. 287; Richardson v. Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293; Hawkes v. Lackey, 207 Mass. 424, 93 N. E. 828; Chase v. Boughton, 93 Mich. 285, 54 N. W. 44; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Henrioid v. Neusbaumer, 69 Mo. 96; Richards v. Hatfield, 40 Nebr. 879, 59 N. W. 777; Foster v. Knowles, 42 N. J. Eq. 226, 7 Atl. 290; Young v. Young, 51 N. J. Eq. 491, 27 Atl. 627; Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907, affd. 53 N. J. Eq. 695, 35 Atl. 1130; Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; Rhinelander v. Barrow, 17 Johns. (N. Y.) 538; Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. 394; Simpkins v. Taylor, 81 Hun (N. Y.) 467, 63 N. Y. St. 491, 31 N. Y. S. 169; Longworth v. Hunt, 11 Ohio St. 194; Wilson v. Keely, 5 Pa. Co. Ct. 106; Hansell v. Downing, 17 Pa. Super. Ct. 235; McLure v. Ashley, 7 Rich. Eq. (S. Car.) 430; Lowry v. Stapp (Tenn. Ch. App.), 53 S. W. 194; Joy v. Ft. Worth Compress Co., 24 Tex. Civ. App. 94, 58 S. W. 173; Loring v. Palmer, 118 U. S. 321, 30 L. ed. 211, 6 Sup. Ct. 1073; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. 258; Forbes v. Overby, 4 Hughes (U. S.) 441, Fed. Cas. No. 4928a; Fletcher v. Warren, 18 Vt. 45; Virginia Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. 939; Rowe v. Bentley, 29 Grat. (Va.) 756; Rigney v. Tacoma Light & Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Williard v. Comstock, 58 Wis. 565, 17 N. W. 401, 46 Am. Rep. 657. "Where * * * the transaction complained of is the consolidation of two quasi politic corporations, made or attempted to be made under and by virtue of authority conferred by a public statute, by proceedings had and entered of record upon the books of the respective corporations, and by deeds of conveyance executed and recorded in the several counties and filed in the office of the secretary of state, it is difficult to see upon what ground the transaction can be regarded as one which conceals itself. On the contrary, the court would be inclined to hold that the stockholders of the respective corporations are charged with notice of the proceedings, and bound to proceed with reasonable diligence to annul them. And, however this may be, they can not stand by for a series of years, making no sign of discontent, while other innocent parties invest their means upon the faith of the validity of the consolidation." Leavenworth County v. Chicago & C. R. Co., 18 Fed. 209, 5 McCrary (U. S.) 508. See also, Johnson v. Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. 126; Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335; Lant v. Manley, 71 Fed. 7, revd. 75 Fed. 627, 21 C. C. A. 457; Teall v. Slaven, 40 Fed. 774; Brown v. Brown, 142 Ill. 409, 32 N. E. 500; Stettaner v. Dwight, 54 Ill. App. 194; Matlock v. Todd, 25 Ind. 128; Cedar Rapids Ins. Co. v. Butler, 83 Iowa 124, 48 N. W. 1026;

an excuse for delay.¹⁹ But time during which a person is under disability as an adjudged bankrupt²⁰ should certainly not be computed against him where it prevents his acting.²¹ Neither absence nor nonresidence is ordinarily an exculpatory fact,²² nor, so it has been declared, is illiteracy per se capable of securing indulgence.²³ Further, there is nothing inequitable in imputing the dilatoriness of an attorney or other agent in urging his principal's right, to the one whom

Couch's Heirs v. Couch's Admr., 9 B. Mon. (Ky.) 160; *Bliss v. Prichard*, 67 Mo. 181; *Hathaway v. Noble*, 55 N. H. 508; *In re Ellison's Estate*, 163 Pa. St. 315, 30 Atl. 199; *Myers v. O'Hanton*, 12 Rich. Eq. (S. Car.) 196; *Wissler v. Craig's Admr.*, 80 Va. 22.

¹⁹"While the poverty of the complainant [alleged to have been heretofore too poor to employ counsel or prosecute her rights] is much to be regretted, it does not constitute any legal or equitable ground for granting her relief which would be denied to her if rich. The legal and equitable rights of parties to controversies before the courts must be administered regardless alike of poverty and riches." *De Estrada v. San Felipe Land & Co.*, 46 Fed. 280. See further, *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335; *Lumley v. Wabash R. Co.*, 71 Fed. 21, revd. 76 Fed. 66, 22 C. C. A. 60; *Perry v. Craig*, 3 Mo. 516; *Locke v. Armstrong*, 22 N. Car. 147; *Twine v. Carey*, 2 Okla. 249, 37 Pac. 1096; *Matthews v. Young*, 2 Okla. 616, 39 Pac. 387; *Carter v. Chattanooga* (Tenn. Ch. App.), 48 S. W. 117; *Mason v. Crosby*, 2 Ware. (U. S.) (Dav. 303) 306, Fed. Cas. No. 9235; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. 902. That "delay is accounted for and excused on account of defendant's insolvency," see *Stevens v. Martin*, 85 Tenn. 278, 2 S. W. 206.

²⁰*Scheidt v. Goldsmith*, 103 Ill. App. 623; *Peters v. Wallace*, 9 Ky. L. 215, 4 S. W. 914; *Rand v. Sage*, 94 Minn. 344, 102 N. W. 864; *Berry v. Gillis*, 17 N. H. 9, 43 Am.

Dec. 584; *Pickens v. Roy*, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. 78; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113.

²¹*Gamble v. Folsom*, 49 Mich. 141, 13 N. W. 394.

²²*Potts v. Alexander*, 118 Fed. 885; *Demartin v. Phelan*, 51 Fed. 865, 2 C. C. A. 523; *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335; *Wright v. Leclair*, 3 Iowa 221; *Smith v. Kincaid*, 4 J. J. Marsh. (Ky.) 239; *England v. Garner*, 90 N. Car. 197; *In re Thierfeld's Estate*, 11 Pa. County Ct. 47; *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514. And compare *Reorganized Church of Jesus Christ of Latter-Day Saints v. Church of Christ*, 60 Fed. 937, revd. 70 Fed. 179, 17 C. C. A. 387, in which delay occasioned by military expulsion and continued on account of hostile public feeling and sentiment was not permitted to prejudice the rights of the complainants. See also, *Sayre v. Elyton Land Co.*, 73 Ala. 85; *Miles v. Wheeler*, 43 Ill. 123; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; *Phillips v. Wilmarth*, 98 Iowa 32, 66 N. W. 1053. So, upon the question of knowledge and opportunity to assert the right it might be important.

²³"Nor is the fact that complainant is ignorant and unable to read or write of itself sufficient to bring into action the aid of a court of equity in behalf of a claim and demand otherwise barred by lapse of time. Every one, not under legal disability, must assert his or her rights within the time prescribed by the rules of law or equity as the case may be." *De Estrada v. San Felipe Land & Water Co.*, 46 Fed. 280.

he represents, since the latter has sufficient remedy in a personal action against the delinquent.²⁴

§ 2646. **Delay resulting from attempted extra-judicial settlement, etc.**—But since courts are very much inclined to discourage unnecessary litigation, the lapse of time consumed in attempting to negotiate an amicable settlement or to effect a private adjustment will not, as a rule, jeopardize equitable cognizance of the rights invaded.²⁵ It has been said, in this connection, that, "Time is frequently of great advantage to a debtor, and an indulgent creditor will not be prejudiced in equity because he has yielded to his debtor's request for delay, and has not pressed him while in embarrassed circumstances."²⁶ Again, the attempted judicial assertion of a right will commonly discount the time which may have passed since its accrual to such an extent that the elapsed interval will be valueless in defeating subsequent proceedings required to establish the right.²⁷ Thus, where separate actions at law, brought prior to the attach-

²⁴ *Wilson v. Smith*, 126 Fed. 916, 61 C. C. A. 446; *Breit v. Yeaton*, 101 Ill. 242; *Pairo v. Vickery*, 37 Md. 467; *Cushing v. Schoeneman*, 1 Nebr. (unof.) 482, 96 N. W. 346; *Greer v. New York*, 1 Abb. Pr. (N. S.) (N. Y.) 206, 27 N. Y. Super. Ct. 675; *Simpkins v. Taylor*, 81 Hun (N. Y.) 467, 63 N. Y. St. 491, 31 N. Y. S. 169; *Hurt v. West's Admr.*, 87 Va. 78, 12 S. E. 141; *In re Holden's Estate*, 37 Wis. 98.

²⁵ *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328; *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *Springer v. Springer*, 114 Ill. 550, 2 N. E. 527; *Seymour v. Detroit Copper &c. Rolling Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Chance v. Jennings*, 159 Mo. 544, 61 S. W. 177; *Kline v. Cutter*, 34 N. J. Eq. 329, rev'd. 35 N. J. Eq. 534; *Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. 435; *In re Ischy's Estate*, 17 Pa. Co. Ct. 316; *Mackall v. Casilear*, 137 U. S. 556, 34 L. ed.

776, 11 Sup. Ct. 178; *Young v. Chicago &c. R. Co.*, 28 Wis. 171. Compare *Waller v. Demint*, 1 Dana (Ky.) 92, 25 Am. Dec. 134.

²⁶ *Hellams v. Prior*, 64 S. Car. 296, 42 S. E. 106.

²⁷ *Hagerman v. Bates*, 24 Colo. 71, 49 Pac. 139; *Northern Pac. R. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18, affg. *Boyd v. Northern Pac. R. Co.*, 170 Fed. 779; *Pepin Tp. v. Sage*, 129 Fed. 657, 64 C. C. A. 169; *Graham v. Day*, 4 Gil. (Ill.) 389; *Cox v. Montgomery*, 43 Ill. 110; *Hart's Devises v. Hawkins' Heirs*, 3 Bibb (Ky.) 502, 6 Am. Dec. 666; *Comins v. Culver*, 35 N. J. Eq. 94; *United New Jersey R. &c. Co. v. Bayonne* (N. J.), 3 Atl. 123; *Schaefer v. Fond du Lac*, 104 Wis. 39, 80 N. W. 59. Compare *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Cockrill v. Hutchinson*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. 564; *Boston, C. & M. R. Co. v. Boston &c. R. Co.*, 65 N. H. 393, 23 Atl. 529; *Cressey v. Meyer*, 138 U. S. 525, 34 L. ed. 1018, 11 Sup. Ct. 387.

ment of limitations, are, on motion, permitted to be consolidated in equity, the former defendants at law can not avail themselves of the bar recognized in favor of persons, first made defendants in equity, who by reason of limitations could not then be proceeded against at law.²⁸ So, too, where an original bill, filed in due season, states a cause of action corresponding in substance with that revealed by the amended bill upon which recovery is eventually allowed, time can not be cumulated to bar the latter.²⁹

§ 2647. Recognition of right as fact mitigatory of delay.—Another fact which may be urged in extenuation of delay is the recognition by the adverse party of the existence of the right. A right recognized is a right preserved, and a party who, either designedly or innocently, recognizes a right, adhering to another and detrimental to his own interests, can not seize upon the resulting postponement of judicial proceedings as a reason why the right should not be afterwards enforced.³⁰ For example, where a deed fails to reserve a way over the lands granted, according to the mutual intention of the parties, but the grantors “for a long time” use the way with the grantee’s knowledge and consent, and when finally denied the privilege, discover the mistake and offer, to no purpose, a correct conveyance, equity will not refuse reformation on the ground of lapse of time.³¹

§ 2648. Application in equity of statutes of limitation.—Even when suits in equity are not expressly comprehended

²⁸ *Smith v. Butler*, 176 Mass. 38, 57 N. E. 322.

²⁹ *Pendery v. Carleton*, 87 Fed. 41, 30 C. C. A. 510.

³⁰ *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077; *Callender v. Colegrove*, 17 Conn. 1; *Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334; *Citizens’ Sav. Bank v. Stewart*, 90 Iowa 467, 57 N. W. 957; *Hill v. Jones*, 17 N. Car. 101; *Kelly v. Kelly* (Tenn. Ch. App.), 58 S. W. 870; *McCampbell v. Durst*, 73 Tex. 410, 11 S. W. 380; *Riggs v. Polk*, 3 Tex. Civ. App. 179, 21 S.

W. 1013; *Franklin v. Piper*, 5 Tex. Civ. App. 253, 23 S. W. 942; *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300. Compare, *Mackall v. Casilear*, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. 178; *Silsby v. Young*, 3 Cranch. (U. S.) 249, 2 L. ed. 429; *Griffin’s Exr. v. Maccauley’s Admr.*, 7 Grat. (Va.) 476; *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, 39 Am. St. 844.

³¹ *Schautz v. Keener*, 87 Ind. 258.

by statutes of limitation, courts of equity will frequently, in effect, apply the latter by analogy.³² In this connection

³² "The defense that the claim is stale is now generally governed by the question whether the statute of limitations applies." *Udpike v. Mace*, 194 Fed. 1001; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369; *Presley v. Weakley*, 135 Ala. 517, 33 So. 434, 93 Am. St. 39; *Baldwin v. Williams*, 74 Ark. 316, 86 S. W. 423, 109 Am. St. 81; *Perkins v. Cartmell*, 4 Har. (Del.) 270, 42 Am. Dec. 753; *Washington Loan & Co. v. Darling*, 21 App. D. C. 132; *Johnson v. Florida Transit & Co. R. Co.*, 18 Fed. 821; *Hickox v. Elliott*, 22 Fed. 13, 10 Sawy. (U. S.) 415; *Hale v. Coffin*, 120 Fed. 470, 57 C. C. A. 528, affg. 114 Fed. 567; *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609; *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369; *Sloan v. Graham*, 85 Ill. 26; *Barnes v. Born*, 133 Ind. 169, 30 N. E. 509, 32 N. E. 833; *McNagney v. Frazer*, 1 Ind. App. 98, 27 N. E. 431; *Sioux City & Co. R. Co. v. O'Brien County*, 118 Iowa 582, 92 N. W. 857; *Dickey v. Permanent Land Co.*, 63 Md. 170; *Ela v. Ela*, 158 Mass. 54, 32 N. E. 957; *McVickar v. Filer*, 31 Mich. 304; *Howell v. Blindbury* (Smith v. Blindbury) 66 Mich. 319, 33 N. W. 391; *Sheridan Tp. v. Frost Tp.*, 62 Mich. 136, 28 N. W. 747; *Sheridan Tp. v. Hayes Tp.*, 62 Mich. 140, 28 N. W. 749; *Arnett v. Finney*, 41 N. J. Eq. 147, 3 Atl. 696; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Tucker v. Linn* (N. J. Eq.), 57 Atl. 1017; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Watson v. Texas & P. R. Co.* (Tex. Civ. App.), 73 S. W. 830; *Robinson v. Hook*, 4 Mason (U. S.) 139, Fed. Cas. No. 11956; *Sullivan v. Portland & K. R. Co.*, 4 Cliff. (U. S.) 212, Fed. Cas. No. 13596, affd. 94 U. S. 806, 24 L. ed. 324; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660; *Wilsons v. Harper*, 25 W. Va. 179. See also, *Wilson v. Anthony*, 19 Ark. 16; *Ringo v. Woodruff*, 43 Ark. 469; *Budington v. Munson*, 33 Conn. 481; *Dodd v. Wilson*, 4 Del. Ch. 399; *Willard v. Wood*, 1 App. D. C. 44, affd. 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. 176; *McDonald v. Sims*, 3 Ga. 383; *Keaton v. McGwier*, 24 Ga. 217; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Gilbert v. Guptill*, 34 Ill. 112; *Kane County v. Herrington*, 50 Ill. 232; *Hancock v. Harper*, 86 Ill. 445; *Palmer v. Wood*, 48 Ill. App. 630, affd. 149 Ill. 146, 35 N. E. 1122; *Wright v. Leclair*, 3 Iowa 221; *Johnson v. Hopkins*, 19 Iowa 49; *Harbour v. Rhinehart*, 39 Iowa 672; *Frame v. Kenny's Heirs*, 2 A. K. Marsh. (Ky.) 145, 12 Am. Dec. 367; *Watkins v. Harwood*, 2 Gill & J. (Md.) 307; *Sindall v. Campbell*, 7 Gill (Md.) 66; *Knight v. Brawner*, 14 Md. 1; *Syester v. Brewer*, 27 Md. 288; *Smith v. Davidson*, 40 Mich. 632; *Wood v. Ford*, 29 Miss. 57; *Goff v. Robins*, 33 Miss. 153; *Mitchell v. Woodson*, 37 Miss. 567; *Perry v. Craig*, 3 Mo. 516; *Conover v. Wright*, 6 N. J. Eq. 613, 47 Am. Dec. 213; *Dean v. Dean*, 9 N. J. Eq. 425; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455; *Didier v. Davison*, 2 Barb. Ch. (N. Y.) 477; *McCotter v. Lawrence*, 4 Hun (N. Y.) 107, 6 Thomp. & C. (N. Y.) 392; *St. John v. Coates*, 63 Hun (N. Y.) 460, 45 N. Y. St. 431, 18 N. Y. S. 419, affd. 140 N. Y. 634, 35 N. E. 891; *Bell v. Beeman*, 7 N. Car. 273, 9 Am. Dec. 604; *Mardre v. Leigh*, 16 N. Car. 360; *Taylor v. McMurray*, 58 N. Car. 357; *Leggett v. Coffield*, 58 N. Car. 382; *Anderson v. Baxter*, 4 Ore. 105; *In re Neely's Appeal*, 85 Pa. St. 387; *In re Bickel's Appeal*, 86 Pa. St. 204; *Fricke v. Magee*, 10 Wkly. Notes Cas. (Pa.) 50; *Prescott v. Hubbell*, 1 Hill Eq. (S. Car.) 210; *Smith v. Smith*, *McMul. Eq.* (S. Car.) 126; *Lafferty v. Conn*, 3 Sneed (Tenn.) 221; *Glasscock v. Nelson's Admr.*, 26 Tex. 150; *Montgomery v. Noyes*, 73 Tex. 203, 11 S. W. 138; *Campbell v. Houchin* (Tex. Civ. App.), 35 S. W. 753; *Martin v. Bowker*, 19 Vt. 526. In the case of a purely equitable right the court will not recognize

it has been said that a defendant, sued within the time fixed by the analogous statute, has the burden of showing either from the face of the bill or by his answer that unusual circumstances require the application of the doctrine of laches, and, on the other hand, that it devolves upon the complainant who sues after the statutory time has elapsed to show, by proper averments in his bill, the inequity of applying the statute in his case.³³ The right to make such application of the statute, however, does not, apparently, amount to a duty, it being within the power of the chancellor to resolve the question of lapse of time according to the peculiar circumstances of the particular case.³⁴ Al-

and is not controlled by the period of limitation fixed by the statute. *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740.

³³ *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14; *Boynton v. Haggart*, 120 Fed. 819, 57 C. C. A. 301; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189. See further, *Fowler v. Alabama Iron & Co.*, 164 Ala. 414, 51 So. 393.

³⁴ "In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. * * * The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it." *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14. "The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute fre-

quently works great practical injustice,—the doctrine of laches, never." *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. 35, affg. 11 N. Mex. 1, 66 Pac. 552, 55 L. R. A. 658. See further, *Beckford v. Wade*, 17 Ves. 87; *Bonney v. Ridgard*, 1 Cox Ch. 145; *Nelson v. Worthington*, 3 App. D. C. 503; *Potts v. Alexander*, 118 Fed. 885; *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520; *Williams v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Holmes v. Cleveland & C. Co.*, 93 Fed. 100; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *Carlock v. Carlock*, 249 Ill. 330, 94 N. E. 507; *Moneta v. Hoffman*, 249 Ill. 56, 94 N. E. 72; *Lloyd v. Simons*, 97 Minn. 315, 105 N. W. 902; *New York Bank-Note Co. v. Hamilton Bank-Note Engraving & Co.*, 28 App. Div. (N. Y.) 411, 50 N. Y. S. 1093, revd. 180 N. Y. 280, 73 N. E. 48; *Coleman v. Zapp* (Tex. Civ. App.), 135 S. W. 730; *Bowman v. Wathen*, 1 How. (U. S.) 189, 11 L. ed. 97; *Piatt v. Vattier*, 9 Pet. (U. S.) 405, 9 L. ed. 173; *Miller v. McIntire*, 6 Pet. (U. S.) 61, 8 L. ed. 320; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481, 5 L. ed. 311; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. ed. 142; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504. Contra, except where special circumstances intervene (*Crittendon v. Brainard*, 2 Root (Conn.) 485; *Preston v. Preston*, 95 U. S. 200, 24 L. ed. 494; *Meath v. Phillips County*, 108 U.

though it has been declared that time will only be treated as a conclusive bar by analogy to the statute when there is an adverse possession,³⁵ a later case is authority for the proposition that "where no actual fraud is shown, equity adopts the period of the statute of limitations."³⁶ And "courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law."³⁷ Moreover, although courts of equity will not follow the statute of limitations when, by so doing, manifest wrong and injustice will be wrought,³⁸ equity can not be used "as a mere device to get rid of the

S. 553, 27 L. ed. 819, 2 Sup. Ct. 869); or the relief sought is based upon a right purely equitable. (*Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Loomis v. Missouri Pac. R. Co.*, 165 Mo. 469, 65 S. W. 962; *McLain v. Ferrell*, 1 Swan (Tenn.) 48. See also, *Hall v. Phelps*, Dall. Dig. (Tex.) 435). In Missouri "the same statute which bars actions at law bars also proceedings in equity, saving those which the statute excepts." *Hoester v. Sammelmann*, 101 Mo. 619, 14 S. W. 728, quoted with approval in *Lile v. Kincaid*, 160 Mo. App. 297, 142 S. W. 434. See also, *Meigs v. Pinkham* (Cal.), 112 Pac. 883; *Wentworth v. Wentworth*, 75 N. H. 547, 78 Atl. 646.

³⁵ *Varick v. Edwards*, 1 Hoff. Ch. (N. Y.) 382, affd. 11 Paige (N. Y.) 289.

³⁶ *Church v. Winton*, 196 Pa. St. 107, 46 Atl. 363.

³⁷ *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 37 L. ed. 799, 13 Sup. Ct. 944, quoted in *Baker v. Cummings*, 169 U. S. 188, 42 L. ed. 711 and note. See further, *Gunn v. Brantley*, 21 Ala. 633; *Crocker v. Clements' Admr.*, 23 Ala. 296; *Sullivan v. Hadley*, 16 Ark. 129; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Nash v. Ingalls*, 101 Fed. 645, 41 C. C. A. 545, affg. 79 Fed. 510; *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433, 51 C. C. A. 267; *Manning v. Warren*, 17 Ill. 267; *Richardson v. Gregory*, 126 Ill. 166, 18 N. E. 777; *Breckenridge v. Church-*

ill, 3 J. J. Marsh. (Ky.) 11; *Tiernan v. Rescaniere's Admr.*, 10 Gill & J. (Md.) 217; *Sindall v. Campbell*, 7 Gill (Md.) 66; *Hertle v. Schwartz*, 3 Md. 366; *Teackle v. Gibson*, 8 Md. 70; *Wilhelm v. Caylor*, 32 Md. 151; *People v. Michigan Cent. R. Co.*, 145 Mich. 140, 108 N. W. 772; *Kelly v. Hurt*, 74 Mo. 561; *Somerset County Bank v. Veghte*, 42 N. J. Eq. 39, 6 Atl. 278; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881; *Tooker v. National Sugar Refining Co.* (N. J. Eq.), 84 Atl. 10; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Humbert v. Trinity Church*, 7 Paige (N. Y.) 195, affd. 24 Wend. (N. Y.) 587; *Bank of United States v. Biddle*, 2 Pars. Eq. Cas. (Pa.) 31; *Shelby's Heirs v. Shelby*, 3 Tenn. (Cooke) 179, 5 Am. Dec. 686; *Lafferty v. Turley*, 3 Sneed (Tenn.) 157; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Robinson v. Hook*, 4 Mason (U. S.) 139, Fed. Cas. No. 11956; *Pratt v. Northern*, 5 Mason (U. S.) 95, Fed. Cas. No. 11376; *Sherwood v. Sutton*, 5 Mason (U. S.) 143, Fed. Cas. No. 12782; *Sullivan v. Portland & K. R. Co.*, 4 Cliff. (U. S.) 212, Fed. Cas. No. 13596, affd. 94 U. S. 806, 24 L. ed. 324; *Hall v. Russell*, 3 Sawy. (U. S.) 506, Fed. Cas. No. 5943, affd. 101 U. S. 503, 25 L. ed. 829; *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

³⁸ *Fogg v. St. Louis, H. & K. R. Co.*, 17 Fed. 871, 5 McCrary (U. S.) 449.

statute.”³⁹ In a number of instances it has been said, though, perhaps, somewhat too broadly, that the lapse of no period short of that prescribed by the statute of limitations will bar relief in equity.⁴⁰ Especially has this doctrine been adhered to when no unusual circumstances have intervened.⁴¹ On the other hand, the proposition that, in equity, a delay may be fatal, although it does not measure up to that fixed by the statute, is not without authority to support it.⁴² Thus, it has been declared that the de-

³⁹ *Ela v. Ela*, 158 Mass. 54, 32 N. E. 957. “Unless there be some controlling equity, the court will not conjure the doctrine of laches to defeat or destroy a statute fixing a time within which actions may be brought.” *Roger v. Whittham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105, quoted in *Gray v. Reeves* (Wash.), 125 Pac. 162.

⁴⁰ *Chapman v. Lee*, 64 Ala. 483; *Washington Loan & Co. v. Darling*, 21 App. D. C. 132; *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81; *Florida Mortg. & Co. v. Finlayson*, 91 Fed. 13, 33 C. C. A. 307; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587; *Gordon v. Johnson*, 79 Ill. App. 423, revd. 186 Ill. 18, 57 N. E. 790; *Henry County v. Winnebago Swamp-Drainage Co.*, 52 Ill. 454; *Murphy v. Blair*, 12 Ind. 184; *Cotton v. Wood*, 25 Iowa 43; *Weaver's Heirs v. Froman*, 6 J. J. Marsh. (Ky.) 213; *Barrett v. Mutual Life Ins. Co.*, 27 Ky. L. 586, 85 S. W. 749; *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Lilliendahl v. Stegmair*, 45 N. J. Eq. 648, 18 Atl. 216; *Brush v. Manhattan R. Co.*, 26 Abb. N. Cas. (N. Y.) 73, 13 N. Y. S. 908; *Robeson v. Gibbons*, 2 Rawle (Pa.) 45; *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804; *Steinmeyer v. Steinmeyer*, 55 S. Car. 9, 33 S. E. 15; *Bains v. Perry*, 1 Lea (Tenn.) 37; *Slaughter v. Coke County*, 34 Tex. Civ. App. 598, 79 S. W. 863; *Putnam v. New Albany*, 4 Biss. (U. S.) 365, Fed. Cas. No. 11481, revd. 11 Wall. (U. S.) 96, 20 L. ed. 155, affd. 16 Wall. 390, 21 L. ed. 361; *Cole's Admr. v. Ballard*, 78 Va. 139; *Gibson v. Green's Admr.*, 89 Va. 524, 16 S. E. 661, 37

Am. St. 888; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

⁴¹ *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134, 35 So. 50; *Cook v. Ceas*, 147 Cal. 614, 82 Pac. 370; *Ritchie v. Sayers*, 100 Fed. 520; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189; *Williamson v. Monroe*, 101 Fed. 322; *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402; *Light v. West*, 42 Iowa 138; *Hagerty v. Mann*, 56 Md. 522; *Summers v. Abernathy*, 234 Mo. 156, 136 S. W. 289; *Herbert v. Herbert*, 47 N. J. Eq. 11, 20 Atl. 290; *Gist v. Cattell's Heirs*, 2 Desaus. (S. Car.) 53; *McGee v. Hall*, 26 S. Car. 179, 1 S. E. 711; *Houck's Admr. v. Dunham*, 92 Va. 211, 23 S. E. 238. See also, *Paterson v. East Jersey Water Co.*, 74 N. J. Eq. 49, 70 Atl. 472, affd. *Paterson v. East Jersey Water Co.*, 77 N. J. Eq. 588, 78 Atl. 1134.

⁴² “Even if the statute of limitations be made applicable in general terms to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired.” *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. 35, affg. 11 N. Mex. 1, 66 Pac. 552, 55 L. R. A. 658. “Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where * * * the delay in the assertion of rights is not adequately explained, and such circumstances have intervened in the

struction of muniments of title, the death or removal of parties, the necessity of conserving the rights of a number of innocent purchasers, radical changes in the condition and value of the property, and its speculative character are circumstances which will induce a court of equity to apply the doctrine of laches upon the expiration of a

condition of the adverse party as render it unjust to him or to his estate that a court of equity should assist the plaintiff." *Whitney v. Fox*, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. 713. See further, *Great West. Min. Co. v. Woodmas of Alaton Min. Co.*, 14 Colo. 90, 23 Pac. 908; *Stansbury v. Inglehart*, 19 Wash. L. 594, 9 Mackey (D. C.) 134; *Ide v. Trorlicht &c. Carpet Co.*, 115 Fed. 137, 53 C. C. A. 341; *Phillips v. Rogers*, 12 Metc. (Mass.) 405; *Burgess v. St. Louis County R. Co.*, 99 Mo. 496, 12 S. W. 1050; *Kroenung v. Goehri*, 112 Mo. 641, 20 S. W. 661; *Bobb v. Wolff*, 148 Mo. 335, 49 S. W. 996; *Stanton v. Thompson* (Mo.), 136 S. W. 698; *Hawley v. Von Lanken*, 75 Nebr. 597, 106 N. W. 456; *Peters v. Delaplaine*, 49 N. Y. 362; *Wilson v. Wilson*, 41 Ore. 459, 69 Pac. 923; *National Mut. Bldg. &c. Assn. v. Blair*, 98 Va. 490, 36 S. E. 513; *Trader v. Jarvis*, 23 W. Va. 100; *Wilson v. Harper*, 25 W. Va. 179. "As between a trustee and his cestui que trust, neither the statute, nor the rule of analogy, nor lapse of time will, in general, effect the right of the beneficiary to redress; yet equity will in such cases, when the circumstances require it, enforce against the cestui que trust, especially where the rights of third persons are concerned, its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*; and while there are cases of this class where equity has granted relief after a great length of time, even fifty years, yet there are others in which it has refused it after only a few months. Among the cases which have been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are (1) those in which the public convenience requires that there shall

be a speedy end of strife; (2) others in which some of the principal parties, in transactions sought to be reviewed, are dead and their vouchers lost; (3) others in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; (4) others where the disturbance of purchases or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons." *Etting v. Marx's Exr.*, 4 Fed. 673, 4 Hughes (U. S.) 312, citing *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407; *Flanders v. Flanders*, 23 Ga. 249, 68 Am. Dec. 523; *Hough v. Coughlan*, 41 Ill. 131; *Mitchell v. Berry*, 1 Metc. (Ky.) 602; *State v. West*, 68 Mo. 229; *Davison v. Associates of the Jersey Co.*, 71 N. Y. 333; *McKnight v. Taylor*, 1 How. (U. S.) 161, 10 L. ed. 86; *Badger v. Badger*, 2 Wall. (U. S.) 87, 17 L. ed. 836; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; *Atkinson v. Robinson*, 9 Leigh (Va.) 393; *Robertson v. Read's Admr.*, 17 Grat. (Va.) 544; *Harrison v. Gibson*, 23 Grat. (Va.) 212; *Hudson v. Hudson's Exr.*, 3 Rand. (Va.) 117. "There may be cases of statutory proceedings, or cases of purely equitable cognizance, where the laches of a party may be of such a character, and under such circumstances, as will bar his right to prosecute his action in less time than that fixed by the statute of limitations. But that is only in cases where the laches are of such a character, and under such circumstances, as to work an equitable estoppel." *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

period shorter than that fixed by the statute.⁴³ These circumstances, however, are certainly “unusual” ones, and, being such, the rule last stated does not differ appreciably from the one just before noted.

§ 2649. Final word on subject of delay alone.—Finally, on the subject of delay alone, the principles which have been outlined form a circle about, and in support of, the one proposition, distinguishable above all others, that it is impossible to announce a well-defined limit of time beyond which it will be vain to sue for equitable relief; in other words, that the failure to assert an existing right within a given number of years, months or days will not, ipso facto, invariably exclude its owner from the jurisdiction of equity, since a delay prejudicial to the opposite party in one instance will be unprejudicial in another. Here it is, then, that the element of prejudice enters.

§ 2650. Element of prejudice.—In the constitution of laches, prejudice to the party alleging the same is the complement of long delay. Ordinarily, laches can not be predicated of either alone. It is the combination of the two—lapse of time plus prejudice—which works disaster to one who has slept upon his rights. “Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he can not be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right.”⁴⁴ But while laches is not, like

⁴³ *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14, citing *Lemoine v. Dunklin*, 51 Fed. 487, 2 C. C. A. 343.

⁴⁴ *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804, quoted in *Tatum v.*

Arkansas Lumber Co. (Ark.), 146 S. W. 135; *Cowans v. Tapley (Miss.)*, 57 So. 567. “The cases are many in which this defense [laches] has been invoked and considered. It is true, that by reason

limitations, a mere matter of time,⁴⁵ it has frequently been held that a long delay will create the presumption,⁴⁶ or at

of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in conditions or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them. * * * They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. 873, quoted in *Old Colony Trust Co. v. Dubuque Light & Co.*, 89 Fed. 794; *Harwood v. Cincinnati & C. R. Co.*, 17 Wall. (U. S.) 78, 21 L. ed. 558. "Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort." *Wollaston v. Tribe*, L. R. 9 Eq. 44. See further, *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Rozell v. Chicago Mill. & C. Co.*, 76 Ark. 525, 89 S. W. 469; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467; *London & S. F. Bank v. Dexter Horton*, 126 Fed. 593, 61 C. C. A. 515; *Curtis v. Lakin*, 94 Fed. 251, 36 C. C. A. 222; *Hauckett v. Blair*, 100 Fed. 817, 41 C. C. A. 76; *Bachrach v. Jewish Foster Home*, 185 Fed. 847; *Stiger v. Bent*, 111 Ill. 328; *Ryason v. Dunten*, 164 Ind. 85, 73 N. E.

74; *Radford's Admrs. v. Harris*, 144 Ky. 809, 139 S. W. 963; *Nudd v. Powers*, 136 Mass. 273; *Haff v. Jenney*, 54 Mich. 511, 20 N. W. 563; *Hathaway v. New Baltimore*, 48 Mich. 251, 12 N. W. 186; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Hawley v. Von Lanken*, 75 Nebr. 597, 106 N. W. 456; *Hawley v. Jahnel*, 76 Nebr. 134, 106 N. W. 459; *Farr v. Hauenstein*, 69 N. J. Eq. 740, 61 Atl. 147; *Daggers v. Van Dyck*, 37 N. J. Eq. 130; *Northrup v. Roe*, 10 N. J. Law J. 334; *Legendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621; *Tynan v. Warren*, 53 N. J. Eq. 313, 31 Atl. 596; *Retsch v. Renahan*, 16 N. Mex. 541, 120 Pac. 897; *Brush v. Manhattan R. Co.*, 26 Abb. N. Cas. (N. Y.) 73, 13 N. Y. S. 908; *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Shearer v. Hutterische Bruder Gemeinde (S. Dak.)*, 134 N. W. 63; *Renshaw v. First Nat. Bank (Tenn. Ch. App.)*, 63 S. W. 194; *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636, 22 Sup. Ct. 354, affg. 95 Fed. 883, 37 C. C. A. 309; *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. 35, affg. 11 N. Mex. 1, 66 Pac. 552, 55 L. R. A. 658; *Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769; *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407.

⁴⁵*Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. 873; *Penn. Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 43 L. ed. 626, 18 Sup. Ct. 223. "Laches * * * is not measured by the yard stick of the statute of limitations, but rather by the conduct of the parties and the equities of the situation." *Shelton v. Horrell (Mo.)*, 134 S. W. 988. And yet "the lapse of twenty years, without recognition of right, or admission of liability, operates an absolute rule of repose." *Alabama Coal & Coke Co. v. Gulf Coal & Coke Co.*, 171 Ala. 544, 54 So. 685.

⁴⁶*Pratt v. Stone*, 80 Ill. 440; *Sunderland v. Sunderland*, 19 Iowa

least a reasonable inference, of laches;⁴⁷ that is, that prejudice will be presumed from inaction long continued.⁴⁸

§ 2651. **Basis for finding of prejudice, etc.**—Injury may lie in the fact that there has been, through the death of witnesses,⁴⁹ or otherwise, an unavoidable loss of evidence;⁵⁰

325; *Wood v. Egan*, 39 La. Ann. 684, 2 So. 191; *Miller v. Smith*, 44 Minn. 127, 46 N. W. 324; *Plet v. Bouchaud*, 4 Edw. Ch. (N. Y.) 30; *Kribbs v. Downing*, 25 Pa. St. 399; *Appeal of Neely*, 85 Pa. St. 387; *Pape v. Harrison*, 16 Lea (Tenn.) 82; *Pope v. Alwell*, 16 Lea (Tenn.) 99; *Brackenridge v. Howth*, 64 Tex. 190; *Dade v. Irwin*, 2 How. (U. S.) 383, 11 L. ed. 308; *Conner v. Chase*, 15 Vt. 764; *Dadisman v. Long* (Va.), 22 S. E. 850; *Evans v. Spurgin*, 11 Grat. (Va.) 615.

⁴⁷*Jones v. Perkins*, 76 Fed. 82.

⁴⁸"It is contended on behalf of complainant * * * that it must appear to the court, where laches is urged as the ground of defense, that detriment has come to the defendant from the delay; that his position has been changed, to his injury, or that he has been deprived of evidence which an earlier prosecution of the suit would have enabled him to obtain. This position is not tenable. There are cases where a longer delay than is here complained of has been excused by circumstances, where the court could clearly see that it has occasioned no prejudice to the defendants, but these are exceptional. The doctrine of laches as a defense presumes that the lapse of time is constantly destroying the evidence of rights, and that the death of witnesses and the loss of documentary evidence is its ordinary consequence." *Jones v. Perkins*, 76 Fed. 82.

⁴⁹*Rives v. Morris*, 108 Ala. 527, 18 So. 743; *Bogle v. Bogle's Admr.*, 23 Ala. 544; *Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791, 2 Am. St. 791; *Dugan v. O'Donnell*, 68 Fed. 983; *Percy v. Cockrill*, 53 Fed. 872, 4 C. C. A. 73; *Helm's Exr. v. Rogers*, 81 Ky. 568; *Moore v. Hemp's Exrs.*, 24 Ky. L. 121, 68 S. W. 1; *Gillette v. Plimpton*, 253

Ill. 147, 97 N. E. 260; *Compo v. Jackson Iron Co.*, 50 Mich. 578, 16 N. W. 295; *Barnes v. Taylor*, 27 N. J. Eq. 259, affd. 28 N. J. Eq. 625; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228; *Wilkinson v. Scudder*, 47 N. J. Eq. 324, 21 Atl. 955; *Johnston v. Dunn* (N. J.), 29 Atl. 361; *Oregon Pac. R. Co. v. DeForrest*, 56 Hun (N. Y.) 650, 32 N. Y. St. 178, 11 N. Y. S. 8, affd. 128 N. Y. 83, 28 N. E. 137; *McKechnie v. McKechnie*, 3 App. Div. (N. Y.) 91, 39 N. Y. S. 402; *Packer v. Vandever*, 13 Pa. Co. Ct. 31; *Mobley v. Cureton*, 2 S. Car. 140; *Bolton v. Dickens*, 4 Lea (Tenn.) 569; *Clarke v. Boorman's Exrs.*, 18 Wall. (U. S.) 493, 21 L. ed. 904; *Foster v. Mansfield & Co. R. Co.*, 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. 28, affg. 36 Fed. 627; *Perkins v. Lane*, 82 Va. 59.

⁵⁰"But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud." *Prevost v. Gratz*, 6 Wheat. (U. S.) 481, 5 L. ed. 311. "The lapse of time carries with it the life and memory of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded." *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422. See further, *Davis v. Harrell* (Ark.), 142 S. W. 156; *Sage v. Winona & St. P. R. Co.*, 58 Fed. 297, 7 C. C. A. 237; *Hinchman v. Kelley*, 54 Fed. 63, 4 C. C. A. 189; *Maher v. Farwell*, 97 Ill. 56; *Yeamans v. James*, 29 Kans. 373; *Loomis v. Brush*, 36

disadvantage may be the result of extensive improvements bona fide made;⁵¹ prejudice may exist by reason of there having been a market fluctuation in the value of the property.⁵² In any case, when the court feels satisfied upon the peculiar facts in evidence that the negligence of the complainant in not promptly asserting his right has militated, unconscionably, against the interests of the defendant, it will be justified in denying the relief sought.⁵³ Even more

Mich. 40; *Day v. Cole*, 65 Mich. 154, 41 N. W. 505; *Reddy v. Aldrich* (Miss.), 11 So. 828; *McCartin v. Traphagen's Admr.*, 43 N. J. Eq. 323, 11 Atl. 156; *Chesson v. Chesson*, 43 N. Car. 141; *Ludlow's Heirs v. Cooper's Devises*, 13 Ohio 552; *Clark v. Pratt*, 15 Ore. 304, 14 Pac. 418; *Garland's Admr. v. Garland's Admr.* (Va.), 24 S. E. 505.

⁵¹ *Johnston v. Standard Min. Co.*, 39 Fed. 304, affd. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. 585; *Kinne v. Webb*, 54 Fed. 34, 4 C. C. A. 170; *Schlawig v. Purslow*, 8 C. C. A. 315, 59 Fed. 848; *King v. Wilder*, 75 Ill. 275; *Harlow v. Lake Superior Iron Co.*, 41 Mich. 583, 2 N. W. 913; *Ford v. Loomis*, 33 Mich. 121; *Dunklin County v. Chouteau*, 120 Mo. 577, 25 S. W. 553; *Moreman v. Talbott*, 55 Mo. 392; *Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158; *Carr v. Wallace*, 7 Watts (Pa.) 394; *Burr v. Kase*, 168 Pa. St. 81, 31 Atl. 954; *Blanchard v. Doering*, 23 Wis. 200.

⁵² *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85; *Sayre v. Citizens' Gaslight & Co.*, 69 Cal. 207, 7 Pac. 437, 10 Pac. 408; *Royal Bank v. Grand Junction R. & Depot Co.*, 125 Mass. 490; *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143; *Moreman v. Talbott*, 55 Mo. 392; *Pettijohn v. Williams*, 55 N. Car. 356; *Germantown Pass. R. Co. v. Fitler*, 60 Pa. St. 124, 100 Am. Dec. 546; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. ed. 388; *Harkness v. Underhill*, 1 Black (U. S.) 316, 17 L. ed. 208; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. 862, affg. 36 Fed. 457; *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct.

894; *Godwin v. Whitehead*, 88 Va. 600, 14 S. E. 344. And compare, *Merrifield v. Ingersoll*, 61 Mich. 4, 27 N. W. 714.

⁵³ "The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804. See also, *Solomon v. Solomon*, 81 Ala. 505, 1 So. 82; *Vanderveer v. Ware*, 65 Ala. 606; *Brown v. Bocquin*, 57 Ark. 97, 20 S. W. 813; *Bateman v. Reitler*, 19 Colo. 547, 36 Pac. 548; *Graham v. Boston & C. R. Co.*, 14 Fed. 753, affd. 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. 1009; *McKean v. Vick*, 108 Ill. 373; *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854, 7 Am. St. 381; *Lequatte v. Drury*, 101 Ill. 77; *Irish v. Antioch College*, 126 Ill. 474, 18 N. E. 768, 9 Am. St. 638; *Bacon v. Chase*, 83 Iowa 521, 50 N. W. 23; *Miller v. Baxter*, 17 Ky. L. 1371, 34 S. W. 1073; *Cooke v. Barrett*, 155 Mass. 413, 29 N. E. 625; *First Congregational Soc. v. Snow*, 1 Cush. (Mass.) 510; *Bowers v. Cutler*, 165 Mass. 441, 43 N. E. 188; *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53; *Taylor v. Whitney*, 56 Minn. 386, 57 N. W. 937; *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. 468; *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727, 33 Am. St. 512; *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Smith v. Davis* (N. J.), 19 Atl. 541; *Myrich v. Selden*, 36 Barb. (N. Y.) 15; *Calhoun v. Delhi & C. R. Co.* (Millard), 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248; *Quinn v. Jenks*,

preclusive in its effect, if possible, than the one of prejudice⁵⁴ is the presumption announced in an Alabama case to the effect that almost any fact necessary to support the regularity and validity of a decree and of the title acquired at a sale thereunder, whether consistent with, or contradictory of the record, will be presumed after the lapse of twenty years.⁵⁵

§ 2652. **Imputation of laches to sovereignty.**—On the question as to whether laches may be imputed to sovereignty, authorities differ. While it has been very recently declared that “laches is not commonly imputed to public officers in respect of their governmental functions or as representatives of the sovereignty,”⁵⁶ there are cases which

88 Hun (N. Y.) 428, 69 N. Y. St. 130, 34 N. Y. S. 962; *People v. Donohue*, 70 Hun (N. Y.) 317, 24 N. Y. S. 437; *Piatt v. Sinton*, 5 Ohio Dec. 547, 2 Wkly. L. Bul. (Ohio) 273, *affd.* 37 Ohio St. 353; *In re Niewind's Estate*, 40 Pittsb. L. J. (O. S.) (Pa.) 385, 23 Pitts. L. J. (N. S.) (Pa.) 385; *Insurance Co. of North America v. Union Canal Co.*, 2 Pa. L. J. 65; *In re Dohnert's Appeal*, 64 Pa. St. 311; *Alsop v. Riker*, 155 U. S. 448, 39 L. ed. 218, 15 Sup. Ct. 162; *In re Butler*, 2 Hughes (U. S.) 247, Fed. Cas. No. 2235; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Becker v. Howard*, 75 Wis. 415, 44 N. W. 755. And compare, *Morse v. Hackensack Sav. Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517.

⁵⁴ Ante § 2650.

⁵⁵ *Duncan v. Williams*, 89 Ala. 341, 7 So. 416.

⁵⁶ *Weatherbee v. Dedham & F. St. R. Co.* (Mass.) 95 N. E. 81. “When the government has a direct pecuniary interest in the subject-matter of the litigation the defenses of stale claim and laches can not be set up as a bar.” *San Pedro & Co. v. United States*, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. ed. 911, citing *United States v. Dallas Military Road Co.*, 140 U.

S. 599, 11 Sup. Ct. 988, 35 L. ed. 560. To the same effect, *United States v. Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 30 L. ed. 81, 6 Sup. Ct. 1006; *United States v. Insley*, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. 485. But “where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties.” *United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. 308, quoted with approval in *La Clair v. United States*, 184 Fed. 128. To the same effect, *Curtner v. United States*, 149 U. S. 662, 37 L. ed. 890, 13 Sup. Ct. 985; *United States v. Southern Pac. R. Co.*, 39 Fed. 132, *revd.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. 163; *United States v. Curtner*, 26 Fed. 296; *United States v. Southern Colorado Coal & Co.*, 18 Fed. 273, 5 McCrary (U. S.) 563, *revd.* 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. 131; *United States v. Willamette Val. & Wagon-Road Co.*, 54 Fed. 807; *State v. John A. Creighton Real Estate & Co.*, 191 Fed. 170, 112 C. C. A. 496; *State v. Carr*, 191 Fed.

require even the federal government itself to sue within a time which would have been reasonable and just had the suit been instituted by an individual, their reasoning being that when the federal government "voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants."⁵⁷ So, too, it has been held that the state will be powerless to proceed in equity against a corporation which has been passively permitted to make an enormous outlay in constructing a viaduct, for the building of which it believed that it had received the necessary legislative sanction.⁵⁸ Likewise, it has been said that "the doctrine of laches applies to a county or other municipal corporation as well as to individuals."⁵⁹

§ 2653. Safer course to plead defense.—Where laches ap-

257, 112 C. C. A. 477; *McCarter v. Lehigh Valley R. Co.*, 78 N. J. Eq. 346, 79 Atl. 93; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720, 6 L. ed. 199; *Gaussen v. United States*, 97 U. S. 584, 24 L. ed. 1009; *United States v. Alexandria*, 19 Fed. 609, 4 Hughes (U. S.) 545; *Dox v. United States Postmaster-General*, 1 Pet. (U. S.) 318, 7 L. ed. 160. And compare *La Republique Francaise v. Saratoga Vichy Spring Co.*, 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. 145.

⁵⁷ *United States v. Beebe*, 17 Fed. 36, 4 McCrary (U. S.) 12, affd. 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. 1083, citing *United States v. Fossatt*, 21 How. (U. S.) 446, 16 L. ed. 186; *The Floyd Acceptances*, 7 Wall. (U. S.) 666, 19 L. ed. 169, 7 Ct. Cl. (U. S.) 65; *United States v. Barker*, 12 Wheat. (U. S.) 559, 6 L. ed. 728, followed in *United States v. McElroy*, 25 Fed. 804, revd. 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. 485. See further, *United States v. Alexandria*, 19 Fed. 614. And compare, *State of Iowa v. Carr*, 191 Fed. 257, 112 C. C. A. 477, in which it is said that, "the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while

mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." See also, *State v. John A. Creighton Real Estate & Co.*, 191 Fed. 270, 112 C. C. A. 496.

⁵⁸ *Attorney-General v. Delaware & C. R. Co.*, 27 N. J. Eq. 1, affd. 27 N. J. Eq. 631. See further, *Hepburn's Case*, 3 Bland. (Md.) 95. And compare, *State v. State of Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. 331.

⁵⁹ *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700. See further, *American Stave & Co. v. Butler County*, 93 Fed. 301. And compare, *Engstad v. Dinnie*, 8 N. Dak. 1, 76 N. W. 292, citing *Schumm v. Seymour*, 24 N. J. Eq. 143, in which it is said that "as against the public, the doctrine of equitable estoppel by laches is very rarely applied, and then in extreme cases only."

pears on the face of the complaint,⁶⁰ or the complainant has admitted his delay by alleging facts in attempted exculpation thereof,⁶¹ it seems that the defense of an inequitable lapse of time need not be specially pleaded.⁶² Such defense, it has been held, may be presented on the hearing or on proceedings preliminary thereto as upon a motion by the complainant for leave to file his replication nunc pro tunc;⁶³ or again, it may first be urged upon the argument.⁶⁴ In fact, some courts apparently take the position that the eye of conscience attributed to equity is all-surveying and all-beholding and that equity should, therefore, when the day of grace has been slept away, declare as much, even though laches has not been brought to its attention in a direct and formal manner.⁶⁵ A recent Massachusetts case,

⁶⁰ "It is not necessary to set up that defense [laches] by way of an answer to a bill in equity, where the laches is apparent on the face of the bill." *Evans v. Woods-worth*, 213 Ill. 404, 72 N. E. 1082. See further, *Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906; *Porter v. Armour*, 241 Ill. 145, 89 N. E. 356; *Gray v. Hayhurst*, 157 Ill. App. 488; *Dexter v. MacDonald*, 196 Mo. 373, 95 S. W. 359.

⁶¹ *Hall v. Fullerton*, 69 Ill. 448; *DeWitt v. Miller's Admr.*, 9 Tex. 239.

⁶² *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804. But see, *Smith v. Russell*, 20 Colo. App. 554, 80 Pac. 474, which declares that, "as a general rule, laches is a matter of defense, and, to be availed of, must be presented by answer." And also, *Schools v. Wright*, 12 Ill. 432; *Zeigler v. Hughes*, 55 Ill. 288; *Dawson v. Vickery*, 150 Ill. 398, 37 N. E. 910; *Keller v. Harrison*, 151 Iowa 320, 128 N. W. 851, 131 N. W. 53; *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56, 36, L. R. A. (N. S.) 402n; *Patterson v. Ingraham*, 23 Miss. 87.

⁶³ *Potts v. Alexander*, 118 Fed. 885. See further, *Adams v. Taylor*, 14 Ark. 62; *Kelly v. Walker*, 91 Ga. 199, 17 S. E. 118; *Robinson v. Lewis*, 45 N. Car. 58. And compare *Ogden v. Stevens*, 241 Ill. 556, 89 N. E. 741, 132 Am. St. 237.

⁶⁴ *National Cash Register Co. v. Union Computing Mach. Co.*, 143 Fed. 342; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001. Contra, "upon the pleadings, and under all the facts and circumstances and character of this case," *Green v. Terwilliger*, 56 Fed. 384.

⁶⁵ "While * * * the defense of laches need not be specifically pleaded by the defendant, still, when not pleaded, unless it clearly and satisfactorily appears to the court from the evidence that there has been an unreasonable delay in prosecuting the suit, the court, of its own motion, should not rest the decision upon that ground." *Hagerman v. Bates*, 24 Colo. 71, 49 Pac. 139. See further, *Haskell v. Bailey*, 22 Conn. 569; *Mayse v. Gaddis*, 2 App. D. C. 20; *Woodmanse & Co. Mfg. Co. v. Williams*, 15 C. C. A. 520, 68 Fed. 489; *Johnson v. Florida Transit & Co. R. Co.*, 18 Fed. 821; *Leavenworth County v. Chicago & Co. R. Co.*, 18 Fed. 209, 5 McCrary (U. S.) 508; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. 46, 5 McCrary (U. S.) 23; *Calivada Colonization Co. v. Hays*, 119 Fed. 202; *National Cash Register Co. v. Union Computing Mach. Co.*, 143 Fed. 342; *Predestinarian Baptist Church v. United Baptist Church*, 139 Ky. 110, 129 S. W. 546; *Lyester v. Brewer*, 27 Md. 288; *Learned v. Foster*, 117 Mass. 365; *American*

however, holds to the effect that the defense of laches, not having been set up in the pleadings, is not open to the defendant as of right after the master has made his report.⁶⁶

§ 2654. **Resumé.**—In conclusion, the salient facts regarding the subject of laches can not be better summed up than in the words of an eminent English jurist, Lord Selborne: "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."⁶⁷

Min. Co. v. Basin & Bay State Min. Co., 39 Mont. 476, 104 Pac. 525, 24 L. R. A. (N. S.) 305; German Nat. Bank v. First Nat. Bank, 55 Nebr. 86, 75 N. W. 531; Sullivan v. Portland & C. R. Co., 94 U. S. 806, 24 L. ed. 324; Blackwell v. Ace, 3 C. P. (Pa.) 177. Contra, Grand Lodge K. P. of North & South America v. Grand Lodge K. P. (Ala.), 56 So. 963; Wilson v. Anthony, 19 Ark. 16; Hill v. Hoefler, 8 Cal. App. 70, 96 Pac. 116; Hill v. Barner, 8 Cal. App. 58, 96 Pac. 111; Hutchinson v. Bambas, 249 Ill. 624, 94 N. E. 987; Borders v. Murphy, 78 Ill. 81; Keller v. Harrison, 151 Iowa 320, 128 N.

W. 851, 131 N. W. 53; Dixon v. Dixon, 1 Md. Ch. 271; Davis v. Downer, 210 Mass. 573, 97 N. E. 90; Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402n; Stephens v. Martin, 85 Tenn. 278, 2 S. W. 206. Compare, Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479. That relief on the chancellor's own motion is discretionary, see Crutchfield v. Hewett, 2 App. D. C. 373; Stewart v. Joyce, 201 Mass. 301, 87 N. E. 613.

⁶⁶ Hawkes v. Lackey, 207 Mass. 424, 93 N. E. 828.

⁶⁷ Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221, quoted with

§ 2655. **Statutes of limitations—Introduction.**—The common law does not accord to lapse of time the power either to destroy or bar a legal right,⁶⁸ except in the case of a fine with proclamation,⁶⁹ and in that of an incorporeal hereditament, it being possible to acquire title to the latter by prescription.⁷⁰ Although it has been said⁷¹ that title to land by adverse possession was known to the common law, this proposition as to the old common law, it is believed, is not fully sustained by the authorities cited.⁷² So, too, while the antiquity of a debt will sometimes permit the presumption of payment to be indulged, such presumption when born of the agedness of the claim is not ordinarily regarded as conclusive.⁷³ Thus, it has remained for the statutory law to prescribe definite periods of time, beyond which, provided certain enumerated contingencies have not occurred, the vitality of remedies, otherwise pursuable, must be denied. Hence arise what are generally known as statutes of limitation—statutes intended to make

approval in *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218; *Jonathan Mills Mfg. Co. v. Whitehurst*, 60 Fed. 81; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

⁶⁸ "The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes." *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194. See further, *Nonce v. Richmond & Co. R. Co.*, 33 Fed. 429; *Bank of United States v. Biddle*, 2 Pars. Eq. Cas. (Pa.) 31; *Forster v. Cumberland Val. R. Co.*, 23 Pa. 371; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Ireland v. Mackintosh*, 22 Utah 296, 61 Pac. 901; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 608, 63 Am. St. 17.

⁶⁹ *Wood, Lim. of Actions* (3d ed.), § 2, cited in *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

⁷⁰ *Campbell, Principles of Eng. Law*, 191.

⁷¹ 19 Am. & Eng. Encyc. (2d ed.) 145; 3 Page Conts., § 1646.

⁷² "By the theory of the common law, no length of adverse possession could divest the title of the true owner except so far as it shifted the burden of proof." *Campbell, Principles of Eng. Law*, 191.

⁷³ *Daggett v. Tallman*, 8 Conn. 168; *McCoy v. Morrow*, 18 Ill. 519, 68 Am. Dec. 578; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Rogers v. Bishop*, 5 Blackf. (Ind.) 108; *Doty v. Jameson*, 29 Ky. L. 507, 93 S. W. 638; *Carr v. Dings*, 54 Mo. 95; *Smith's Exr. v. Benton*, 15 Mo. 371; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895; *In re Hayes' Appeal*, 113 Pa. 380, 6 Atl. 144; *Lash v. Von Neida*, 109 Pa. St. 207; *Didlake v. Robb*, 1 Woods (U. S.) 680, Fed. Cas. No. 3899; *Atkinson v. Dance*, 17 Tenn. 424, 30 Am. Dec. 422; *Kilpatrick v. Brashear*, 10 Heisk. (Tenn.) 372; *Rix v. Smith's Heirs*, 6 Vt. 348; *Evarts v. Mason's Estate*, 11 Vt. 122. Presumption conclusive, *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. 894. See ante § 1931.

for the greater security of personal and property rights.⁷⁴ Such statutes, fathered by the one passed in England during the reign of King James I,⁷⁵ have been universally enacted, and it is of the rules of construction of statutes of limitation, pertinent to the subject of contracts, that the succeeding pages will treat.

§ 2656. Construction of statutes.—However much the view of the nature of statutes of limitation may once have fluctuated, it is now very generally accepted that they are statutes of repose, rather than of presumption.⁷⁶ This point is decidedly important. As said by one learned author: "If the statute of limitation be a statute of presumption, then it is taken away by whatever will rebut the presumption; and this is anything which implies or amounts to an acknowledgment that the debt still exists. But if it be a statute of repose, then it remains in force, unless the debtor renounces its benefit and protection, and voluntarily makes a new promise to pay the old debt."⁷⁷ Further, as statutes of repose, they must be accorded a liberal construction.⁷⁸ They are dictated by a wise public policy which requires their recognition and prohibits their evasion.⁷⁹ The

⁷⁴ "The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts." *Shaddock v. Alpine Plank-Road Co.*, 79 Mich. 7, 44 N. W. 158. See also, *Spring v. Gray*, 5 Mason (U. S.) 305, Fed. Cas. No. 13259, affd. 6 Pet. (U. S.) 151, 8 L. ed. 352.

⁷⁵ 21 Jac. 1, ch. 16. See *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496.

⁷⁶ *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Sibert v. Wilder*, 16 Kans. 176, 22 Am. Rep. 280; *Dwight v. Clark*, 7 Mass. 515; *Spuryer v. Hardy*, 4 Mo. App. 573; *Thorpe v. Corwin*, 20 N. J. L. 311; *Leask v. Hoagland*, 64 Misc. (N. Y.) 156, 118 N. Y. S. 1035; *Mahoney v. Southern R. Co.*, Car. Div., 82 S. Car. 215, 64 S. E. 228; *Pritchard v. Howell*, 1 Wis. 131, 60 Am. Dec. 363.

⁷⁷ 3 Parsons Cont. (9th ed.), 63.

⁷⁸ *Hamner v. Yazoo Delta Lumber Co.* (Miss.), 56 So. 466; *State v. Yates*, 231 Mo. 276, 132 S. W. 672; *State v. Grant* (Mo.), 132 S. W. 676. More particularly does this hold good when the statute relates to land. *Phillips v. Pope's Heirs*, 10 B. Mon. (Ky.) 163.

⁷⁹ *Hart v. Goodby*, 72 Misc. (N. Y.) 232, 129 N. Y. S. 892. "Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction." *Pillow v. Roberts*, 13 How. (U. S.) 472, 14 L. ed. 228. "The application of a statute of limitations can not be avoided by showing facts that might ordinarily constitute an estoppel in pais." *Williams v. J. L. Gates Land Co.*, 146 Wis. 55, 130 N. W. 880. See also, *San Diego Realty Co. v. Bergman*, 7 Cal. App. XIII, 94 Pac. 376; *San Diego Realty*

construction must, of course, be reasonable;⁸⁰ the specific language must control; and supposed general and abstract principles of equity can not be invoked to broaden its meaning.⁸¹ Likewise, it has been declared to be a well recognized doctrine that the provisions excepting certain persons or classes of persons from the operation of the statute are to be strictly construed.⁸² So, also, there is authority for the proposition that short statutes are to receive strict construction.⁸³ Although it has been held that the legislature may make statutes of limitation "applicable even to vested rights, provided only it accords to the citizen a reasonable time in which his right may be enforced,"⁸⁴

Co. v. McGinn, 7 Cal. App. 264, 94 Pac. 374; Dickinson v. McCamy, 5 Ga. 486, 48 Am. Dec. 298; Young v. Cook, 30 Miss. 320; Burleigh County v. Kidder County, 20 N. Dak. 27, 125 N. W. 1063; Gautier v. Franklin, 1 Tex. 732. The case of Green v. Rivett, 2 Salk. 421, decided in 1702, declared that: "The statute of limitations, on which the security of all men depends, is to be favored." Contra, Gold Glen Mining &c. Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677.

⁸⁰ Strong v. Andros, 34 App. D. C. 278.

⁸¹ Isenberg v. Rainier, 70 Misc. (N. Y.) 498, 127 N. Y. S. 411. "Statutes limiting the right to bring actions to a particular period are restrictive, and will not be extended to other than those cases expressly provided for." Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897. See also, Garland v. Scott's Estate, 15 La. Ann. 143; Arrowsmith v. Durell, 21 La. Ann. 295; Pleadwell v. Missouri Glass Co., 151 Mo. App. 51, 131 S. W. 941. And compare, Rutter v. Carothers, 223 Mo. 631, 122 S. W. 1056.

⁸² Lawson v. Tripp, 34 Utah 28, 95 Pac. 520. See also, Socia v. DeGraaf, 1 Cow. (N. Y.) 356.

⁸³ St. Louis, I. M. & S. R. Co. v. Batesville &c. Tel. Co., 86 Ark. 300, 110 S. W. 1047.

⁸⁴ Kolbow v. State, 44 Mont. 259, 119 Pac. 791. Compare, Baugher v. Boley (Fla.), 58 So. 980. And

see Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365, in which it is said that, "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * * The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced;" and Sansberry v. Hughes, 174 Ind. 638, 92 N. E. 783, in which Hadley, J., delivering the opinion of the court, says: "A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right, except that, when there exists but a single remedy for the enforcement of a vested right, such remedy can not be wholly taken away, without providing some other reasonably convenient and efficient means of enforcement, without violating the Constitution, since a withdrawal of all legal means for the enforcement of a right is equivalent to a subversion of the right itself. But as pertaining to a mere remedy, there exists no doubt of legislative power to make such changes therein as to it seems fit, if in so doing it preserves or provides a

such statutes will, as a general rule, be given retroactive operation to the sole end that a distinctly manifested legislative intent that they shall be thus construed may be effectuated.⁸⁵ In this connection it has been held that the "reasonable time" which must be allowed for the commencement of an action based upon a right in existence, when an act amendatory of the then statute of limitations is passed, should equal the unexpired portion of the period prescribed by the superseded law, except in a case where such portion exceeds the entire length of time allowed by the new statute.⁸⁶ So, also, it has been held that "the reasonable time is to be computed from the day when the new law is passed, and not from the time it takes effect."⁸⁷ Finally, it has been held that the courts should

reasonable means and opportunity for full enjoyment of the right.

* * * A statute of limitations is peculiarly within the operation of the rule, since it can not, in any ordinary sense, be said to impair the obligation of a contract. Hence, it is firmly settled that the statute in force at the time suit is brought must govern, even though it shortens or lengthens the limitation for enforcement of the contract." To the same effect see, *Paragould v. Lawson*, 88 Ark. 478, 115 S. W. 379; *Wrightman v. Boone County*, 82 Fed. 412; *Dare v. Wabash & C. R. Co.*, 119 Ill. App. 256; *State v. Swope*, 7 Ind. 91; *Fish v. Genett*, 22 Ky. L. 177, 56 S. W. 813; *Warner v. Bartle*, 39 App. Div. (N. Y.) 91, 56 N. Y. S. 585; *Millwee v. Jay*, 47 S. Car. 430, 25 S. E. 298. Contra, to the extent that the governing statute is the one during whose existence the cause of action arose, *McKenzie v. A. P. Cook Co.*, 113 Mich. 452, 71 N. W. 868; and see, *Corrigan v. Reilly*, 64 Ill. App. 124; *Hotaling v. Huntington*, 64 Ill. App. 655. "When there is no proviso in the new act saving rights of action already accrued, the former act should govern." *Gimbel v. Smidth*, 7 Ind. 627. See also, *Cummings v. Rosenberg*, 12 Ariz. 327, 100 Pac. 810; *McElroy v. Ford*, 81 Mo. App. 500; *Clark v. Kansas City & C. R. Co.*, 219 Mo.

524, 118 S. W. 40; *Halsted v. Silberstein*, 196 N. Y. 1, 89 N. E. 443; *Bryan v. McGurk*, 200 N. Y. 332, 93 N. E. 989; *Matthews v. Peterson*, 150 N. Car. 132, 63 S. E. 722; *Adams & Freese Co. v. Kenoyer*, 17 N. Dak. 302, 116 N. W. 98, 16 L. R. A. (N. S.) 681; *Hoke River Boom Co. v. Fairservice (Wash.)*, 125 Pac. 145.

⁸⁵ *Curtis v. Boquillas Land & C. Co.*, 9 Ariz. 62, 76 Pac. 612, affd. 200 U. S. 96, 50 L. ed. 388, 26 Sup. Ct. 192; *Work v. United Globe Mines*, 12 Ariz. 339, 100 Pac. 813; *Crowell v. Davenport*, 11 Ariz. 323, 94 Pac. 1114; *George v. George*, 250 Ill. 251, 95 N. E. 167; *Walker v. People*, 202 Ill. 34, 66 N. E. 827; *Thoeni v. Dubuque*, 115 Iowa 482, 88 N. W. 967; *Clarke v. Doyle*, 17 N. Dak. 340, 116 N. W. 348; *Shuman v. Drayton*, 14 Ohio C. C. 328, 8 Ohio C. D. 12; *Theis v. Beaver County*, 22 Okla. 333, 97 Pac. 973; *In re Mosher*, 24 Okla. 61, 102 Pac. 705; *Walker v. Burgess*, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. 775; *Thomas v. Higgs*, 68 W. Va. 152, 69 S. E. 654, Ann. Cas. 1912A, 1039.

⁸⁶ *Culbreth v. Downing*, 121 N. Car. 205, 28 S. E. 294, 61 Am. St. 661; *Carson v. Norfolk & C. R. Co.*, 128 N. Car. 95, 38 S. E. 287.

⁸⁷ *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 75 N. W. 244, 66 Am. St. 653.

construe statutes of limitation most strongly in favor of the rights which they jeopardize.⁸⁸

§ 2657. **Evasion of limitations by form of action.**—A litigant can not evade limitations by any peculiar designation or form of his action. The statute goes to the substance or subject-matter, and it is such substance or subject-matter, or, in other words, the nature of the action rather than its mere form, that determines the time limit within which suit must be brought. The following extract from a Kentucky case concisely states the rule on this point: "The word 'action,' as used in the statute of limitations, is not restricted in its signification to that which is technically an action, but includes all civil proceedings in courts of justice for the enforcement of legal or equitable rights, whether by action, suit or special proceeding. The statute applies to the cause of action—the case presented by the plaintiff—and whether a particular case is embraced by the statute is to be determined by ascertaining whether it is included in the causes of action to which the statute is made applicable; and neither the form of the proceeding nor the name by which it may be called can have any influence on the question whether the statute applies."⁸⁹ Thus, a suit by petition and

⁸⁸ *Elder v. Bradley*, 2 Sneed (Tenn.) 247.

⁸⁹ *Auditor v. Halbert*, 78 Ky. 577, 1 Ky. L. 253. To the same effect, see, *Bell v. California Bank*, 153 Cal. 234, 94 Pac. 889; *Persoll v. Scott*, 64 Ga. 767; *Bedell v. Janney*, 9 Ill. 193; *Maltby v. Cooper*, *Morris* (Iowa) 59; *Chapman v. Woodward*, 16 La. Ann. 167; *Le Blanc v. Robertson*, 41 La. Ann. 1023, 6 So. 720; *Sibley v. Pierson*, 125 La. 478, 51 So. 502; *Brooks v. Spann*, 63 Miss. 198; *Hoyt v. Putnam*, 39 Hun (N. Y.) 402; *Jex v. New York*, 47 Hun (N. Y.) 633, 13 N. Y. St. 545, *affd.* 111 N. Y. 339, 19 N. E. 52; *Bayles v. Crossman*, 5 Ohio Dec. 354; *Carpenter v. Cincinnati &c. Canal Co.*, 35 Ohio St. 307; *Landes v. Norristown*, 9 Sad. (Pa.) 557, 13 Atl. 189; *De Haven v. Bartholomew*, 57 Pa. St. 126; *Wickersham v. Lee*, 83 Pa. St. 422; *Merritt v. Parks*, 6 Humph. (Tenn.) 332; *Callaway v. McMillian*, 11 Heisk. (Tenn.) 557; *United States &c. Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.), 112 S. W. 447; *Logan v. Robertson* (Tex. Civ. App.), 83 S. W. 395. See also, *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463; *Ferriss v. Ferriss*, 1 Root (Conn.) 365; *State v. Foulks*, 83 Ind. 374; *Lamb v. Clark*, 5 Pick. (Mass.) 193; *People v. Michigan Cent. R. Co.*, 145 Mich. 140, 108 N. W. 772; *Brasie v. Minneapolis Brew. Co.*, 87 Minn. 456, 92 N. W. 340, 67 L. R. A. 865, 94 Am. St. 709; *Fries v. Wheeling &c. R. Co.*, 56 Ohio St. 135, 46 N. E. 516; *Davis v. Ford's Admr.*, *Wright* (Ohio) 200; *Plant v. Murphy*, 5 Ohio Dec. 544; *McCombs v. Guild*, 9 Lea (Tenn.) 81; *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 591.

summons⁹⁰ and a summary execution against the sureties of an executor against whom a judgment has been revived are within the statute.⁹¹ But "the ex parte steps taken by the mortgagee or his assignee to execute the irrevocable power of sale given by the mortgagor as a part of the security" do not constitute an "action" within the meaning of that word as defined by the South Dakota Code of Civil Procedure.⁹² Nor can limitations be invoked against a petition for scire facias which prays that a judgment be revived and entered nunc pro tunc, the proceeding on such petition not being "the beginning of a suit upon a cause of action, but, in so far as the statute of limitation is concerned," the continuation of an existing suit.⁹³ The plaintiff can not alter the character of his action by evidence produced for the purpose of extending the limitation pleaded as a defense.⁹⁴ While the general rule on this subject is as has been stated above, the doctrine as outlined does not obtain without qualification or exception, since it has been declared that the form, and not the cause of action, fixes the bar.⁹⁵ Thus, "where two methods are provided by statute by which a creditor of a corporation may enforce the liability of a stockholder for his unpaid stock subscription, the statute of limitations begins to run whenever a right accrues to the creditor to proceed directly against the stockholder by either method, and when the statutory period, counting from that time, has elapsed, the right to proceed by either method is barred."⁹⁶ So, too, there is authority for the proposition that it is the prayer

⁹⁰ *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564.

⁹¹ *Martin v. Tally*, 72 Ala. 23.

⁹² *Stevens v. Osgood*, 18 S. Dak. 247, 100 N. W. 161.

⁹³ *Coleman v. Zapp* (Tex. Civ. App.), 135 S. W. 730, 151 S. W. 1040 (in Supreme Court).

⁹⁴ *Crouse v. McKee*, 14 N. Y. St. 158.

⁹⁵ *Avery v. Miller*, 81 Mich. 85, 45 N. W. 503; *Christy v. Farlin*, 49 Mich. 319, 13 N. W. 607. To the same effect, see *Knott v. Cunning-*

ham, 2 Sneed (Tenn.) 204. See also, *Mortimer v. Louisville & C. R. Co.*, 10 Bush. (Ky.) 485; *Wilson v. McGreal*, 12 La. Ann. 357; *Burch v. Willis*, 21 La. Ann. 492; *McCormick v. Kaye*, 41 Mo. App. 263; *Reeves v. Nye*, 28 Nebr. 571, 44 N. W. 736; *Cincinnati & C. R. Co. v. Davis*, 19 Ohio C. C. 589, 10 Ohio C. D. 745; *Webber v. Toledo*, 23 Ohio C. C. 237; *Lapham v. Briggs*, 27 Vt. 26.

⁹⁶ *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725.

of the petition or complaint which relieves from or serves to apply the statute.⁹⁷ Likewise, the fact that a creditor can not, by reason of limitations, sue, as personal representative, an executor who is also entitled to the residue of the burdened personalty does not preclude an action against the executor as legatee.⁹⁸ And there are many instances in which there is a right to an election of remedies, or more than one remedy, so that one may be resorted to even though the other is barred.^{98a}

§ 2658. When limitations commence to run.—The earliest moment at which it is possible for limitations to begin to run against a cause of action is that of its accrual.⁹⁹ But the statement that the accrual alone of a cause of action sets the statute in motion would be entirely too broad, unless such statement at the same time presumed the existence of certain other impelling forces. That each of such other forces possesses a portion of the power necessary to start the operation of limitations admits of no doubt. "To start the running of a statute of limitations there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits."¹

⁹⁷ *Bender v. Looney*, 22 La. Ann. 488. But see, *Biggs v. D'Aquin*, 13 La. Ann. 21.

⁹⁸ *Fuller v. McEwen*, 17 Ohio St. 288.

^{98a} *Missouri Sav. & Co. v. Rice*, 84 Fed. 131, 55 U. S. App. 205; *St. Louis & C. R. Co. v. Sweet*, 63 Ark. 563; *Triscony v. Brandenstein*, 66 Cal. 514, 6 Pac. 384; *Dickson v. Epling*, 170 Ill. 329, 48 N. E. 1001.

⁹⁹ *Osborn v. Hopkins*, 160 Cal. 501, 117 Pac. 519; *Middlekamp v. Bessemer Irr. Co.*, 46 Colo. 102, 103 Pac. 280, 23 L. R. A. (N. S.) 795n; *Barnum v. Bessemer Irrigating Ditch Co.*, 46 Colo. 125, 103 Pac. 287; *Wimbush v. Curry*, 8 Ga. App. 223, 68 S. E. 951; *Staninger v. Tabor*, 103 Ill. App. 330; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564; *Dobyns v. Schoolfield*, 10 B. Mon. (Ky.) 311; *Chatterson v. Louisville*, 145 Ky. 485, 140 S.

W. 647; *Hardee v. Dunn* (Lynn), 13 La. Ann. 161; *Ganser v. Ganser*, 83 Minn. 199, 86 N. W. 18, 85 Am. St. 461; *Gray v. Givens*, 26 Mo. 291; *Pitman v. Ball*, 140 Mo. App. 389, 124 S. W. 1082; *Brown v. Silver*, 2 Nebr. (unof.) 164, 96 N. W. 281; *Odlin v. Greenleaf*, 3 N. H. 270; *Stephenson v. Van Bloklund*, 60 Ore. 247, 118 Pac. 1026; *Hoskins v. Lindsay*, 1 Del. Co. (Pa.) 249; *Jones v. Conoway*, 4 Yeates (Pa.) 109; *Hall's Lessee v. Vandegrift*, 3 Bin. (Pa.) 374; *Mayfield v. Seawell*, *Cooke* (Tenn.) 437; *Ex parte Storer*, 2 Ware (U. S.) (Dav. 294) 298, Fed. Cas. No. 13490; *Horner v. Speed*, 2 Pat. & H. (Va.) 616; *Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492. See also, *Young v. Mackall*, 3 Md. Ch. 398.

¹ *Collier v. Goessling*, 160 Fed. 604, 87 C. C. A. 506; *Hanger v. Abbott*, 6 Wall. (U. S.) 532, 18 L. ed. 939. See also, *Lecroix v. Ma-*

§ 2659. When cause of action accrues—In general.—

A cause of action accrues to one coincidently to his becoming possessed of a legal right to sue thereon.² Manifestly, this legal right to sue does not arise until the contract has been breached.³ Where a debtor has paid premiums on a life insurance policy in fraud of his creditors, the right of the latter to charge the proceeds of the policy with such premiums accrues only upon the death of the insured since, until that event occurs, although the policy contains a surrender-value clause, there are no proceeds to be reached.⁴

lone, 157 Ala. 434, 47 So. 725; *Hopper v. Steele*, 18 Ala. 828; *Devereaux v. Brownsville*, 29 Fed. 742; *Andrews v. Rhodes*, 10 Rob. (La.) 52; *Ruff's Admr. v. Bull*, 7 Har. & J. (Md.) 14, 16 Am. Dec. 290; *Brewer v. Williams*, 210 Mass. 256, 96 N. E. 687; *Funkhouser v. Langkopf*, 26 Mo. 453; *Saranac Land & Timber Co. v. Roberts*, 125 App. Div. (N. Y.) 333, 109 N. Y. S. 547; *Grant v. Hughes*, 94 N. Car. 231; *Glass v. Williams*, 16 Lea (Tenn.) 697; *Greenwald v. Appell*, 5 McCrary (U. S.) 339, 17 Fed. 140.

²"A cause of action accrues at the moment the party owning it has a legal right to sue on it, except in cases where extrinsic facts are interposed which would postpone the operation of the statute." *Farneman v. Farneman*, 46 Ind. App. 453, 90 N. E. 775, 91 N. E. 968; *La Rue v. C. G. Kershaw Contracting Co.* (Ala.), 59 So. 155; *Martin v. Tally*, 72 Ala. 23; *Middlekamp v. Bessemer Irr. Co.*, 46 Colo. 102, 103 Pac. 280, 23 L. R. A. (N. S.) 795n; *Barnum v. Bessemer Irr. Co.*, 46 Colo. 125, 103 Pac. 287; *Weiser v. McDowell*, 93 Iowa 772, 61 N. W. 1094; *Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912, 24 Am. St. 403; *Cary v. Koener*, 200 N. Y. 253, 93 N. E. 979; *Van Nest v. Lott*, 16 Abb. Pr. (N. Y.) 130; *Shattuck v. Buek*, 148 App. Div. (N. Y.) 205, 136 N. Y. S. 103; *Smith v. Blythwood*, *Rice* (S. Car.) 245, 33 Am. Dec. 111; *McBee v. Loftis*, 11 Strob. Eq. (S. Car.) 90; *McPherson v. Swift*, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; *Port Arthur Rice Milling Co. v. Beau-*

mont Rice Mills (Tex.), 143 S. W. 926.

³"The general rule is that a right of action does not accrue upon a contract until it is executed, or payment thereunder becomes due by its terms, and the statute of limitations does not commence to run until that event happens. The right to bring an action previous to that event is exceptional, and is only permitted in cases of a breach of a contract by one of the parties which permits the aggrieved party, at his option, to maintain an action for such breach, and recover the damages he has suffered on account thereof. In reaching this conclusion, we have assumed, as above stated, that the breach was of such a character as to permit the bringing of an action for damages. We do not, however, wish to be understood as deciding that question, for the rule that renunciation of a continuous executory contract by one party before the day of performance, giving the other the right to sue at once for damages, is usually applied only to contracts of a special character." *Ga Nun v. Palmer*, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922n. See also, *Hale v. Cushman*, 96 Maine 148, 51 Atl. 874; *Pinch v. McCulloch*, 72 Minn. 71, 74 N. W. 897.

⁴*York v. Flaherty*, 210 Mass. 35, 96 N. E. 53. See also, *Stokes v. Waters' Exr.*, 32 Ky. L. 1218, 108 S. W. 275; and compare, *Harde v. Germania L. Ins. Co.* (Tex. Civ. App.), 153 S. W. 666.

So, limitations will not begin to run during the currency of securities delivered by a debtor and accepted by his creditors as conditional payment of the former's note, the agreement being that such securities "when and if paid shall be in full settlement of the said note."⁵ But when a breach of the contract does occur, the right to sue is not postponed by reason of the fact that injury does not immediately result.⁶ So, it has been held that the statute is set in motion on the date of the completion of the services rendered, rather than that upon which the bill is presented.⁷

§ 2660. Demand, contingency and condition precedent.—

But "where a demand must be made before bringing an action, it is plain that, in a strict sense, a cause of action does not accrue until after the demand,"⁸ that is, "the statute will not generally be put in motion before such demand is made."⁹ This rule has been carried to a point where it has been declared that even the lapse of a number of years will not obviate the necessity of a demand.¹⁰ On the other hand, it has been said that "it is no stretch of language to hold that a cause of action accrues for the purpose of set-

⁵ *Davis v. Davis*, 104 Va. 65, 51 S. E. 216.

⁶ *Woodland Oil Co. v. Byers*, 223 Pa. 241, 72 Atl. 518, 132 Am. St. 737. See also, *Houser v. Farmers' Sup. Co.*, 6 Ga. App. 102, 64 S. E. 293.

⁷ *Hornblower v. George Washington University*, 31 App. D. C. 64.

⁸ *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070. See also, *Holland v. Clark*, 32 Ark. 697; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Foute v. Bacon*, 24 Miss. 156; *Brooks v. Brooks*, 4 Redf. Sur. (N. Y.) 313.

⁹ *High v. Shelby County*, 92 Ind. 580. See also, *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *American Mut. Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; *Bank of Louisville v. Gray*, 84 Ky. 565, 8 Ky. L. 664, 2 S. W. 168; *Kimball v. Kimball*, 16 Mich. 211; *Mertens v. Kielmann*, 79 Mo. 412; *Sawyer v.*

Tappen, 14 N. H. 352; *Sweet v. Irish*, 36 Barb. (N. Y.) 467; *Jones v. Woods*, 70 N. Car. 447; *Wright v. Hamilton*, 2 Bailey (S. Car.) 51, 21 Am. Dec. 513; *Brown v. Brown*, 107 Tenn. 349, 65 S. W. 413; *Babcock v. Wyman*, 19 How. (U. S.) 289, 15 L. ed. 644, affg. *Wyman v. Babcock*, 2 Curt. (U. S.) 386, Fed. Cas. No. 18113; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; *Staniford v. Tuttle*, 4 Vt. 82; *Collard v. Tuttle*, 4 Vt. 491, 24 Am. Dec. 627; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

¹⁰ *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, Ryan & M. 388; *Thorpe v. Coombe*, 8 Dowl. & R. 347; *Rhind v. Hyndman*, 54 Md. 527, 39 Am. Rep. 402; *Girard Bank v. Bank of Penn Tp.*, 39 Pa. St. 92, 80 Am. Dec. 507; *Stanton v. Stanton's Estate*, 37 Vt. 411. See also, *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070; *Thrall v. Meade's Estate*, 40 Vt. 540.

ting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But where no delay is contemplated the rule is just and reasonable; and the presentment should be reasonably prompt, or the creditor should be subjected to the operation of the statute."¹¹ And the expiration of a reasonable time may create the conclusive presumption that a demand was made,¹² especially when the period which has elapsed equals the one prescribed by the statute as that within which suit must be brought.¹³ But where the vendor in a contract for the sale of land promises to convey "on demand," the vendee sets the statute in motion against his right to enforce a conveyance only by making de-

¹¹ *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605, quoted in part, arguendo, in *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070, citing *Ware v. Hewey*, 57 Maine 391, 99 Am. Dec. 780; *Sanford v. Lancaster*, 81 Maine 434, 17 Atl. 402; *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605; *Pittsburgh & Connellsville R. Co. v. Byers*, 32 Pa. St. 22, 72 Am. Dec. 770; *Morrison's Admr. v. Mullin*, 34 Pa. St. 12; *Rhines' Admr. v. Evans*, 66 Pa. St. 192, 5 Am. Rep. 364.

¹² *Massie v. Byrd*, 87 Ala. 672, 6 So. 145; *De Espinosa v. Gregory*, 40 Cal. 58; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. 113; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. 159; *Scroggin v. McClelland*, 37 Nebr. 644, 56 N. W. 208, 22 L. R. A. 110, 40 Am. St. 520; *Dickinson v. New York*, 92 N. Y. 584, affg. *Dickinson v. New York*, 28 Hun (N. Y.) 254, 3 Civ. Proc. (N. Y.) 93; *Oaks v. Taylor*, 30 App. Div. (N. Y.) 177, 51 N. Y. St. 775; *Keithler v. Foster*, 22 Ohio St. 27; *Schraum v. Nolte*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1156; *Collard v. Tuttle*, 4 Vt. 491, 24 Am. Dec. 627; *Staniford v. Tuttle*, 4 Vt. 82; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

¹³ *Meherin v. San Francisco Pro-*

duce Exchange, 117 Cal. 215, 48 Pac. 1074; *Sheaf v. Dodge*, 161 Ind. 270, 68 N. E. 292; *Hitchcock v. Casper*, 164 Ind. 633, 73 N. E. 264; *High v. Shelby County*, 92 Ind. 580; *Travelers' Ins. Co. v. Stucki*, 4 Kans. App. 424, 46 Pac. 42; *Reid v. Albany County*, 128 N. Y. 364, 28 N. E. 367; *Dolon v. Davidson*, 16 Misc. (N. Y.) 316, 39 N. Y. S. 394; *Donlon v. Davidson*, 7 App. Div. (N. Y.) 461, 39 N. Y. S. 1020; *Morrison's Admr. v. Mullin*, 34 Pa. St. 12; *Conyugham School Dist. v. Columbia County*, 6 Leg. Gaz. (Pa.) 26; *Mosgrove v. Golden*, 101 Pa. St. 605; *Schackamaxon Bank v. Desston*, 4 Pa. Co. Ct. 201; *Clements v. Lee*, 8 Tex. 374; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795. But see, *Collis v. Bowen*, 8 Blackf. (Ind.) 262; *Dougherty v. Wheeler*, 125 Ind. 421, 25 N. E. 542; *Jefferson School Tp. v. Worthington*, 5 Ind. App. 586, 32 N. E. 807; *Langsdale v. Woollen*, 99 Ind. 575; *Dobson v. Noyes*, 39 Kans. 471, 18 Pac. 697; *In re Van Dyke's Estate*, 5 Dem. Sur. (N. Y.) 331, 7 N. Y. St. 710, revd. 44 Hun (N. Y.) 394, 9 N. Y. St. 137; *Fry v. Clow*, 50 Hun (N. Y.) 574, 20 N. Y. St. 847, 3 N. Y. S. 593; *Kahnweiler v. Anderson*, 78 N. Car. 133.

mand for the same.¹⁴ Likewise, where one undertakes to support another "when called on for help," a demand that the assistance be given must necessarily precede a breach of the contract.¹⁵ Where a creditor, who has been given collateral security in the form of land, has engaged to reconvey the same "at any time said Hall [debtor] will demand me to do so by his paying me my debt and interest," and to render an accounting of the rents and profits therefrom, the debtor must offer to settle and demand a reconveyance before the statute will run in favor of his secured creditor.¹⁶ Further, it has been held that it is a demand and not the conversion of property bailed which sets the statute in operation against its recovery.¹⁷ Likewise, "where there is a continuing trust, or where the contract is a continuing one, and of such a character as to make a demand necessary to a complete cause of action, the statute does not begin to run until demand has been made."¹⁸

¹⁴ *Thomas v. Pacific Beach Co.* (Cal.), 44 Pac. 475; *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899. "An action can not be brought on a covenant or agreement to convey real estate, as a general rule, until there has been a demand for such a conveyance. * * * Until, therefore, a demand has been made, or there has been such a repudiation of the contract as excuses a demand, the statute of limitations does not begin to run. * * * If it may be said that the complaint does not show a demand for a deed, the repudiation of the contract, and denial of obligation under it, and the conveyance to a stranger to the contract, obviated the need for a demand." *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732.

¹⁵ *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242.

¹⁶ *Hall v. Felton*, 105 Mass. 516.

¹⁷ *Parker v. Gaines* (Ark.), 11 S. W. 693; *Selleck v. Selleck*, 107 Ill. 389; *Lynch v. Jennings*, 43 Ind. 276; *Battle v. Crawford*, 68 Mo. 280; *Hutchins v. Gilman*, 9 N. H. 359; *Moore v. Williams*, 26 N. Y. S. 766; *Northrop v. Smith*, 8 N. Y. St. 161, revd. 118 N. Y. 682, 23 N. E. 571, 2 Silvernail Ct. App. (N. Y.) 532; *Sheldon v. Heaton*, 88 Hun (N. Y.) 535, 68

N. Y. St. 825, 34 N. Y. S. 856; *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487; *Earp v. Richardson*, 81 N. Car. 5; *Goodwin v. Ray*, 108 Tenn. 614, 69 S. W. 730, 91 Am. St. 761; *Page v. Thrall*, 11 Vt. 230. *Contra*, *Bollman Bros. Co. v. Peake*, 96 Mo. 253, 69 S. W. 1058; *Stroman v. O'Cain*, 13 S. Car. 100. See also, *Duer v. Twelfth Street Reformed Church*, 31 N. Y. St. 975, 10 N. Y. S. 526.

¹⁸ *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82, citing *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396; *San Luis Obispo County v. King*, 69 Cal. 531, 11 Pac. 178. See also, *Ray v. United States*, 50 Fed. 166; *Davenport v. Prince*, 56 Fed. 186; *Hileman v. Hileman*, 85 Ind. 1; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070; *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414; *Gutch v. Fosdick*, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. 473; *De Crano v. Moore*, 50 App. Div. (N. Y.) 631, 64 N. Y. S. 3; *Moore v. Moore*, 32 Misc. (N. Y.) 68, 66 N. Y. S. 167; *Wright v. Cain*, 93 N. Car. 296; *Faison v. Stewart*, 112 N. Car. 332, 17 S. E. 157; *Quinn v. Gross*, 24 Ore. 147, 33 Pac. 535; *Robinson v. Cameron County*, 1 Walk. (Pa.) 305. But compare, *Hostetter v. Hollinger*, 117 Pa. St.

The period after which recovery of an ordinary bank deposit will be barred will, in general, unless a demand has been waived and this fact is within the knowledge of the depositor, be computed from the time of the making of the same.¹⁹ But presentation of a check satisfies the requirement of a demand,²⁰ and "suspension of payment and discontinuance of banking operations by the bank waive demand by the depositor, and the statute of limitations begins to run from the suspension."²¹ The retention of money deposited with a municipality in lieu of a bail bond has been held actionable only after demand.²² But a certificate of deposit payable on demand is nothing more than a demand note,²³ and as such the better rule seems to be that limitations will begin to run from its date.²⁴ By the great weight of au-

606, 12 Atl. 741; *Huffnagle v. Blackburn*, 137 Pa. St. 633, 20 Atl. 869; *Hawkins v. Walker*, 4 Yerg. (Tenn.) 188.

¹⁹ "A breach of the bank's obligation to pay upon a proper demand being made, or some act on the part of the bank dispensing with such demand, is essential to a cause of action to recover of it and set the statute of limitations running in respect to the debt." *Koelzer v. First Nat. Bank*, 125 Wis. 595, 104 N. W. 838, 2 L. R. A. (N. S.) 571n, 110 Am. St. 870. See also, *Starr v. Stiles*, 2 Ariz. 436, 19 Pac. 225; *Zuck v. Culp*, 59 Cal. 142; *Schinotti v. Whitney*, 130 Fed. 780; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. 159; *Patterson v. Blanchard*, 98 Ga. 518, 25 S. E. 572; *Brown v. Pike*, 34 La. Ann. 576; *Planters' Bank v. Farmers' & C. Bank*, 8 Gill & J. (Md.) 449; *Dickenson v. Leominster Sav. Bank*, 152 Mass. 49, 25 N. E. 12; *Branch v. Dawson*, 33 Minn. 399, 23 N. W. 552; *Citizens' Bank v. Fromholz*, 64 Nebr. 284, 89 N. W. 775; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Bank of British North America v. Merchants' Nat. Bank*, 48 N. Y. Super. Ct. 1, affd. 91 N. Y. 106; *In re Waldron*, 28 Hun (N. Y.) 481; *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186, affg. *Smiley v. Fry*, 49 N. Y. Super. Ct. 134; *Girard Bank v. Penn. Tp. Bank*, 39 Pa. 92, 80 Am. Dec. 507; *Humphrey v. Coun-*

ty Nat. Bank, 113 Pa. St. 417, 6 Atl. 155; *Arnold v. Penn.*, 11 Tex. Civ. App. 325, 32 S. W. 353; *Goodell v. Brandon Nat. Bank*, 63 Vt. 303, 21 Atl. 956, 25 Am. St. 766.

²⁰ *Viets v. Union Nat. Bank*, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743, approved in *Citizens' Nat. Bank v. Importers' & C. Nat. Bank*, 119 N. Y. 195, 23 N. E. 540, which cites *Marzetti v. Williams*, 1 Barn. & Adol. 415.

²¹ *Schinotti v. Whitney*, 130 Fed. 780.

²² *Savannah v. Kassell*, 115 Ga. 310, 41 S. E. 572.

²³ *Joyce*, Def. to Com. Paper, § 505.

²⁴ *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24; *Brummagim v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61; *Mereness v. First Nat. Bank*, 112 Iowa 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. 318; *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910; *In re Cook*, 86 App. Div. (N. Y.) 586, 83 N. Y. S. 1009; *Koelzer v. First Nat. Bank*, 125 Wis. 595, 104 N. W. 838, 2 L. R. A. (N. S.) 571, 110 Am. St. 870; *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827. *Contra*, *Fells' Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Sharp v. Citizens' Bank*, 70 Nebr. 758, 98 N. W. 50; *Bank of Commerce v. Harrison*, 11 N. Mex. 50, 66 Pac. 460; *Payne v. Gardiner*, 29 N. Y. 146; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262, 3 N. E.

thority no formal demand is necessary to set the statute in operation against a promissory note payable on demand. A note of such character is due immediately and the statutory period will be computed from the date and delivery of the paper.²⁵ But a note due thirty days after demand

186; *McGough v. Jamison*, 107 Pa. St. 336; *Smith v. Steen*, 38 S. Car. 361, 16 S. E. 1003; *Tobin v. McKinney*, 15 S. Dak. 257, 88 N. W. 572, 91 Am. St. 694. See also, *Riddle v. First Nat. Bank*, 27 Fed. 503, which holds that even the appointment of a receiver for the bank issuing the certificate of deposit does not cause the statute to run against such paper.

²⁵ *O'Neil v. Wagner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. 88; *Jones v. Nicholls*, 82 Cal. 32, 22 Pac. 878; *Hall v. Letts*, 21 Iowa 596; *Ware v. Hewey*, 57 Maine, 391, 99 Am. Dec. 780; *Fells' Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Darnall's Exrs. v. Magruder*, 1 Har. & G. (Md.) 439; *Newman v. Kettelle*, 13 Pick. (Mass.) 418; *Easton v. McAllister*, 1 Mo. 662; *Larason v. Lambert*, 12 N. J. L. 247; *Wenman v. Mohawk Inst. Co.*, 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; *White's Bank v. Ward*, 35 Barb. (N. Y.) 637; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334; *De Lavallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; *Caldwell v. Rodman*, 50 N. Car. 139; *Hill v. Henry*, 17 Ohio 9; *Taylor's Admrs. v. Whitman's Admrs.*, 3 Grant Cas. (Pa.) 138; *In re Milne's Appeal*, 99 Pa. St. 483; *Wilks v. Robinson*, 3 Rich. Law (S. Car.) 182; *Smith v. Blythe-wood*, Rice (S. Car.) 245, 33 Am. Dec. 111; *Cook's Admrs. v. Cook*, 19 Tex. 434; *Laidley v. Smith's Exr.*, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. 825. See also, *Old Alms-House Farm v. Smith*, 52 Conn. 434; *Edgell v. Coates*, 3 Houst. (Del.) 325; *Luther v. Crawford*, 213 Ill. 596, 73 N. E. 430; *Kraft v. Thomas*, 123 Ind. 513, 24 N. E. 346, 18 Am. St. 345; *Gerke Brewing Co. v. Busse*, 11 Ky. L. 322; *Andrews v. Rhodes*, 10 Rob. (La.) 52; *Fenno v. Gay*, 146 Mass. 118, 15 N. E. 87; *Butts v. Vicksburg & M. R. Co.*, 63 Miss. 462; *De Raismes v. De Raismes*, 71 N. J. L. 680,

60 Atl. 1133, affg. 70 N. J. L. 15, 56 Atl. 170; *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *Brust v. Barrett*, 16 Hun (N. Y.) 409, affd. 82 N. Y. 400, 37 Am. Rep. 569; *Brush v. Barrett*, 82 N. Y. 400, 37 Am. Rep. 569; *McMullen v. Rafferty*, 89 N. Y. 456; *Bartholomew v. Seaman*, 25 Hun (N. Y.) 619; *Martin v. Stoddard*, 127 N. Y. 61, 27 N. E. 285; *Sheldon v. Heaton*, 88 Hun (N. Y.) 535, 68 N. Y. St. 825, 34 N. Y. S. 856; *Appeal of Address*, 99 Pa. St. 421; *In re Hartranft's Estate*, 153 Pa. 530, 26 Atl. 104, 34 Am. St. 717; *In re Steven's Estate*, 164 Pa. 216, 30 Atl. 245; *Jenkins v. De War*, 112 Tenn. 684, 82 S. W. 470; *Kingsbury v. Butler*, 4 Vt. 458. *Contra*, *Wolfe v. Whiteman*, 4 Har. (Del.) 246; *Wright v. MacCarty*, 92 Ill. App. 120; *Brown v. Brown*, 28 Minn. 501, 11 N. W. 64; *Thurston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382; *Payne v. Slate*, 39 Barb. (N. Y.) 634, affd. 29 N. Y. 146; *F. & M. Bank v. White*, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772; *Wood v. McMeans*, 23 Tex. 481. *Contra*, *Lee v. Cassin*, 2 Cranch (U. S.) 112, Fed. Cas. No. 8184. See also, *In re Galvin's Estate*, 51 Cal. 215; *Haynes v. Wesley*, 112 Ga. 668, 37 S. E. 990, 81 Am. St. 72; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Horton v. Seymour*, 82 Minn. 535, 85 N. W. 551. *Portner v. Wilfahrt*, 85 Minn. 73, 88 N. W. 418; *Scroggin v. McClelland*, 37 Nebr. 644, 56 N. W. 208, 40 Am. St. 520, 22 L. R. A. 110; *Wrigley v. Farmers' & State Bank*, 76 Nebr. 862, 108 N. W. 132; *Dolan v. Mitchell*, 39 App. Div. (N. Y.) 361, 57 N. Y. S. 157; *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Girard Bank v. Penn Tp. Bank*, 4 Phila. (Pa.) 104; *Boustead v. Cuyler*, 116 Pa. 551, 8 Atl. 848; *Larwill v. Burke*, 19 Ohio C. C. 449, 513, 10 Ohio C. D. 605; *Nash v. Woodward*, 62 S. Car. 418, 40 S. E. 895; *Thrall v. Mead's Estate*, 40 Vt. 540.

has been held actionable fourteen years after it was delivered, the court declaring that "where a note is * * * payable a certain time after demand, no right of action can arise until a demand, and the subsequent lapse of the time specified. * * * Until demand and refusal of payment, such a note can not ordinarily be considered dishonored, as regards either maker or indorser. * * * There are authorities which hold that, in the case of a note payable at the expiration of a certain time after demand, the statute of limitations begins to run against it upon the expiration of that time after the day when a demand ought, in reason, to have been made, and that a demand ought, in reason, to be made within the period allowed by the statute for suing on notes which are payable on the day of their date. * * * If such be the law in any case, it must rest on the presumed intention of the parties to the contract at the time of its execution."²⁶ A condition precedent for the performance of which there has been no definite time allotted by the parties to the contract postpones the running of the statute of limitations for a reasonable length of time.²⁷ But

²⁶ *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935. See also, *Thorpe v. Booth*, Ryan & M. 388; *Holmes v. Kerrison*, 2 Taunt. 323; *Massie v. Byrd*, 87 Ala. 672, 6 So. 145; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; *Taylor v. Witman's Admrs.* 3 Grant Cas. (Pa.) 138; *Picquet v. Curtis*, 1 Sumn. (U. S.) 478, Fed. Cas. No. 11131. And compare, *Wurth v. Paducah*, 116 Ky. 403, 25 Ky. L. 586, 76 S. W. 143, 105 Am. St. 225; *Knapp v. Greene*, 79 Hun (N. Y.) 264, 60 N. Y. St. 559, 29 N. Y. S. 350.

²⁷ "When the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he can not suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act," but "if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin

to run after the lapse of such reasonable time. What is a reasonable time will depend upon the circumstances of each case. A party can not by his own negligence, or for his own convenience, stop the running of the statute. * * * The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule, however, ceases when the right of action is not under his control, but depends upon the act of another; and when the act upon which his right to maintain an action depends is an official act, to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable." *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877. *Hill v. Haskin*, 42 Cal. 159; *Bank of North America v. Rindge*, 57 Fed. 279; *Bryant v. Atlantic Coast Line R. Co.*, 119 Ga. 607, 46 S. E. 829; *Tama Water Power Co. v. Hopkins*, 79 Iowa, 653, 44 N. W. 797; *Atchison, T. & S. F. R. Co.*

the right to sue upon a contract, one of the obligations of which is to be performed only upon the happening of a certain contingency, does not exist until such contingency shall have transpired.²⁸ In keeping with this principle is the one that where a promise has been made to pay for services by will, the cause of action accrues and the statute begins to run at the time of the death of the promisor,²⁹

v. Burlingame Tp., 36 Kans. 628, 14 Pac. 271, 59 Am. Rep. 578; Donaldson v. Jacobitz, 67 Kans. 244, 72 Pac. 846; Baird v. Livingston, 1 Rob. (La.) 182; Yocum v. Bullitt, 6 Mart. (N. S.) (La.) 324, 17 Am. Dec. 184; Morgan v. Brown, 12 La. Ann. 159; Taggart v. Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Brookline v. Norfolk, 114 Mass. 548; Equitable Marine Ins. Co. v. Adams, 173 Mass. 436, 53 N. E. 883; Shepherd v. Shepherd's Estate, 108 Mich. 82, 65 N. W. 580; Wardle v. Hudson, 96 Mich. 432, 55 N. W. 992; Langworthy v. C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974; Wood v. Myrick, 16 Gil. (Minn.) 447; Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. 461; Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74; Ainsworth v. Roubal, 74 Nebr. 723, 105 N. W. 248; French v. Higgins, 66 N. J. L. 579, 50 Atl. 344; People v. Comrs. of Land Office, 90 Hun (N. Y.) 525, 36 N. Y. S. 29, In re Harris, 12 Misc. (N. Y.) 223, 67 N. Y. St. 806, 33 N. Y. S. 1102, affd. 90 Hun (N. Y.) 525, 71 N. Y. St. 36, 36 N. Y. S. 29; Christensen v. Quintard, 36 Hun (N. Y.) 334; Christensen v. Colby, 43 Hun (N. Y.) 362; Raegener v. Medicus, 171 N. Y. 699, 64 N. E. 1125; Ryder v. Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251, affg. 57 Hun (N. Y.) 591, 32 N. Y. St. 1105, 10 N. Y. S. 748; In re Gall's Estate, 42 App. Div. (N. Y.) 255, 59 N. Y. S. 254; In re Taylor's Estate, 30 App. Div. (N. Y.) 213, 51 N. Y. S. 609; Trustees of Cincinnati Southern R. Co. v. Banning, 10 Ohio Dec. (reprint) 385, 21 Wkly. L. Bul. 9; Mills v. Whitmore, 22 Ohio C. C. 467, 12 Ohio C. D. 338; Kilton v. Providence Tool Co., 22 R. I. 605, 48 Atl. 1039; National Cotton Oil Co. v. Taylor (Tex. Civ. App.), 45 S. W. 478; Stribling v.

Moore, 33 Tex. Civ. App. 297, 76 S. W. 593; Horton v. United States, 31 Ct. Cl. (U. S.) 148; United States v. Louisiana, 123 U. S. 32, 8 Sup. Ct. 17, 31 L. ed. 69; United States v. Alabama, 123 U. S. 39, 31 L. ed. 73, 8 Sup. Ct. 21; McClaine v. Fairchild, 23 Wash. 758, 63 Pac. 517. And compare, Callanan v. Madison 45 Iowa 561; Donovan v. Judson, 81 Cal. 334, 22 Pac. 682, 6 L. R. A. 591; First Nat. Bank v. Greene, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; Short v. Van Dyke, 50 Minn. 286, 52 N. W. 643; State v. Norton, 59 Minn. 424, 50 N. W. 458; Barlick v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. 798; Younglove v. Kelly Island Lime Co., 49 Ohio St. 663, 33 N. E. 234; Vashon v. Barrett, 99 Va. 344, 38 S. E. 200.
²⁸ Thompson v. Ruiz, 134 Cal. 26, 66 Pac. 24; Allen v. Stephens, 102 Ga. 596, 29 S. E. 443; De Courcy's Admr. v. Dicken, 1 Ky. L. (abstract) 260; Crouse v. Moody, 130 Iowa 320, 106 N. W. 757; Noyes v. Young, 32 Mont. 226, 79 Pac. 1063; Clay v. McKeen, 69 N. H. 86, 36 Atl. 877; Lance v. Bonnell, 58 N. J. Eq. 259, 43 Atl. 288; Cooper v. Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. 660; Cunningham v. Fiske, 13 N. Mex. 331, 83 Pac. 789; Greenley v. Greenley, 104 App. Div. (N. Y.) 640, 100 N. Y. S. 114; Eller v. Church, 121 N. Car. 269, 28 S. E. 364; Holt v. Lamb, 17 Ohio St. 374.

²⁹ In re Beardley's Appeal, 83 Conn. 34, 75 Atl. 141; Banks v. Howard, 117 Ga. 94, 43 S. E. 438; Gullett v. Gullett, 28 Ind. App. 670, 63 N. E. 782; Bennett v. Lutz, 119 Iowa 215, 93 N. W. 288; Gross v. Newman's Admr., 20 Ky. L. 1910, 50 S. W. 530; Leahy v. Campbell, 70 App. Div. (N. Y.) 127, 75 N. Y. S. 72; Bair v. Hager, 97 App. Div. (N. Y.) 358, 90 N. Y. S. 27, 15 N. Y. Ann. Cas. 283;

notwithstanding the fact that the servant has been antecedently dismissed, he being all the while ready and willing to complete the agreed term of his service.³⁰ So, limitations will not run upon the promise of a husband who has received money from his wife with the understanding that the sum is to be paid to her children at the time of his death or sooner at his option, until his death has actually occurred.³¹ Likewise, one who performs services for another, under an agreement that he is to receive the entire estate left by the promisor and his wife, has no right to sue upon his contract until immediately upon the death of the surviving spouse.³² The right of action of one who holds a written contract for the sale of land, which does not designate any particular date upon which the necessary abstract is to be forthcoming, accrues upon the lapse of a period within which such abstract might have been reasonably delivered.³³ But it has been held that it is only the levy of execution upon his property which sets the statute in motion against one of the makers of a note who has been promised by his comaker that he would be saved harmless, no right of action having theretofore arisen, although judgment has been entered against both of the makers of the same.³⁴

§ 2661. Continuing and severable contracts.—The great difficulty in the matter of continuing contracts is not so much in determining when the statute begins to run as it

Freeman v. Brown, 151 N. Car. 111, 65 S. E. 743; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703; Cross v. Dunlavy (Tenn. Ch. App.), 46 S. W. 473; Green v. Orgain (Tenn. Ch. App.), 46 S. W. 477; Cann v. Cann's Heirs, 45 W. Va. 563, 31 S. E. 923. See also, Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007; Story v. Story, 22 Ky. L. 1731, 61 S. W. 279, 22 Ky. L. 1869, 62 S. W. 865; Morrissey v. Morrissey, 180 Mass. 480, 62 N. E. 972; Acton v. Shultz, 69 N. J. Eq. 6, 59 Atl. 876; In re Neil's Estate, 35 Misc. (N. Y.) 254, 71 N. Y. S. 840; Waddell v. Waddell (Tenn.), 42 S. W. 46. And compare, Hull v.

Thoms, 82 Conn. 647, 74 Atl. 925; Henry v. Rowell, 63 App. Div. (N. Y.) 620, 71 N. Y. S. 1137; Martin v. Martin's Estate, 108 Wis. 284, 84 N. W. 439, 81 Am. St. 895.

³⁰ Heery v. Reed, 80 Kans. 380, 102 Pac. 846. Contra, Ga Nun v. Palmer, 63 Misc. (N. Y.) 77, 116 N. Y. S. 23, affd. 123 N. Y. S. 1117.

³¹ Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441.

³² Thomas v. Feese, 21 Ky. L. 206, 51 S. W. 150.

³³ Hopkins v. Lewis, 18 Cal. App. 107, 122 Pac. 433.

³⁴ Polk v. Seale (Tex. Civ. App.), 144 S. W. 329.

is in determining just what are continuing contracts.³⁵ It is sometimes said that it is the "termination" of a contract of a continuing character which starts limitations in favor of a defaulting obligor. This statement, however, is capable of misinterpretation. A contract may be terminated, to all intents and purposes, when one of the parties refuses to perform. Such "termination" of a continuing contract, however, does not, it seems as a general thing, put the statute in operation. Ordinarily, limitations will be computed from the expiration of the time during which it was originally agreed the contract should exist,³⁶ although, upon occasion, the complete fulfilment of his agreement by one of the parties to the contract may set the statute in motion in favor of the other. This is well illustrated in the case of contracts for services. Thus, where no certain time is fixed for payment or the termination of the contract, or where the compensation is to be made at or before the death of the employer, the contract, whether express or implied, should be held to be a continuous one and the statute inoperative until the services are ended.³⁷ "Where there is

³⁵ See ante, § 2658.

³⁶ "Upon an entire continuing contract, an action accrues when it is terminated." *Littler v. Smiley*, 9 Ind. 116. "Ordinarily, the statute of limitations does not begin to run on a contract for a continuing service until the contract has been fully performed." *Heery v. Reed*, 80 Kans. 380, 102 Pac. 846. See also, *Conner v. Smith*, 88 Ala. 300, 7 So. 150; *Dinkelspiel v. Nason*, 17 Cal. App. 591, 120 Pac. 789; *Flege v. Covington & Co.*, 122 Ky. 348, 28 Ky. L. 1257, 91 S. W. 738, 121 Am. St. 463; *Carter v. Carter*, 28 Ill. App. 340; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; *Wood v. Willis*, 110 Mass. 454; *Alden v. Barnard*, 15 Misc. (N. Y.) 512, 74 N. Y. St. 367, 37 N. Y. S. 1069; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Chunn v. Patton*, 35 N. Car. 421; *Allibone v. Hager*, 46 Pa. St. 48; *Galveston Chamber of Commerce v. Railroad Commission* (Tex. Civ. App.), 137 S. W. 737; *Nelson v. San Antonio Traction Co.* (Tex. Civ.

App.), 142 S. W. 146; *Amy v. Galena*, 10 Biss. (U. S.) 263, 7 Fed. 163. And compare, *Atlanta, K. & N. R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436n, 110 Am. St. 215; *Russell v. Polk County Abstract Co.*, 87 Iowa 233, 54 N. W. 212, 43 Am. St. 381; *Story v. McCormick*, 70 Kans. 323, 78 Pac. 819; *Boeto v. Laine*, 3 La. Ann. 141; *Ryan v. Canton National Bank*, 103 Md. 428, 63 Atl. 1062; *Douglass v. Ohio River R. Co.*, 51 Va. 523, 41 S. E. 911.

³⁷ *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456; *Crampton v. Logan*, 28 Ind. App. 405, 63 N. E. 51. See also, *Rodman v. Woolman*, 2 Houst. (Del.) 581; *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188; *O'Brien v. Sexton*, 140 Ill. 517, 30 N. E. 461; *Littler v. Smiley*, 9 Ind. 116; *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *Grave v. Pemberton*, 3 Ind. App. 71, 29 N. E. 177; *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364; *Shorick v. Bruce*, 21 Iowa 305; *Carney v. Havens*, 23 Kans. 82; *Grisham v.*

an isolated or special agency, one for a particular act or acts, one to collect a specific debt or debts, the statute begins from the act or collection in each particular case; but where the agency has currency, is continuous, is general, involving many acts, or a course of business involving many transactions, the statute begins from the termination of the agency."³⁸ But the law will not regard services as continuous when, although their rendition is not in fact interrupted, they are performed under two distinct agreements, and a right to sue predicated of the services rendered under the first agreement accrues upon the execution of the second.³⁹ Likewise, personal services rendered by an individual upon a boat in which another person had an interest can not be tacked to those rendered by him upon a second craft which such other person owned and thus establish continuity of contract.⁴⁰ Where an attorney agrees to faithfully prosecute certain causes, a right of action by his client for breach of the contract accrues upon the trial and determination of the suits.⁴¹ So an attorney who undertakes the conduct of a suit thereby executes an entire contract and, provided the contract exists up to that time, the termination of the suit will alone set the statute in motion against his recovery of the value of any particular item of his service.⁴² Again, a firm of attorneys which engages

Lee, 61 Kans. 533, 60 Pac. 312; Duncan's Exrs. v. Poydras' Exrs., 5 Mart. (N. S.) (La.) 492; Pressas v. Mendiburn, 4 La. 128; Carter v. Carter, 36 Mich. 207; Elwell v. Roper, 72 N. H. 254, 56 Atl. 342; Schoch's Admrs. v. Garrett, 69 Pa. St. 144; Stevens v. Lee, 70 Tex. 279, 8 S. W. 40; Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Morrissey v. Faucett, 28 Wash. 52, 68 Pac. 352; Martin v. Fox & Co. Imp. Co., 19 Wis. 552. And compare, Lafon's Heirs v. His Executors, 3 Mart. (N. S.) (La.) 707; Ditch v. Wilkinson's Curator, 10 La. 201; Judice's Heirs v. Brent, 6 Mart. (N. S.) (La.) 226; Coote v. Cotton, 5 La. 12.

³⁸Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. 796. See also, Riverview Land Co. v.

Dance, 98 Va. 239, 35 S. E. 720.

³⁹Salvador v. Feeley, 105 Iowa 478, 75 N. W. 476. See also, Gavin v. Bischoff, 80 Iowa 605, 45 N. W. 306; In re Succession of Reynolds, Man. Unrep. Cas. (La.) 370; Ertel v. Warren, 157 Mo. App. 592, 138 S. W. 694.

⁴⁰Chadwick v. Waters, 3 Mart. (N. S.) (La.) 432.

⁴¹Kruegel v. Porter (Tex. Civ. App.), 136 S. W. 801. See also, Walker v. Goodrich, 16 Ill. 341.

⁴²Elliott v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683. See also, Phelps v. Patterson, 25 Ark. 185; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. 139; Meyer v. McCumber, 75 Ill. App. 119; Shepherd v. Dickson, 38 La. Ann. 741; Johnson v. Pyles, 11

to represent a party to an action enters into a single employment and it has a right to sue for services rendered only when such action is terminated, that is, when judgment has been rendered; and this rule is not altered by the fact that a dissolution of the firm takes place before judgment is obtained.⁴³ Further, the time limited by statute for the bringing of an action upon a contract to marry begins to run from the date when the engagement is denied or a refusal to ever fulfill the same is voiced, in other words, when one of the obligors renounces the contract.⁴⁴ During the existence of a pledge, the pledgor will be secure from limitations, the statute being computed only from the time of the surrender of the property.⁴⁵ So, too, where a grandmother undertakes to rear her grandchild upon the agreement of its father to pay for necessities, the contract is a continuing one, and during its existence limitations will not run in favor of the father upon a claim for certain of such necessities.⁴⁶ Likewise, where a person conveys property in consideration of the grantee's written promise to support him during the remainder of his life, a continuing contract is executed and the grantee will be liable for breaches so long as it remains in force, which will be until the grantor dies.⁴⁷ In the case of a continuing guaranty, the statute

Sm. & M. (Miss.) 189; Wells v. Salina, 71 Hun (N. Y.) 559, 55 N. Y. St. 95, 25 N. Y. S. 134; McCrea v. Scofield, 86 N. Y. S. 10; Bathgate v. Haskin, 5 Daly (N. Y.) 361, revd. 63 N. Y. 261; Gustine v. Stoddard, 23 Hun (N. Y.) 99; Foster v. Jack, 4 Watts (Pa.) 334; Wilson v. Miller, 104 Va. 446, 51 S. E. 837. And compare, Osborn v. Hopkins, 160 Cal. 501, 117 Pac. 519; Ennis v. Pullman Palace Car Co., 165 Ill. 161, 46 N. E. 439; Greek v. McDaniel, 68 Nebr. 569, 94 N. W. 518; McCoon v. Galbraith, 29 Pa. St. 293; Mosgrove v. Golden, 101 Pa. St. 605; Campbell v. Maple's Admr., 105 Pa. St. 304; Stark v. Hart, 22 Tex. Civ. App. 543, 55 S. W. 378; Adams v. Mott, 44 Vt. 259.

⁴³Felt v. Mitchell, 44 Ind. App. 96, 88 N. E. 723.

⁴⁴Hanson v. Elton, 38 Minn. 493, 38 N. W. 614. See also, Blackburn v. Mann, 85 Ill. 222; Clark v. Phillips, 4 Ky. L. (abstract) 826.

⁴⁵Wilson v. Bannen, 1 Rob. (La.) 556; Chouteau v. Allen, 70 Mo. 290. See also, Auld v. Butcher, 22 Kans. 400; Roberts v. Berdell, 61 Barb. (N. Y.) 37, aff'd. 52 N. Y. 644, 15 Abb. Pr. (N. S.) (N. Y.) 177; University of N. Car. v. State, Nat. Bank, 96 N. Car. 280, 3 S. E. 359.

⁴⁶Jackson v. Mull, 6 Wyo. 55, 42 Pac. 603. See also, Carroll v. McCoy, 40 Iowa 38.

⁴⁷Riddle v. Beattie, 77 Iowa 168, 41 N. W. 606. See also, McCay v. McDowell, 80 Iowa 146, 45 N. W. 730; Lane v. Wingate, 25 N. Car. 326; and compare, Whitley v. Whitley's Admr., 26 Ky. L. 134, 80 S. W. 825.

operates in favor of the guarantor only after the principal has made default in payment.⁴⁸

In the case of a severable contract, it may be stated, as a general rule, that limitations will run upon an integral part of the same from the time of its individual breach. What constitutes a severable contract is altogether another proposition. A judgment requiring the payment of money in instalments at fixed periods causes limitations to run on the various instalments from the time each becomes severably payable.⁴⁹ Likewise, whenever one makes payment of usurious interest, he thereby sets the statute in motion.⁵⁰ Again, the time prescribed by statute may be computed from the completed delivery under each one of the several contracts for certain building material, notwithstanding the fact that the basic contract evidenced the intention that the whole of the work for which the material was furnished was to be completed under a single contract.⁵¹ So, also, the rule of limitations applies upon its maturity to each one of several notes secured by mortgage and maturing at different times.⁵² But the maturing of the note as per its terms and not the default in interest sets the statute in operation against the foreclosure of a mortgage which stipulates that, coincidentally with a default in interest, the entire amount secured will immediately become due and that foreclosure proceedings may then be instituted.⁵³ Where a note provides that shall a maker fail to pay interest thereon as stipulated therein, the holder may elect to consider the note due and may proceed to collect, it is optional with the holder as to whether he will on default in an instalment of interest elect to consider the note due, and if he does not exercise such election, limitations do not begin to run upon such default.⁵⁴

⁴⁸ *Bank v. Knotts*, 10 Rich. L. (S. Car.) 543, 70 Am. Dec. 234. See also, *City National Bank v. Phelps*, 86 N. Y. 484; *Jones v. Trimble*, 3 Rawle (Pa.) 381.

⁴⁹ *Schuler v. Schuler*, 209 Ill. 522, 71 N. E. 16.

⁵⁰ *Albany v. Abbott*, 61 N. H. 157.

⁵¹ *Sanger v. United States*, 40 Ct. Cl. (U. S.) 47.

⁵² *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. 756. And compare, *First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828; *White v. McMillan*, 37 Wash. 34, 79 Pac. 495.

⁵³ *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72. See also, *Richards v. Daley*, 116 Cal. 336, 48 Pac. 220.

⁵⁴ *Fletcher v. Daugherty*, 13 Nebr.

Further, "the statute runs against the right to enforce calls" which have been made for subscriptions to corporate stock, "but not against the right to make calls for the unpaid portions of the stock when need therefor may arise."⁵⁵ So, also, the United States supreme court has declared that "coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different instalments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures; and to each action—to that upon the bond and to each of those upon the coupons—the same limitation must, upon principle, apply. All statutes of limitation begin to run when the right of action is complete, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons whilst a complete right of action upon such claims exists in the holder."⁵⁶ But the statute does not run against any part of the interest on the principal of a county bond which stipulates that the same shall be paid each year on the presentation of one of the warrants or coupons attached, prior to the time when it is set in motion against the principal obligation by the maturing thereof.⁵⁷ While

224, 13 N. W. 207. See also, *Sherwood v. Wilkins*, 65 Ark. 312, 45 S. W. 988; *California Sav. & Soc. v. Culver*, 127 Cal. 107, 59 Pac. 292; *First Nat. Bank v. Park*, 37 Colo. 303, 86 Pac. 106; *Keene Five Cent Sav. Bank v. Reid*, 123 Fed. 221, 59 C. C. A. 225; *Watts v. Hoffman*, 77 Ill. App. 411; *Blakeslee v. Hoit*, 116 Ill. App. 83; *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361; *Westcott v. Whiteside*, 63 Kans. 49, 64 Pac. 1032; *Kennedy v. Gibson*, 68 Kans. 612, 75 Pac. 1044; *York-Ritchie Exchange & Co. v. Mitchell*, 6 Kans. App. 317, 51 Pac. 57; *Batey v. Walter* (Tenn. Ch. App.), 46 S. W. 1024; *Bowman v. Rutter* (Tex. Civ. App.), 47 S. W. 52; *Harrington v. Claflin*, 28 Tex. Civ. App. 100, 66 S. W. 898; *Cooper v. Ford*, 29 Tex. Civ. App. 253, 69 S. W. 487; *First National Bank v.*

Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828; *White v. McMillan*, 37 Wash. 34, 79 Pac. 495. Compare, *Burnes v. Ballinger*, 76 Mo. App. 58; *Nares v. Bell*, 66 Nebr. 606, 92 N. W. 571; *San Antonio Real Estate & Assn. v. Stewart*, 94 Tex. 441, 61 S. W. 386, 86 Am. St. 864; *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926.

⁵⁶ *Priest v. Glenn*, 51 Fed. 405, 2 C. C. A. 311. See also, *Dorsheimer v. Glenn*, 51 Fed. 404, 2 C. C. A. 309.

⁵⁷ *Clark v. Iowa City*, 20 Wall. (U. S.) 583, 22 L. ed. 427.

⁵⁷ *Cushman v. Carver County*, 19 Gil. (Minn.) 252. See also, *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884; *Roeding v. Porter*, 65 Cal. 19, 2 Pac. 888; *Haysmeister v. Porter* (Cal.), 3 Pac. 123; *De Cordova v. Galveston*, 4 Tex. 470. And compare, *Smith v. Purdy*,

it has been declared in an early case that where a note provides that interest shall be paid each year, limitations will run upon each of the several instalments of the same from the time it becomes payable rather than from the time when the principal note itself matures and becomes due,⁵⁸ a later case is authority for the proposition that where a note, whose maker has given a trust deed to secure its payment, provides for interest at a specified rate per annum, "payable semiannually as per ten coupons hereto attached," such coupons remaining unsevered are merely evidence of the interest against which the statute will not operate until it likewise runs against the note itself.⁵⁹ "Where an agreement embraces several distinct subjects which admit of being separately executed and closed, and the facts show that they were so separately performed, and the compensation agreed upon and apportioned to each of them, such an agreement is to be taken severally, and a right of action accrued as to each of them when the services were rendered."⁶⁰

§ 2662. Personal disabilities—In general.—In considering the question of the time from which limitations will run, no regard has been had thus far to the postponing effect of personal disabilities. This category includes infancy, coverture, insanity and incarceration for crime. Each of these disabilities will in turn be briefly noticed. But while proceeding along such lines, it should be kept in mind that the general rule is that disabilities following one upon an-

1 Root (Conn.) 129; Griffin v. Macon City, 36 Fed. 885, 2 L. R. A. 353; Mather v. San Francisco, 115 Fed. 37, 52 C. C. A. 631; Amy v. Dubuque, 98 U. S. 470, 25 L. ed. 228.

⁵⁸ Dearborn v. Parks, 5 Greenl. (Maine) 81, 17 Am. Dec. 206. See also, Washington Loan & Co. v. Darling, 21 App. D. C. 132.

⁵⁹ First Nat. Bank v. Parks, 37 Colo. 303, 86 Pac. 106. See also, Ferry v. Ferry, 2 Cush. (Mass.) 92; Greenwood v. Fenton, 54 Nebr. 573, 74 N. W. 843; Scott v. Sloan, 3 Tex. Civ. App. 302, 23 S. W. 42; Porter's

Admx. v. Shattuck's Estate, 75 Vt. 270, 54 Atl. 958, 98 Am. St. 823.

⁶⁰ Bartel v. Mathias, 19 Ore. 482, 24 Pac. 918 (syllabus by the court). See also, McLaughlin v. Maund, 55 Ga. 689; Dewar v. Beirne, McGloin (La.) 75; Wood v. Cullen, 13 Gil. (Minn.) 365; Berry v. Doremus, 30 N. J. L. 399; Mason v. New York, 28 Hun (N. Y.) 115; Robertson v. Pickerell, 77 N. Car. 302; Hale's Exrs. v. Ard's Exrs., 48 Pa. St. 22; Lichty v. Hugus, 55 Pa. St. 434; Jones v. Lewis, 11 Tex. 359. And compare, Looney v. Levy, 35 La. Ann. 1012.

other can not be cumulated and the running of the statute be thus delayed for an indefinite length of time.⁶¹ For example, coverture, immediately succeeding infancy, will not extend the period of immunity enjoined by the latter disability.⁶² Successive covertures can not be tacked one upon

⁶¹ "Disabilities which bring a party within the exceptions of the statute can not be piled one upon another, but a party claiming the benefit of the exception can only avail himself of the disability existing when the right of action first accrued." *Hogan v. Kurtz*, 94 U. S. 773, 24 L. ed. 317, citing *Mercer v. Selden*, 1 How. (U. S.) 37, 11 L. ed. 38. "Cumulative disabilities can not * * * be regarded, as one disability can not be added to another." *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434. See also, *Eaton v. Sanford*, 2 Day (Conn.) 523; *Healy v. Mothershed*, Fed. Cas. No. 6296; *Scott v. Had-dock*, 11 Ga. 258; *Fritz v. Joiner*, 54 Ill. 101; *Knippenberg v. Morris*, 80 Ind. 540; *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; *South's Heirs v. Thomas' Heirs*, 7 T. B. Mon. (Ky.) 59; *Ashbrook v. Quarles' Heirs*, 15 B. Mon. (Ky.) 20; *Butler v. Howe*, 13 Maine 397; *Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017; *McCoy v. Nichols*, 4 How. (Miss.) 31; *Dease v. Jones*, 23 Miss. 133; *Williams v. Dongan*, 20 Mo. 186; *Dessaunier v. Murphy*, 33 Mo. 184; *Gordon v. Lewis*, 88 Mo. 378; *Clark v. Richards*, 15 N. J. L. 347; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Bradstreet v. Clark*, 12 Wend. (N. Y.) 602; *Ran-kin v. Tenbrook*, 6 Watts (Pa.) 388; *Union Sav. Bank v. Taber*, 13 R. I. 683; *Starke v. Starke*, 3 Rich. L. (S. Car.) 438; *Stevens v. Bomar*, 9 Humph. (Tenn.) 546; *Guion's Lessee v. Bradley Academy*, 4 Yerg. (Tenn.) 232; *McDonald v. Johns*, 4 Yerg. (Tenn.) 258; *Franks v. Hancock*, 1 Posey Unrep. Cas. (Tex.) 554; *White v. Latimer*, 12 Tex. 61; *Mc-Masters v. Mills*, 30 Tex. 591; *Lewis v. Barksdale*, 2 Brock. (U. S.) 436, Fed. Cas. No. 8317; *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325;

Fitzhugh v. Anderson, 2 Hen. & M. (Va.) 289, 3 Am. Dec. 625; *Han-cock v. Hutcherson*, 76 Va. 609; *Hud-son v. Hudson's Admr.*, 6 Munf. (Va.) 352; *Parsons v. McCracken*, 9 Leigh. (Va.) 495.

⁶² *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547; *White v. Clawson*, 79 Ind. 188; *Knippenberg v. Morris*, 80 Ind. 540; *Royse v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485; *Sims v. Gay*, 109 Ind. 501, 9 N. E. 120; *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *Findley v. Patterson's Exr.*, 2 B. Mon. (Ky.) 76; *Boyce's Heirs v. Dudley*, 8 B. Mon. (Ky.) 511; *Martin v. Letty*, 18 B. Mon. (Ky.) 573; *Manion's Admrs. v. Titsworth*, 18 B. Mon. (Ky.) 582; *Clark v. Jones*, 16 B. Mon. (Ky.) 121; *Hertle v. McDonald*, 2 Md. Ch. 128; *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Eager v. Commonwealth*, 4 Mass. 182; *Quick v. Rufe*, 164 Mo. 408, 64 S. W. 102; *Franklin v. Cunningham*, 187 Mo. 184, 86 S. W. 79; *Billon v. Larimore*, 37 Mo. 375; *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; *Keeton's Heirs v. Keeton's Admr.*, 20 Mo. 530; *Watts v. Gunn*, 53 Miss. 502; *Nutter v. DeRochemont*, 46 N. H. 80; *Wellborn v. Finley*, 52 N. Car. 228; *Cozzens v. Farman*, 30 Ohio St. 491, 27 Am. Rep. 470; *Carlisle v. Stitler*, 1 Pen. & W. (Pa.) 6; *Thomp-son v. Smith*, 7 Serg. & R. (Pa.) 209, 10 Am. Dec. 453; *Fewell v. Col-lins*, 3 Brev. (S. Car.) 286, 1 Tread. Const. 202; *Buttery v. Brown* (Tenn. Ch. App.), 52 S. W. 713; *Hale v. Ellison* (Tenn.), 59 S. W. 673; *State v. Parker*, 8 Baxt. (Tenn.) 495; *Rags-dale v. Barnes*, 68 Tex. 504, 5 S. W. 68; *Parish v. Alston*, 65 Tex. 194; *York v. Hutcheson*, 37 Tex. Civ. App. 367, 83 S. W. 895; *Gaines v. Hammond's Admr.*, 2 McCrary (U. S.) 432, 6 Fed. 449, affd. 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. 426; *Blackwell's Admr. v. Bragg*, 78 Va. 529. Compare, *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Duckett*

the other,⁶³ nor can the time during which one is under disability of infancy be added to that during which the one through whom the right of action accrued was under the disability of coverture.⁶⁴ Again, it has been held that where unsoundness of mind develops subsequently to the time when the cause of action has vested, such disability can not be added to infancy to extend the time within which suit may be instituted.⁶⁵ Likewise, the heir of an infant in whom there reposes a cause of action must bring suit within the statutory time after the infant's death, notwithstanding the fact that the heir is himself under disability during such time.⁶⁶ But where several disabilities exist at the time of the accrual of the right of action, "the statute does not begin to run until the party has survived them all."⁶⁷ Further, it seems to be a rule from which there has been practically no deviation that, unless the legislature has provided otherwise,⁶⁸ the statute, once set in motion, runs continuously, uninterrupted by any subsequent disability,⁶⁹

v. Crider, 11 B. Mon. (Ky.) 188; Jones v. Coffey, 109 N. Car. 515, 14 S. E. 84; McLean v. Jackson, 34 N. Car. 149; Davis v. Cooke, 10 N. Car. 608; Gillian v. Jacocks, 11 N. Car. 310; Wilson v. Kilcannon, 4 Hayw. (Tenn.) 182; Matherson v. Davis, 2 Coldw. (Tenn.) 443.

⁶³ Mitchell v. Berry, 1 Metc. (Ky.) 602.

⁶⁴ Elcan v. Childress, 40 Tex. Civ. App. 193, 89 S. W. 84; Lamberida v. Barnum (Tex. Civ. App.), 90 S. W. 698. See also, Davis v. Coblens, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. 832.

⁶⁵ Sharp v. Stephens' Committee, 21 Ky. L. 687, 52 S. W. 977.

⁶⁶ Robinson v. Allison, 192 Mo. 366, 91 S. W. 115. See also, Caperton v. Gregory, 11 Gratt. (Va.) 505. Compare, Bailey v. Teackle, Wythe (Va.) Orig. Ed. 8 (2d. ed.) 173.

⁶⁷ Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306. "It is an acknowledged rule, that where there are two or more co-existing disabilities in the same person, when his right of action accrues, he is not obliged to act until the last is removed."

* * * This is the rule under the

statute of limitations." Wilson v. Branch, 77 Va. 65, 7 Va. L. J. 161, 46 Am. Rep. 709. See also, Fox v. Drewry, 62 Ark. 316, 35 S. W. 533; Scott v. Haddock, 11 Ga. 258; Butler v. Howe, 13 Maine 397; North v. James, 61 Miss. 761; Keeton's Heirs v. Keeton's Admr., 20 Mo. 530; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Lippard v. Troutman, 72 N. Car. 551; Jones v. Lemon, 26 Va. 629; Blake v. Hollandsworth (W. Va.), 76 S. E. 814.

⁶⁸ See Jordan v. Jordan's Admr., Dud. (Ga.) 181; Prendergrast v. Foley, 8 Ga. 1; Peoria County v. Gordon, 82 Ill. 435; Dowell v. Webber, 2 Smed. & M. (Miss.) 452.

⁶⁹ Gibson v. Ruff, 8 App. D. C. 262; Caldwell v. Thorp, 8 Ala. 253; Lee v. Wood, 85 Ala. 169, 4 So. 693; Underhill v. Mobile Fire Dept. Ins. Co., 67 Ala. 45; Gherson v. Brooks (Ark.), 5 S. W. 329; Denton v. Brownlee, 24 Ark. 556; McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. 814; Bunce v. Wolcott, 2 Conn. 27; Rogers v. Hillhouse, 3 Conn. 398; Oliver v. Pullan, 24 Fed. 127; Wade v. Doyle, 17 Fla. 522; Wellborn v. Weaver, 17 Ga. 267, 63

save only, perhaps, one for which a "superior power" is alone responsible.⁷⁰ Likewise, "the statute of limitations

Am. Dec. 235; Sparks v. Roberts, 65 Ga. 571; Calumet Elect. St. R. Co. v. Mabie, 63 Ill. App. 235; Keil v. Healey, 84 Ill. 104, 25 Am. Rep. 434; Kitsler v. Hereth, 75 Ind. 177, 39 Am. Rep. 131; Walker v. Hill, 111 Ind. 223, 12 N. E. 387; Black v. Ross, 110 Iowa 112, 81 N. W. 229; Hopson v. Boyd, 6 B. Mon. (Ky.) 296; Loyd v. Loyd, 20 Ky. L. 347, 46 S. W. 485; Kendal v. Slaughter, 1 A. K. Marsh (Ky.) 375; Crozier v. Gano, 1 Bibb (Ky.) 257; Ruff's Admr. v. Bull, 7 Har. & J. (Md.) 14, 16 Am. Dec. 290; Dow v. Warren, 6 Mass. 328; Allis v. Moore, 2 Allen (Mass.) 306; Currier v. Gale, 3 Allen (Mass.) 328; Kelley v. Gallup, 67 Minn. 169, 69 N. W. 812; Tippin v. Coleman, 61 Miss. 516; Stevenson's Heirs v. McReary, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102; State v. Macy, 72 Mo. App. 427; Meyer v. Christopher, 176 Mo. 580, 75 S. W. 750; Cunningham v. Snow, 82 Mo. 587; Pim v. St. Louis, 122 Mo. 654, 27 S. W. 525; Wilkinson v. St. Louis & Dock Co., 102 Mo. 130, 14 S. W. 177; Clark v. Richards, 15 N. J. L. 347; Peck v. Randall, 1 Johns. (N. Y.) 165; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Fleming v. Griswold, 3 Hill (N. Y.) 85; Causey v. Snow, 122 N. Car. 326, 29 S. E. 359; Barden v. Stickney, 132 N. Car. 416, 43 S. E. 912, rehearing denied 130 N. Car. 62, 40 S. E. 842 Jones v. Clayton, 6 N. Car. 62; Killian v. Watt, 7 N. Car. 167; Miller v. Bumgardner, 109 N. Car. 412, 13 S. E. 935; Chancy v. Powell, 103 N. Car. 159, 9 S. E. 298; Kennedy v. Cromwell, 108 N. Car. 1, 13 S. E. 135; Amole's Appeal, 115 Pa. St. 356, 8 Atl. 614; Neilly v. McCormick, 2 Yeates (Pa.) 447; Adamson v. Smith, 2 Mill Const. (S. Car.) 269, 12 Am. Dec. 665; McCollough v. Speed, 3 McCord (S. Car.) 455; Dillard v. Philson, 5 Strobb. (S. Car.) 213; Barino v. McGee, 3 McCord (S. Car.) 452; Chaney v. Moore, 1 Cold. (Tenn.) 48; Jones v. Preston, 40 Tenn. 161; Shortridge v. Allen, 2 Tex. Civ. App. 193, 21 S. W. 419; Bowles v. Smith (Tex. Crim. App.), 34 S. W. 381; Pecton v. Alexander, 27 Tex. 659; McDonald v. Mc-

Guire, 8 Tex. 361; Cole v. Runnells, 6 Tex. 272; De Arnaud v. United States, 151 U. S. 483, 38 L. ed. 244, 29 Ct. Cl. (U. S.) 555; 14 Sup. Ct. 374; Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317; McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. 142; Roberts v. Moore, 3 Wall. Jr. (U. S.) 292, Fed. Cas. No. 11905; Fitzhugh v. Anderson, 2 Hen. & M. (Va.) 289, 3 Am. Dec. 625; Parsons v. McCracken, 9 Leigh. (Va.) 495; Mynes v. Mynes, 47 W. Va. 681, 35 S. E. 935; Swearingen v. Robertson, 39 Wis. 462; Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106, 110 Am. St. 827; Blier v. Boswell, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.
 "Braun v. Sauerwein, 10 Wall. (U. S.) 218, 19 L. ed. 895. In this case it is said that: "It is, undoubtedly, a general principle, that when a statute of limitation has begun to run, a disability to sue subsequently intervening does not stop its running, even though the disability be one of those expressly recognized in the statute itself. Notwithstanding this, however, the courts in this country have engrafted upon such statutes at least one implied exception. Thus, in Hopkirk v. Bell, 3 Cranch (U. S.) 454, this court held that the Treaty of Peace of 1783, by which the independence of the United States was acknowledged by Great Britain, prevented the operation of a Virginia statute of limitations upon debts due to British subjects, and contracted before the treaty was made. In that case, though the statute had begun to run before the commencement of the war in 1775, the time during which it had thus run was not allowed to be added to any time subsequent to the treaty. This, perhaps, is not to be regarded as a clearly judicial exception, incorporated into the Virginia statute. It was rested upon the force of the treaty which declared the creditors on either side (British or American), should meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts theretofore contracted. The treaty, however, was not the act of Virginia, and the sus-

having commenced to run during the lifetime of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue."⁷¹ It must be borne in mind,

pension of the statute's operation was by something outside of the statute itself. But in *Hanger v. Abbott*, 6 Wall. (U. S.) 532, [117 U. S. XVIII, 939], it was ruled, after grave consideration, that the time during which the courts of the recently rebellious states were closed to the citizens of other states, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, and this, though the statutes contain no such exemption. In other words, it was held that the statutes of limitations of the insurrectionary states were suspended, while the courts in those states were closed by the war. Similar decisions have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue." But although the court may have had clearly in mind the ground upon which decisions of the character referred to were based, the fact remains that in expressing that idea it has been, to say the least, very unwise in its choice of words. The idea that a disability brought about by "a superior power" has ipso facto a suspensive effect is in direct conflict with a volume of authorities holding to the contrary, if the words "superior power" be given their ordinary meaning. Under this view of the subject since supervening insanity does not suspend the statute, the unfortunate whose reason has been dethroned and mind beclouded must have necessarily been afflicted (for our purpose, disabled) by an "inferior," rather than

"superior" power. Likewise the one who has had the misfortune to be born an infant and to remain an infant for twenty-one years rather than to have been born an adult, must attribute this calamity to an "inferior" power.

⁷¹*Harris v. McGovern*, 99 U. S. 161, 25 L. ed. 317. See also, *Oates v. Beckworth*, 112 Ala. 356, 20 So. 399; *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180; *Bozeman v. Browning*, 31 Ark. 364; *Chase v. Cartwright*, 53 Ark. 358, 14 S. W. 90, 22 Am. St. 207; *McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. 814; *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. 84; *Doyle v. Wade*, 23 Fla. 90, 1 So. 516, 11 Am. St. 334; *Sparks v. Roberts*, 65 Ga. 571; *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340; *Dawson v. Edwards*, 189 Ill. 60, 59 N. E. 590; *Grether v. Clark*, 75 Iowa 383, 39 N. W. 655, 9 Am. St. 491; *Ray v. Thurman's Exr.*, 13 Ky. L. 3, 15 S. W. 1116; *Loyd v. Loyd*, 20 Ky. L. 347, 46 S. W. 485; *Henderson v. Bonar*, 11 Ky. L. 219, 11 S. W. 809; *Doty v. Jameson*, 29 Ky. L. 507, 93 S. W. 638; *Hertle v. Schwartz*, 3 Md. 366; *DeMill v. Moffat*, 49 Mich. 125, 13 N. W. 387; *Rogers v. Brown*, 61 Mo. 187; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056; *Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131; *Ballou v. Sherwood*, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131; *Munroe v. Wilson*, 68 N. H. 580, 41 Atl. 240; *Gregan v. Buchanan*, 15 Misc. (N. Y.) 580, 72 N. Y. St. 115, 37 N. Y. S. 83; *Jackson v. Robins*, 15 Johns. (N. Y.) 169; *Scallon v. Manhattan R. Co.*, 185 N. Y. 359, 78 N. E. 384; *Bennett v. Williamson*, 30 N. Car. 121; *Frederick v. Williams*, 103 N. Car. 189, 93 S. E. 298; *Asbury v. Fair*, 111 N. Car. 251, 16 S. E. 467; *Bartlow v. Kinnard*, 38 Ohio St. 373; *Lynch v. Cox*, 23 Pa. St. 265; *Douglas v. Irvine*, 126 Pa. St. 643, 17 Atl. 802; *Duren v. Kee*, 26 S. Car. 219, 2 S. E. 4; *Satcher v. Grice*, 53 S. Car.

however, that it has not been said that the operation of the statute can not be suspended. There is, in fact, more than one agency which may interrupt the running of limitations. The statute being a legislative creation, the legislature may provide for its suspension on the happening of certain contingencies, or that it shall be deemed suspended during a certain period as, for instance, that of war.⁷² So, also, war may ipso facto close the courts and thus deny a plaintiff a tribunal in which suit may be instituted.⁷³ Again, the legislature may repeal a municipal charter,⁷⁴ and in the interim before a new charter is granted, a plaintiff may have no one whom he can make a party defendant and thus enforce his claim.⁷⁵ Other suspensive agencies, such as the acknowledgment of the cause of action, part payment and the institution of suit will be considered later on.

126, 31 S. E. 3; *Patton v. Dixon*, 105 Tenn. 97, 58 S. W. 299; *Weisinger v. Murphy*, 39 Tenn. 674; *Jones v. Preston*, 40 Tenn. 161; *Campbell v. McFadden*, 9 Tex. Civ. App. 379, 31 S. W. 436; *Jenkins v. Jensen*, 24 Utah 108, 66 Pac. 773, 91 Am. St. 783; *Wilsons v. Harper*, 25 W. Va. 179; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Compare, May's Heirs v. Slaughter*, 3 A. K. Marsh. (Ky.) 505; *Everett's Exrs. v. Whitfield's Admr.*, 27 Ga. 133; *Ladd v. Jackson*, 43 Ga. 288; *Machir v. May*, 4 Bibb (Ky.) 43; *Sentney v. Overton*, 7 Ky. 445; *South v. Thomas' Heirs*, 7 T. B. Mon. (Ky.) 59; *Smith v. Escoubas*, 43 La. Ann. 932, 9 So. 907; *Orso v. Orso*, 11 La. 61; *Bucklin v. Bucklin*, 40 N. Y. (1 Keyes) 141, 1 Abb. Dec. (N. Y.) 242; *Mills v. Thompkins*, 47 Misc. (N. Y.) 455, 95 N. Y. S. 962, reversed on another point, *Mills v. Thompkins*, 110 App. Div. (N. Y.) 212, 97 N. Y. S. 9; *Rose v. Daniel*, 3 Brev. (S. Car.) 438, 2 Tread. Const. 549; *Cook v. Wood*, 1 McCord (S. Car.) 139; *Gibson v. Taylor*, 3 McCord (S. Car.) 451; *Holtzapple v. Phillibaum*, 4 Wash. (U. S.) C. C. 356, Fed. Cas. No. 6648; *Baird v. Bland*, 3 Munf. (Va.) 570.

⁷²*Coleman v. Holmes*, 44 Ala. 124, 4 Am. Rep. 121; *Black v. Pratt Coal*

&c. Co., 85 Ala. 504, 5 So. 89; *McDonald v. Bogue*, 14 Fla. 363; *Renew v. Darley*, 49 Ga. 332; *Spratley v. Mutual Benefit Life Ins. Co.*, 74 Ky. 443; *Harrison v. Succession of Adger*, 24 La. Ann. 565; *Ringgold v. Cannell*, 2 Har. & McH. (Md.) 408; *Johns v. Lane*, 3 Har. & McH. (Md.) 398; *Griffing v. Mills*, 40 Miss. 611; *McCutchen v. Dougherty*, 44 Miss. 419; *Wiggle v. Owen*, 45 Miss. 691; *Sacia v. De Graaf*, 1 Cow. (N. Y.) 356; *Thompson v. Nations*, 112 N. Car. 508, 17 S. E. 432; *Penrose v. King*, 1 Yeates (Pa.) 344; *East Tennessee Iron Mfg. Co. v. Gaskell*, 70 Lea (Tenn.) 742; *Bender v. Crawford*, 33 Tex. 745; 7 Am. Rep. 270; *Harvey v. Carroll*, 5 Tex. Civ. App. 324, 23 S. W. 713; *Mayfield v. Richards*, 115 U. S. 137, 29 L. ed. 334, 5 Sup. Ct. 1187; *United States v. Wiley*, 11 Wall. (U. S.) 508, 20 L. ed. 211; *Stewart v. Kahn*, 11 Wall. (U. S.) 493, 20 L. ed. 176; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Tunstall's Admr. v. Withers*, 86 Va. 892, 11 S. E. 565; *Huffman v. Alderson's Admr.*, 9 W. Va. 616; *Shields v. Farmers' Bank*, 5 W. Va. 259.

⁷³See ante, § 2658.

⁷⁴*Broadfoot v. Fayetteville*, 124 N. Car. 478, 32 S. E. 804, 70 Am. St. 610.

⁷⁵See ante, § 2658.

§ 2663. **Infancy.**—The fact that a statute of limitations contains no saving in favor of infants does not render it unconstitutional.⁷⁶ “It would be entirely competent for the legislature to enact a general statute of limitations putting minors and adults on the same footing as to all causes of action, and such would be the legal effect of a statute which contained no saving clause excepting infants from its operation.”⁷⁷ However this may be, the legislatures of the several states have very generally provided, in substance, that limitations shall not, at least in certain cases, run against infants and that they shall have a specified time after they reach majority in which to apply for judicial enforcement of their rights.⁷⁸ The Indiana statutes “provides”⁷⁹ * * * that any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. Though the statute of limitations runs from the time the cause of action accrues, yet as to persons under legal disabilities, the time for suing is extended. * * * Where a cause of action has accrued to an infant, the action may be maintained if brought within the time thus extended.”⁸⁰ But notwithstanding the fact that the trustee who holds the legal title for an infant has sold to one having notice that the grantor has violated his trust, the saving in the statute in behalf of infants will not in this case avail the cestui que trust.⁸¹ Where the legal title to lands is in the infant himself, and the same have been illegally disposed of by his guardian, he can not wait until the termination of a later disability at a time subsequent to the expiration of the original saving of the statute and then sue to recover them, but must bring an action within the statutory period after reaching his majority.⁸² “If legal title had been in the

⁷⁶ *Schauble v. Schulz*, 137 Fed. 389, 69 C. C. A. 581, quoting from *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. 854.

⁷⁷ *Morgan v. Des Moines*, 60 Fed. 208, 8 C. C. A. 569, quoted in *Schauble v. Schulz*, 137 Fed. 389, 69 C. C. A. 581.

⁷⁸ See statutes of the several states.

⁷⁹ *Burn's Ann. Stat.* 1908, § 298.

⁸⁰ *Bryson v. Collmer*, 33 Ind. App. 494, 71 N. E. 229.

⁸¹ *Willson v. Louisville Trust Co.*, 102 Ky. 522, 19 Ky. L. 1590, 44 S. W. 121.

⁸² *Hale v. Ellison* (Tenn. Ch. App.), 59 S. W. 673. But see, *Aiken v. Smith*, 33 Tenn. 304.

guardian, and the infant had the beneficial interest in the cause of action, then perhaps, as the guardian would have been barred, the infant would also have been barred. This is the rule applied in cases of executors, administrators and trustees, the beneficial interest being in infants.”⁸³

§ 2664. **Coverture.**—Even though coverture be regarded as a disability, precluding a woman laboring thereunder from suing in her own name, it is in no wise imperative to its constitutionality that a statute of limitations contain a saving in her favor. As in the case of infants,⁸⁴ such saving may be entirely omitted.⁸⁵ But at the present time, a married woman very generally possesses the same control over and powers in relation to her separate property as a feme sole. Even where she is not expressly brought within the operation of limitations, a statute which does not include her in the list of persons against whom the statute does not operate according to its terms has the effect of placing her in the same position as others who are thereby required to commence their actions within the periods prescribed.⁸⁶ So, also, where it is provided in one section of the statutes that “all the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided,”⁸⁷ and in another that “any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed,”⁸⁸ it has been held that a feme covert is not a person under legal disability within the section last quoted.⁸⁹ But “it needs no argument to prove that evil will

⁸³ Grimsby v. Hudnell, 76 Ga. 378, 2 Am. St. 46.

⁸⁴ Ante, § 2663.

⁸⁵ Shauble v. Schulz, 137 Fed. 389, 69 C. C. A. 581, quoting from Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. 854.

⁸⁶ Machin v. Thompson, 17 Ark. 199; Acker v. Acker, 81 N. Y. 143; Clarke v. Gibbons, 83 N. Y. 107; Dunham v. Sage, 7 Lans. (N. Y.) 419, affd. 52 N. Y. 229. Compare, Harrer v. Wallner, 80 Ill. 197; North v. James, 61 Miss. 761.

⁸⁷ Burns' Ind. Stat. 1908, § 7851.

⁸⁸ Burns' Ind. Stat. 1901, § 297.

⁸⁹ Sedwick v. Ritter, 128 Ind. 209, 27 N. E. 610. See also, Garland County v. Gaines, 47 Ark. 558, 2 S. W. 460; Cameron v. Smith, 50 Cal. 303; Percy v. Cockrill, 53 Fed. 872, 4 C. C. A. 73; Sparks v. Roberts, 65 Ga. 571; Perkins v. Compton, 69 Ga. 736; Hayward v. Gunn, 82 Ill. 385; Enos v. Buckley, 94 Ill. 458; Geisen v. Heiderich, 104 Ill. 537; Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; Safford v. Stubbs, 117 Ill. 389, 7 N.

result from a rule that requires the wife to watch lest the statute of limitations bar her rights, and she be answered, when she asserts her claim after her husband's death, that, as she did not sue him within the statutory time, she must lose the money intrusted to him. It is not for the good of the world that a wife should be compelled to distrust her husband, and deal with him as she would a stranger, in order that she may not have her rights swept away by the lapse of time," and although she has been emancipated from the disability to contract generally, her common-law disability to contract with her husband remains unaffected so that limitations will not run as between them, unless the legislature expressly declares otherwise.⁹⁰

E. 653; *Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551; *Irey v. Markey*, 132 Ind. 546, 32 N. E. 309; *Brown v. Cousens*, 51 Maine 301; *Douglass v. Douglass*, 72 Mich. 86, 40 N. W. 177; *Curbay v. Bellemer*, 70 Mich. 106, 37 N. W. 911; *Murphy v. J. H. Evans City Steam Laundry Co.*, 52 Nebr. 593, 72 N. W. 960; *Linton v. Heye*, 69 Nebr. 450, 95 N. W. 1040, 111 Am. St. 556; *Ball v. Bullard*, 52 Barb. (N. Y.) 141; *Nissley v. Brubaker*, 192 Pa. St. 388, 43 Atl. 967; *In re Hick's Estate*, 7 Pa. Super. Ct. 274; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. Compare, *Memphis & L. R. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952; *Rowland v. McGuire*, 64 Ark. 412, 42 S. W. 1068; *Morrison v. Norman*, 47 Ill. 477; *Noble v. McFarland*, 51 Ill. 226; *Onions v. Covington & Co. Elevated R. & Co.*, 107 Ky. 154, 21 Ky. L. 820, 53 S. W. 8; *Sturgill v. Chesapeake & Co. R. Co.*, 116 Ky. 659, 25 Ky. L. 912, 76 S. W. 826; *Higgins v. Stokes*, 116 Ky. 664, 25 Ky. L. 919, 76 S. W. 834; *Terrell v. Maupin*, 26 Ky. L. 1203, 83 S. W. 591; *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Wilkes v. Allen*, 131 N. Car. 279, 42 S. E. 616; *Lippard v. Troutman*, 72 N. Car. 551; *Campbell v. Crater*, 95 N. Car. 156; *Hurlbut v. Wade*, 40 Ohio St. 603; *Ashley v. Rockwell*, 43 Ohio St. 386, 2 N. E. 437; *Yocum v. Allen*, 58 Ohio St. 280, 50 N. E. 909; *Dexter v. Billings*,

110 Pa. St. 135, 1 Atl. 180; *Moore v. Walker*, 3 Lea (Tenn.) 656; *Bliler v. Boswell*, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

⁹⁰ *Barnett v. Harsbarger*, 105 Ind. 410, 5 N. E. 718. See also, *Fourthman v. Fourthman*, 15 Ind. App. 199, 43 N. E. 965; *Lower v. Lower*, 46 Iowa 525; *Biggerstaff's Admr. v. Biggerstaff's Admr.*, 19 Ky. L. 371, 40 S. W. 671; *Sewell v. McVay*, 30 La. Ann. 673; *Morrison v. Brown*, 84 Maine 82, 24 Atl. 672; *Sabel v. Slingsluff*, 52 Md. 132; *Alpaugh v. Wilson*, 42 N. J. Eq. 424, 28 Atl. 722, affd. 52 N. J. Eq. 589, 33 Atl. 50; *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; *Towers v. Hagner*, 3 Whart. (Pa.) 48; *In re Kutz's Appeal*, 40 Pa. St. 90; *Kennedy v. Knight*, 174 Pa. St. 408, 34 Atl. 585; *In re Wilkinson's Estate*, 192 Pa. St. 117, 43 Atl. 466; *Murdock v. Johnson*, 7 Cold. (Tenn.) 605; *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357; *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Gudden v. Gudden's Estate*, 113 Wis. 297, 89 N. W. 111. And compare, *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Bromwell v. Bromwell's Estate*, 139 Ill. 424, 28 N. E. 1057; *In re Deaner's Estate*, 126 Iowa 701, 102 N. W. 825, 106 Am. St. 374; *Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317; *Reed v. Painter*, 145 Mo. 341, 46 S. W. 1089; *Rosenberger v. Mallerson*, 92 Mo. App. 27.

§ 2665. **Insanity.**—Insanity is another disability of which the various legislatures have seen fit to take cognizance and in very many instances those mentally incapacitated have been made the recipients of periods of immunity to occur after their disability is removed before limitations will attach.⁹¹ But insanity can not be predicated of peevishness and peculiarities on either public or private occasions,⁹² nor are habitual drunkards embraced or included within a statute defining the phrase “under legal disabilities” as including, among others, persons of unsound mind.⁹³ An adjudication of the fact that he is insane is not, however, necessary to entitle one thus afflicted to the exception provided by the statute,⁹⁴ but on the other hand, allegations in a bill based on a fraudulent misrepresentation which induced a sale and conveyance by the father of the complainants, that the vendor “was for ten years before his death old, credulous, and so feeble in mind and body that he was unfit to transact business, are not sufficient to prevent the running of” limitations.⁹⁵ Neither idiocy nor a non compos mentis condition is required to be imputed to a person by reason of his being both deaf and dumb.⁹⁶ On the other hand, all those who are non compos mentis or “of unsound or deranged mind” are comprehended by the word “insane.”⁹⁷ Although the lucid interval coming to one of unsound mind must continue for a length of time sufficient to enable him to investigate his rights and to proceed in the matter of their enforcement, in order for him to come within the operation of limitations,⁹⁸ the running of the statute after

⁹¹ See statutes of the several states. Where the statute contains no exemption in favor of insane persons, no such exemption exists. *Collier v. Smaltz*, 149 Iowa 230, 128 N. W. 396, Ann. Cas. 1912C, 1007, and note on p. 1011.

⁹² *Calumet Electric St. R. Co. v. Mabie*, 66 Ill. App. 235. See also, *Reegan v. Sabin*, 53 Fed. 415, 3 C. A. 578.

⁹³ *Makepeace v. Bronnenberg*, 146 Ind. 243, 45 N. E. 336.

⁹⁴ *Lantis v. Davidson*, 60 Kans. 389,

56 Pac. 745; *Kaack v. Stanton*, 51 Tex. Civ. App. 495, 112 S. W. 702.

⁹⁵ *Rugan v. Sabine*, 53 Fed. 415, 3 C. C. A. 578, quoting from *Ex parte Barnseley*, 3 Atk. 171.

⁹⁶ *Christmas v. Mitchell*, 38 N. Car. 535. But see, *Oliver v. Berry*, 53 Maine 206, 87 Am. Dec. 547.

⁹⁷ *Burnham v. Mitchell*, 34 Wis. 117.

⁹⁸ *Duncan v. Vick*, 7 Ky. L. (abstract) 756. See also, *Dicken v. Johnson*, 7 Ga. 484; *Verdery v. Savannah, F. & W. R. Co.*, 82 Ga. 675, 9 S. E. 1133.

it has once been set in motion against him is not interrupted by the recurrence of lunacy.⁹⁹

§ 2666. Incarceration for crime.—Persons in prison are frequently regarded as under disability to sue and are accordingly given, by legislative action, a limited time to date from that when they are severally liberated in which to bring suits otherwise barred by limitations.¹ Thus, a person who for more than four years is confined in the penitentiary under conviction and sentence for crime, and before his conviction was continuously confined in the county jail for more than nine months prior to the time when he was taken to the penitentiary, with the exception of a period during which he was absent from the jail as an attached witness, he being still in the custody of the sheriff, was to all intents and purposes “a person in prison.”² But an insane asylum is not a “state prison” within the meaning of the statute.³ On the other hand, an early Tennessee case holds to the effect that a negro will be regarded as “imprisoned” when he is detained in slavery after it has been judicially determined that he is entitled to his freedom.⁴

§ 2667. Ignorance and fraud.—Even as it is a familiar maxim that “ignorance of the law is no excuse for crime,” it may be said with equal positiveness that “where ignorance of a fact is not induced by the act, positive or negative, of another, such ignorance will meet with the severest condemnation of the law.” In other words, a person must, if anything, be even more vigilant in law than in equity. Accordingly, “a party can not by his own negligence, or

⁹⁹Clark's *Exr. v. Trail's Admr.*, 58 Ky. 35. See also, *Roelfsen v. Pella*, 121 Iowa 153, 96 N. W. 738; *Hale v. Ritchie*, 142 Ky. 424, 134 S. W. 474; *McCutcheon v. Currier*, 94 Maine 362, 47 Atl. 923; *Nebola v. Minnesota Iron Co.*, 102 Maine 89, 112 N. W. 880, 12 Am. & Eng. Ann. Cas. 56; *Asbury v. Fair*, 111 N. Car. 251, 16 S. E. 467; *Adamson v. Smith*, 2 Mill (S. Car.) 269, 12 Am. Dec. 665; *Lincoln v. Norton*, 36 Vt. 679.

¹See statutes of the several states.

²*Lasater v. Waites* (Tex.), 67 S. W. 518, judgment reversed on another ground, *Lasater v. Waits*, 95 Tex. 553, 68 S. W. 500. See also, *State v. Calhoun*, 50 Kans. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. 141.

³*Alexander v. Thompson*, 195 Fed. 31.

⁴*Matilda v. Crenshaw*, 4 Yerg. (Tenn.) 299. Compare, *Downs v. Allen*, 10 Lea (Tenn.) 652.

for his own convenience, stop the running of the statute" of limitations,⁵ and the running of the period prescribed by statute as that within which suit must be brought will not ordinarily be postponed by reason of the fact that the plaintiff did not, owing to a lack of diligence on his part, discover the cause of action which he is attempting to assert until at a time subsequent to its accrual.⁶ Thus, the right of

⁵ *Reed's Admr. v. Minell*, 30 Ala. 61; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877, citing *Bills v. Silver King Mining Co.*, 106 Cal. 9, 39 Pac. 43; *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Ball v. Keokuk & N. W. R. Co.*, 62 Iowa 751, 16 N. W. 592; *High v. Shelby County*, 92 Ind. 580; *Atchison, T. & S. F. R. Co. v. Burlingame*, 36 Kans. 628, 14 Pac. 271, 59 Am. Rep. 578; *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605. See also, *Ryan v. Woodin*, 9 Idaho 525, 75 Pac. 261; *Waterman Hall v. Waterman*, 220 Ill. 569, 77 N. E. 142, 4 L. R. A. (N. S.) 776; *Steele v. Steele*, 220 Ill. 318, 77 N. E. 232; *Schroer v. Central Kentucky Asylum*, 113 Ky. 288, 24 Ky. L. 150, 68 S. W. 150; *Foust v. Warren* (Tex. Civ. App.) 72 S. W. 404; *Warren v. Foust*, 36 Tex. Civ. App. 59, 81 S. W. 323; *Conner v. Goodman*, 104 Ill. 365; *Biays v. Roberts*, 68 Md. 510, 13 Atl. 366; *Hoffman v. Parry*, 23 Mo. App. 20; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. 253; *Garrett v. Conklin*, 52 Mo. App. 654; *Ransome v. Bearden*, 50 Tex. 119; *Rowe v. Horton*, 65 Tex. 89.

⁶ *Bromberg v. Sands*, 127 Ala. 411, 30 So. 510; *Governor v. Gordon*, 15 Ala. 72; *Underhill v. Mobile Fire Dept. Ins. Co.*, 67 Ala. 45; *Martin v. Branch Bank*, 31 Ala. 115; *Bank of Hartford County v. Waterman*, 26 Conn. 324; *Davis v. Boyett*, 120 Ga. 649, 48 S. E. 185, 66 L. R. A. 258, 102 Am. St. 118; *Cunningham v. Daugherty*, 220 Ill. 45, 77 N. E. 95; *The Telegraph v. Loetscher*, 127 Iowa 383, 101 N. W. 773; *Brown v. Brown*, 44 Iowa 349; *Brunson v. Ballou*, 70 Iowa 34, 29 N. W. 794; *Boomer v. French*, 40 Iowa 601; *Campbell v. Long*, 20 Iowa 382; *Willis v. Brassfield*, 8 Ky. L. (abstract) 353; *Covington v. Morton*, 6 Ky. L. (abstract) 219; *Metropolitan Life Ins. Co. v.*

Trende, 21 Ky. L. 909, 53 S. W. 412; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528; *Bement v. Ohio Valley Banking &c. Co.*, 99 Ky. 109, 18 Ky. L. 37, 35 S. W. 139, 59 Am. St. 445; *Covington v. Voskotter*, 80 Ky. 219, 3 Ky. L. 749; *Perry v. Elgin*, 15 Ky. L. 855, 26 S. W. 4; *Cox v. Von Ahlefeldt*, 105 La. 543, 30 So. 175; *Cole v. McGlathry*, 9 Greenl. (Maine) 131; *Abell v. Harris*, 11 Gill & J. (Md.) 367; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414; *Bates v. Boyce's Estate*, 135 Mich. 540, 98 N. W. 259, 106 Am. St. 402; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253; *Fariss v. Coleman*, 103 Mo. 352, 15 S. W. 767; *Webster v. Bates' Mach. Co.*, 64 Nebr. 306, 89 N. W. 789; *Oakes v. Howell*, 27 How. Pr. (N. Y.) 145; *Price v. Mulford*, 107 N. Y. 303, 14 N. E. 298; *Clowes v. New York*, 47 Hun (N. Y.) 539, 15 N. Y. St. 176; *Reid v. Albany County*, 128 N. Y. 364, 28 N. E. 367; *Collins v. Collins*, 131 N. Y. 648, 30 N. E. 863; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Blount v. Parker*, 78 N. Car. 128; *Davis v. Cotten*, 55 N. Car. 430; *Townsend v. Eichelberger*, 51 Ohio St. 213, 38 N. E. 207; *Groesbeck v. Cincinnati*, 51 Ohio St. 365, 37 N. E. 707; *Guarantee Trust &c. Co. v. Farmers' &c. Nat. Bank*, 202 Pa. 94, 51 Atl. 765; *Mifflin County Nat. Bank v. Fourth St. Nat. Bank*, 199 Pa. 459, 49 Atl. 213; *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. St. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. 684; *Daniels v. Pickett* (Tenn. Ch. App.) 59 S. W. 148; *Harris v. Thomas* (Tenn.), 52 S. W. 706; *Hancock County v. Hawkins County*, 83 Tenn. 266; *Meyer Bros. Drug Co. v. Fry* (Tex. Civ. App.), 48 S. W. 752; *Gaines v. Hammond's Admr.*, 2 McCrary (U. S.) 432, 6

action of one, suing to recover a balance alleged to be due him from his former guardian, was not preserved against limitations because of the fact that about two years before suit was brought it, for the first time, "occurred to him [the plaintiff] that it would be well to inquire of the pension office, and ascertain the aggregate amount received therefrom by the defendant," there being no facts set forth in the petition from which it could be gathered that the plaintiff could not at any time following the settlement have obtained the necessary information.⁷ Likewise, where the statutes give the creditor of a corporation access to its books and thus afford him ample opportunity to ascertain who are stockholders and what amount of the stock subscribed remains unpaid, he can not, in bar of limitations against an action to enforce the liability of those delinquent in the matter of payment for their stock, plead ignorance of their names.⁸ Again, the fact that a foreign vendee who is entitled to a deed as soon as the wife of the vendor relin-

Fed. 449, *affd.* 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. 426; *Green v. United States*, 17 Ct. Cl. (U. S.) 174; *Lisle v. United States*, 23 Ct. Cl. (U. S.) 270; *Pacific Mail Steamship Co. v. United States*, 28 Ct. Cl. (U. S.) 1; *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598. Compare, *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Lieberman v. First Nat. Bank*, 8 Del. Ch. 229, 40 Atl. 382, *affd.* 8 Del. Ch. 519, 2 Pennw. (Del.) 416, 45 Atl. 901, 48 L. R. A. 514, 82 Am. St. 414; *Birkhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107; *Boagni v. Wartelle*, 50 La. Ann. 128, 23 So. 206; *Arnold v. Scott*, 2 Mo. 13, 22 Am. Dec. 433; *McMurray v. McMurray*, 180 Mo. 526, 79 S. W. 701; *Dye v. Bowling*, 82 Mo. App. 587; *Cornwell v. Clement*, 10 App. Div. (N. Y.) 446, 42 N. Y. S. 295; *Moore v. Waco Building Assn.*, 19 Tex. Civ. App. 68, 45 S. W. 974; *Gerfers v. Mecke*, 28 Tex. Civ. App. 269, 67 S. W. 144; *Dashner v. Wallace*, 29 Tex. Civ. App. 151, 68 S. W. 307. Compare, *Leach v. Wilson County*, 68 Tex. 353, 4 S. W. 613; *Henrietta Nat. Bank v. Barrett* (Tex.), 25 S. W. 456; *Snow v. Rich*, 22 Utah 123, 61 Pac. 336;

Bickle v. Chrisman's Admx., 76 Va. 678; *Lightfoot's Admr. v. Greene's Admx.*, 91 Va. 509, 22 S. E. 242; *Craufurd's Admr. v. Smith's Exr.*, 93 Va. 623, 23 S. E. 235, 25 S. E. 657; *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73; *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636, 77 Pac. 1063; *Hutchinson v. Sheboygan County*, 26 Wis. 402. The holding of the Supreme Court of Texas in *Rice v. Ward*, 92 Tex. 704, 51 S. W. 844, to the effect that the heirs, or legatees and devisees under his will, will not be charged with the knowledge that an absolute deed executed by the one through whom they take was really intended as a mortgage until they actually ascertain such fact, can not be regarded as sound law. Such a holding, generally adhered to, would work immeasurable injustice. It would breed sluggishness, carelessness and indifference—all to the detriment of the rights of the public in general.

⁷ *Mather v. Rogers*, 99 Iowa 292, 68 N. W. 700.

⁸ *Chilberg v. Siebendaum*, 41 Wash. 663, 84 Pac. 598.

quishes her right of dower can not postpone his action beyond the expiration of limitations running from the time of the decease of the wife by remaining in ignorance of her death.⁹ So, also, the attorney-general will be charged with notice that a corporation has violated its charter and that therefore an action of forfeiture may be brought against it.¹⁰ In short, "if a party with ordinary care and attention could have detected even fraud, he will be charged with actual knowledge of it, that is, the mere fact that a party is not aware of the existence of certain matters, where there is no concealment, will not prevent the running of the statute of limitations."¹¹ But, as a general rule, limitations will run in favor of one who has been guilty of fraud only from the time when discovery is had or should be had.¹² Statutes of limitations "were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time

*Kavenagh v. Weedon, 1 Ala. 231.

⁹State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541.

¹⁰Welton v. Merrick County, 16 Nebr. 83, 20 N. W. 111.

¹¹Fogg v. Perris Irr. Dist., 142 Cal. XVIII, 76 Pac. 1127; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381; People v. Blankenship, 52 Cal. 619; Persons v. Jones, 12 Ga. 371, 58 Am. Dec. 476; Wellborn v. Rogers, 24 Ga. 558; Day v. Dages, 17 Ind. App. 228, 46 N. E. 589; Raymond v. Simonson, 4 Blackf. (Ind.) 77; Clews v. Traer, 57 Iowa 459, 10 N. W. 838; Green v. Salmon, 23 Ky. L. 517, 63 S. W. 270; Hieronymous v. Mayhall, 64 Ky. 508; Kelley v. Nealley, 76 Maine 71; New England Mut. Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469; Wear v. Skinner, 46 Md. 257, 24 Am. Rep. 517; Buckner v. Calcote, 28 Miss. 432; Thomas v. Mathews, 51 Mo. 107; Hunter v. Hunter, 50 Mo. 445; Weckerly v. Taylor, 74 Nebr. 84, 103 N. W. 1065; Forsyth v. Easterday, 63 Nebr. 887, 89 N. W. 407; Cole v. Boyd, 68 Nebr. 146, 93 N. W. 1003; Parker v. Kuhn, 21 Nebr. 413, 32 N. W. 74, 59 Am. Rep. 838; Wright v. Davis, 28 Nebr. 479, 44 N. W. 490, 26 Am. St. 347; Rafferty's Admrs. v. Todd, 34 N. J. Eq. 552;

Alexander v. Cleland, 13 N. Mex. 524, 82 Pac. 425; Rohrschneider v. Knickerbocker Life Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Frank v. Lanier, 91 N. Y. 112; Gallup v. Bernd, 49 Hun (N. Y.) 605, 17 N. Y. St. 194, 1 N. Y. S. 478; Sweat v. Arrington, 3 N. Car. 129; Smith v. Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. 887; Ferris v. Henderson, 12 Pa. St. 49, 51 Am. Dec. 580; Semple v. Callery, 184 Pa. St. 95, 39 Atl. 6; Bricker v. Lightner's Exr., 40 Pa. St. 199; Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826; Beattie v. Pool, 13 S. Car. 379; Townsend v. Townsend, 4 Cold. (Tenn.) 70, 94 Am. Dec. 185; Boren v. Boren, 38 Tex. Civ. App. 139, 85 S. W. 48; Connolly v. Hammond, 58 Tex. 11; Kennedy v. Baker, 59 Tex. 150; Taylor v. South & C. R. Co., 4 Woods (U. S.) 575, 13 Fed. 152; Larsen v. Utah Loan & C. Co., 23 Utah 449, 65 Pac. 208; Crauford's Admr. v. Smith's Exr., 93 Va. 623, 23 S. E. 235, 25 S. E. 657; Shields v. Anderson, 3 Leigh. (Va.) 729; Odell v. Burnham, 61 Wis. 562, 21 N. W. 635. Compare, Foot v. Farrington, 41 N. Y. 164; Reilly v. Sabater, 26 Civ. Proc. (N. Y.) 34, 43 N. Y. S. 383.

had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.”¹³ Furthermore, a person is not required to presume fraud in the absence of notice of facts sufficient to put a reasonable man on inquiry, and unless he has notice of such facts, lack of diligence in failing to discover the fraud will not be imputed to him.¹⁴ But a person can not, carelessly and indifferently, neglect to avail himself of means of information within his grasp,¹⁵ and “where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purposes of the statute of limitations, to have actually known what he might have known and ought to have known.”¹⁶ The Supreme Court of the United States has declared that “Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowl-

¹³ *Bailey v. Glover*, 21 Wall. (U. S.) 342, 22 L. ed. 636, quoted in *Linn & Co. v. United States*, 196 Fed. 593. See also, *Bartles v. Gibson*, 17 Fed. 293; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. 382; *Sherwood v. Sutton*, 5 Mason (U. S.) 143, Fed. Cas. No. 12782.

¹⁴ *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. 290.

¹⁵ *Bory v. Knox*, 38 La. Ann. 379; *Shelby County v. Bragg*, 135 Mo. 291, 36 S. W. 600; *Taylor v. South & Co.*, 4 Woods (U. S.) 575, 13 Fed. 152.

¹⁶ *Higgins v. Crouse*, 147 N. Y. 411, 42 N. E. 6. See also, *Swift v. Smith*, 79 Fed. 709, 25 C. C. A. 154; *Donaldson v. Jacobitz*, 67 Kans. 244, 72 Pac. 846; *First Nat. Bank v. Strait*, 71 Minn. 69, 73 N. W. 645; *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48.

edge itself.”¹⁷ But a later case decided by the Supreme Court of Nebraska is authority for the proposition that “The mere fact that a party defrauded has the opportunity or power to investigate and discover the fraud without any facts or clue thereto which would cause an ordinarily intelligent and prudent man to make an examination which, if followed up, would disclose such fraud, will not set the statute to running.”¹⁸ Where the fundamental facts upon which the charge of fraud is based are matters appearing of public record, the running of the statute will not be stayed by the ignorance of the alleged victim.¹⁹ Thus, a judgment creditor discovers the fraud of his debtor in executing a certain deed when the same is recorded, in the absence of a showing that the knowledge thus obtained was unavailable as a basis of further inquiry and proceeding.²⁰ But this will not hold good where the deed is not recorded in the proper county,²¹ or where the property is in a distant state in which none of the parties reside.²²

¹⁷ *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807. See also, *Board of Coms. of Monroe County v. Hall* (Ind. App.), 99 N. E. 1009.

¹⁸ *Raymond v. Schriever*, 63 Nebr. 719, 89 N. W. 308 (syllabus by the court).

¹⁹ *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88. See also, *St. Paul, S. & T. F. R. Co. v. Sage*, 49 Fed. 315, 1 C. C. A. 256, 4 U. S. App. 160; *Black v. Black*, 64 Kans. 689, 68 Pac. 662.

²⁰ *Hawley v. Page*, 77 Iowa 239, 42 N. W. 193, 14 Am. St. 275; *Sims v. Gray*, 93 Iowa 38, 61 N. W. 171. See also, *Fuller v. McMahon* (Iowa), 94 N. W. 205; *Clark v. Van Loon*, 108 Iowa 250, 79 N. W. 88, 75 Am. St. 219; *Brooks v. Jones*, 114 Iowa 385, 82 N. W. 434, 86 N. W. 300; *Cotton v. Brown*, 3 Ky. L. 679; *Poynter v. Mallory*, 20 Ky. L. 284, 45 S. W. 1042; *Blake v. Wolfe*, 105 Ky. 380, 20 Ky. L. 1212, 49 S. W. 19, 50 S. W. 2; *Hughes v. Littrell*, 75 Mo. 573; *Hudson v. Cahoon*, 193 Mo. 547, 91 S. W. 72; *State Bank of Pender v. Frey*, 3 Nebr. (Unof.) 83, 91 N. W. 239; *Gillespie v. Cooper*, 36 Nebr. 775, 55 N. W. 302; *Hathaway v. Noble*, 55 N. H. 508; *Lott's*

Exrs. v. DeGraffenreid, 10 Rich. Eq. (S. Car.) 346; *Vodrie v. Tynan* (Tex. Civ. App.), 57 S. W. 680; *McCue's Trustees v. Harris*, 86 Va. 687, 10 S. E. 981; *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360. Compare, *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342; *Lant v. Manley*, 75 Fed. 627, 21 C. C. A. 457; *Donaldson v. Jacobitz*, 67 Kans. 244, 72 Pac. 846; *Chinn v. Curtis*, 24 Ky. L. 1563, 71 S. W. 923; *Ward v. Thomas*, 81 Ky. 452, 5 Ky. L. 495; *Berkey v. Judd*, 22 Minn. 287; *Forsyth v. Easterday*, 63 Nebr. 887, 89 N. W. 407; *Jones v. Danforth*, 71 Nebr. 722, 99 N. W. 495; *Stephenson v. Reeder*, 7 Ohio Dec. 411, 2 Wkly. L. Bull. (Ohio) 335; *Stivens v. Summers*, 68 Ohio St. 421, 67 N. E. 884; *Davis v. Monroe*, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. 581; *Mitchell v. Simons* (Tex. Civ. App.), 53 S. W. 76; *Odell v. Burnham*, 61 Wis. 562, 21 N. W. 635.

²¹ *McGehee v. Cox*, 22 Ky. L. 619, 58 S. W. 532.

²² *Coulson v. Galtsman*, 1 Nebr. (Unof.) 502, 96 N. W. 349.

§ 2668. **Running of statute—Effect of death.**—Unless there is statutory provision to the contrary,²³ it is the general rule that the death of neither party has ipso facto a tolling effect upon the running of limitations.²⁴ But, a statute which provides that where a person entitled to sue or liable to be sued dies before limitations attach, the cause of action shall survive to or against his personal representative and suit may be instituted at any time, after the expiration of that prescribed by statute, within eighteen months

²³ See statutes of the several states.

²⁴ *Sanson's Exrs. v. Harrell*, 55 Ark. 572, 18 S. W. 1047; *Bozeman v. Browning*, 31 Ark. 364; *Daniel v. Day*, 51 Ala. 431. That this is true in the case of death of the would-be plaintiff, see *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Mills v. Glover*, 22 Ga. 319; *Gibbs v. Sawyer*, 48 Iowa 443; *Ackerman v. Hilpert*, 108 Iowa 247, 79 N. W. 90; *Mereness v. First Nat. Bank*, 112 Iowa 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. 318; *Doty v. Jameson*, 29 Ky. L. 507, 93 S. W. 638; *Baker's Admr. v. Baker's Admr.*, 13 B. Mon. (Ky.) 406; *Hull v. Deatley's Admr.*, 70 Ky. 687; *Beauchamp v. Mudd*, 2 Bibb (Ky.) 537; *Stewart v. Spedden*, 5 Md. 433; *Baumeister v. Silver*, 98 Md. 418, 56 Atl. 825; *Berkin v. Marsh*, 18 Mont. 152, 44 Pac. 528, 56 Am. St. 565; *Beach v. Reynolds*, 64 Barb. (N. Y.) 506, affd. 53 N. Y. 1; *Lawrence v. Leake & Watts Orphan House*, 2 Denio (N. Y.) 577; *Irwin v. Garrettson*, 1 Cin. Rep. (Ohio) 533, 13 Ohio Dec. 704; *Granger's Admr. v. Granger*, 6 Ohio 35; *Appeal of Amole's Admr.*, 115 Pa. St. 356, 8 Atl. 614; *Boyd v. Munroe*, 32 S. Car. 249, 10 S. E. 963; *Walker v. Abercrombie*, 61 Tex. 69; *Conant v. Hitt*, 12 Vt. 285. "The law is well settled that, when to a party capable of suing an action has accrued against a party who may be sued, the statute begins to run, unless this be prevented by the case coming within some exception to the statute. After it has begun to run, its running will not be suspended because of the subsequent death of either party, or because of the lapse of time before either has a personal representative."

Handy v. Smith, 30 W. Va. 195, 3 S. E. 604, cited in *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. 796; *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744. Compare, *Dunham v. Sage*, 7 Lans. (N. Y.) 419, affd. 52 N. Y. 229; and in that of the intended defendant, see *Rhodes v. Smethurst*, 4 M. & W. 42; *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Murray v. Houghton*, 2 Ind. Ter. 504, 52 S. W. 48; *Widner v. Wilcox*, 131 Iowa 223, 108 N. W. 238; *Kulp v. Kulp*, 51 Kans. 341, 32 Pac. 1118, 21 L. R. A. 550; *Langford's Admr. v. Gentry*, 7 Ky. 468; *Succession of Dubreuil*, 12 Rob. (La.) 507; *Succession of Linderman*, 3 La. Ann. 714; *Lesieur v. Simon*, 73 Nebr. 645, 103 N. W. 302; *Dekay v. Darrah*, 14 N. J. L. 288; *Thompson v. Hawke*, 54 Hun (N. Y.) 388, 27 N. Y. St. 132, 7 N. Y. S. 490; *Daniel v. Laughlin*, 87 N. Car. 433; *Mitcheltree's Admr. v. Veach*, 31 Pa. St. 455; *Hoskins v. Lindsay*, 1 Del. County Rep. (Pa.) 249; *Anderson v. Bedford*, 44 Tenn. 464; *Swift v. Trotti*, 52 Tex. 498; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. 142. Compare, *Murrell's Admr. v. McAllister*, 79 Ky. 311; *McLellan v. Crofton*, 6 Greenl. (Maine) 307; *Abbott v. McElroy*, 10 Smed. & M. (Miss.) 100; *Jenning v. Love*, 24 Miss. 249; *Appeal of McClintock*, 29 Pa. 360; *In re Kemp's Estate*, 1 Woodw. Dec. (Pa.) 156; *Campbell v. Maple*, 105 Pa. St. 304; *Rose v. Daniel*, 3 Brev. (S. Car.) 438, 2 Tread. Const. 549; *Hapgood v. Southgate*, 21 Vt. 584; *Baylor's Lessee v. Dejarnette*, 13 Grat. (Va.) 152.

after the decease of such person, does not "abbreviate, in any instance, the period of time within which an action might be commenced." While under such section, the ordinary period of limitation may possibly be enlarged, it can in no case be diminished or shortened.²⁵

§ 2669. Meaning of "absence"—"Outside of state."—

Where "absence" from the state, using the word in its most comprehensive sense, has been given the effect of postponing or suspending the running of limitations,²⁶ one of the most important questions to be determined is just what was intended by the use of the word denoting the particular character or phase of "absence" made thus operative. Where the statute provides that if subsequently to the accrual of the cause of action, the defendant "departs from and resides out of the state," the time of his absence shall be excluded in computing limitations, a defendant "must acquire a fixed and permanent abode or dwelling place out of this state, at least for the time being," in order that he may be brought within the meaning of the statute.²⁷ An absence which precludes only a suit against certain property does not meet the requirements of the absence comprehended by the words "out of the state," such phrase having regard to an absence preventive of an action against the defendant personally.²⁸ Further, a person who dies does not thereby become one "out of the state."²⁹ Where there is an absence which prevents such a service of process as will support a general judgment, there is "absence from the state" within the meaning of the statute.³⁰ While it has been declared that the words "beyond seas" are synonymous with "beyond the jurisdiction of the state,"³¹ there are holdings to the effect that such words

²⁵ *Harris v. Rice*, 66 Ind. 267. See also, *Emerick v. Chesrown*, 90 Ind. 47; *Wood v. Bragg*, 75 Minn. 527, 78 N. W. 93.

²⁶ See statutes of the several states.

²⁷ *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117. But see post, notes 35 and 36.

²⁸ *Penley v. Waterhouse*, 1 Iowa 498.

²⁹ *McKim v. Mann*, 141 Mass. 507, 6 N. E. 740.

³⁰ *Rhodes v. Farish*, 16 Mo. App. 430. See also, *Bensley v. Haeberle*, 20 Mo. App. 648; *Gilman v. Cutts*, 23 N. H. 376; *Quarles v. Bickford*, 64 N. H. 425, 13 Atl. 642.

³¹ *Field v. Dickinson*, 3 Ark. 409, 36 Am. Dec. 458; *Keech v. Enriquez*,

refer to an absence beyond the limits of the United States.³² Where the statute provides that "if after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action," it has been held that suspension of the running of the statute can not be predicated alone of either absence from the state or residence outside of its confines.³³ Further, one who having an established residence and home in a certain state is elected to the United States senate is not convicted of "departing from and residing out of the state" by evidence that, without any intention to change his residence, he left his home in the occupancy of his servants, took his family to Washington, and kept house there in rented premises.³⁴ Again, a departure whereby is intended a permanent change of residence is not necessarily contemplated by the words "depart from and reside out of the state,"³⁵ such words having regard to a change of residence which makes impossible the service of process,³⁶ or in other words, the commencement of an action.³⁷ But "the rule that non-

28 Fla. 597, 10 So. 91; Denham v. Holeman, 26 Ga. 182, 71 Am. Dec. 198; Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Pan-coast's Lessee v. Addison, 1 Har. & J. (Md.) 350, 2 Am. Dec. 520; Hurlburt v. Merriam, 3 Mich. 144; Bedford v. Bradford, 8 Mo. 233; Galusha v. Cobleigh, 13 N. H. 79; West v. Pickesimer, 7 Ohio 235 (pt. 2); Bank of Alexandria v. Dyer, 14 Pet. (U. S.) 141, 10 L. ed. 391; Forbes' Admr. v. Foot's Admr., 2 McCord (S. Car.) 331, 13 Am. Dec. 732. See also, Murray's Lessee v. Baker, 3 Wheat. (U. S.) 541, 4 L. ed. 454; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495. Compare, Suckley v. Slade, 5 Cranch (U. S.) C. C. 617, Fed. Cas. No. 13588.

³² Mason v. Johnson, 24 Ill. 159, 76 Am. Dec. 740; Darling v. Meachum, 2 G. Greene (Iowa) 602; Whitney v. Goddard, 20 Pick. (Mass.) 304, 32 Am. Dec. 216; Fackler v. Fackler, 14 Mo. 432; Keeton's Heirs v. Keeton's

Admr., 20 Mo. 530; Earle v. McDowell, 12 N. Car. 16; State v. Harris, 71 N. Car. 174; Gonder v. Estabrook, 33 Pa. 374; Thurston v. Fisher, 9 Serg. & R. (Pa.) 288; Ward v. Hallam, 2 Dall. (U. S.) 217, 1 L. ed. 355, 1 Yeates (Pa.) 329. Compare, Gustin v. Brattle, Kirby (Conn.) 299, in which it is held that "beyond seas" does not comprehend absence at Halifax.

³³ Campbell v. White, 22 Mich. 178. But see, McKensie v. Boylan, 40 Mich. 329.

³⁴ Kerwin v. Sabin, 50 Minn. 320, 52 N. W. 642, 17 L. R. A. 225, 36 Am. St. 645.

³⁵ Johnson v. Smith, 43 Mo. 499.

³⁶ Venuci v. Cademartori, 59 Mo. 352. But see ante, note 27.

³⁷ Blodgett v. Utley, 4 Nebr. 25. See also, Satterthwaite v. Abercrombie, 23 Blatchf. (U. S.) 308, 24 Fed. 543, and compare, Tomes v. Barney, 35 Fed. 112; Hart v. Kip, 148 N. Y. 306, 42 N. E. 712; Barney v. Oel-

residence is absence, and that casual visits to the state do not destroy the continuity of the absence," is not altered by the substitution of the word "and" for the word "or" in a statute reading "departs from and resides without the state, or remains continuously absent therefrom."³⁸ The Supreme Court of Nebraska, however, has declared that "absence and nonresidence are two entirely different things," and holds to the effect that a person is not "absent" from the state when he conducts his business therein, and openly, notoriously and regularly gives his personal attention to it during the working hours of each week-day, and this, although he has established his residence in a foreign state.³⁹ One who closes his city house, stores his furniture, takes his family abroad with the intention of remaining until his son's health improves, and actually does remain abroad until his son dies, three years later, "resides without the state," in the meaning of the statute.⁴⁰ Again, the words "remain continuously absent therefrom for the space of one year or more" contemplate absence from the state during which residence is not established elsewhere.⁴¹

§ 2670. Effect of new promise and part payment.—A limit upon space requires that much which might be said upon the subject of new promise and part payment be omitted. All that can be done is to notice in a general way a few of the salient and commonly accepted facts regarding the same. The general principles having reference to the subject of new promise are well established by the practically uniform current of the more logical opinion and to-day are subject to but very little attack. In the first place,

richs, 138 U. S. 529, 11 Sup. Ct. 414, 34 L. ed. 1037; *Farr v. Durant*, 90 Wis. 341, 63 N. W. 274.

³⁸ *Connecticut Trust & Co. v. Wead*, 172 N. Y. 497, 65 N. E. 261, 92 Am. St. 756.

³⁹ *Webster v. Citizens' Bank*, 2 Nebr. (Unof.) 353, 96 N. W. 118.

⁴⁰ *Bennett v. Watson*, 19 Misc. (N. Y.) 260, 26 Civ. Proc. 128, 44 N. Y. S. 247.

⁴¹ *Paine v. Dodds*, 14 N. Dak. 189,

103 N. W. 931, 116 Am. St. 674. As to whether a statute excluding the time during which the defendant was a nonresident includes one who never was a resident, or was not at the time the cause of action accrued, and whether there is any difference where the statute uses the terms "absent from the state," see *McNamara v. McAllester*, 150 Iowa 243, 130 N. W. 26, Ann. Cas. 1912D, 463 and note.

the new promise must be made by the creditor himself or by his adequately authorized agent. This is fundamental, for if one can not be bound by the promise of a stranger in the first instance, neither can he any more be bound by a subsequent promise for which he is in no manner responsible. Again, the new promise must be made to the creditor in person or to one between whom and the creditor there exists such a privity "that what was said to the former might fairly be presumed to have been meant to reach the ears and influence the course of the latter."⁴² Although, unless otherwise provided by statute, a new promise need not, as a general thing, in order to be effective, be made in keeping with any peculiar form, it must be definite, unequivocal and unambiguous. According to some decisions, "There must be a clear and definite acknowledgment of the debt, a specification of the amount due or a reference to something from which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay."⁴³ Many decisions which seem to be somewhat, but not altogether, in conflict with this holding, rule to the effect that a promise implied from a direct acknowledgment by a debtor that a certain obligation is owing from him will be sufficient to remove the bar of the statute. Even in such case, however, the acknowledgment must be such that the implication of a promise to

⁴² *Whitcomb v. Whiting*, 1 Smith Lead. Cas. 579; *Bachman v. Roller*, 9 Baxt. (Tenn.) 409, 40 Am. Rep. 97. See also, *Cunkle v. Heald*, 6 Mackey (17 D. C.) 485; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Schmucker v. Sibert*, 18 Kans. 104, 26 Am. Rep. 765; *Wakeman v. Sherman*, 9 N. Y. 85, Seld. Notes 160; *Fletcher v. Updike*, 3 Hun (N. Y.) 350, 5 Thomp. & C. 513; *Winterton v. Winterton*, 7 Hun (N. Y.) 230; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *Parker v. Remington*, 15 R. I. 300, 3 Atl. 590, 2 Am. St. 897; *Roller v. Bachman*, 73 Tenn. 153; *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L.

ed. 636. Compare, *Philips v. Peters*, 21 Barb. (N. Y.) 351. See as to promise by one joint debtor as agent for the other, *Elmore v. Training* (85 Kans. 501, 117 Pac. 1019), and note in 38 L. R. A. (N. S.) 685. And see as to promise by principal as extending limitation as to surety, *Clinton County v. Smith* (238 Mo. 118, 141 S. W. 1091), and note in 37 L. R. A. (N. S.) 272.

⁴³ *In re Shaffer's Estate*, 228 Pa. 36, 76 Atl. 716. See also, *Cotulla v. Urbahn* (Tex.), 135 S. W. 1159; *Bell v. Morrison*, 1 Pet. (U. S.) 362, 7 L. ed. 174. A mere expression of hope or expectation is insufficient. Note in 38 L. R. A. (N. S.) 577.

pay will be imperative, or clearly arise.⁴⁴ At all events, the debt must be sufficiently identified,⁴⁵ and a promise to discharge an indefinite indebtedness is nugatory so far as saving a cause of action is concerned. Even if the requirement stops at that point, a basis, at the very least, must be provided by the promise or acknowledgment whereby the amount of the barred debt can be definitely and certainly ascertained.⁴⁶ That the amount may be fixed by the agree-

⁴⁴ "Where acknowledgment alone is relied upon, the expression of the acknowledgment must be clear and unequivocal and made with reference to a particular debt which is subsisting at the time. The acknowledgment must be so clear that a promise to pay must necessarily be implied." *Bank of Montreal v. Guse*, 51 Wash. 365, 98 Pac. 1127. See also, *Worth v. Worth*, 155 Cal. 599, 102 Pac. 663; *Sears v. Howe*, 80 Conn. 414, 68 Atl. 983; *Radigan v. Hughes*, 84 Conn. 137, 79 Atl. 50; *Catholic University v. Waggaman*, 32 App. D. C. 307; *Senninger v. Rowley*, 138 Iowa 617, 116 N. W. 695, 18 L. R. A. (N. S.) 223n; *Marcum's Admx. v. Terry*, 146 Ky. 145, 142 S. W. 209; *Lord v. Jones*, 108 Maine 381, 81 Atl. 169; *Cochrane v. Cott*, 156 Mo. App. 663, 138 S. W. 46; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *In re Farrell's Estate*, 44 Pa. Sup. Ct. 474; *Mowry v. Saunders*, 33 R. I. 45, 80 Atl. 421; *Western Casket Co. v. Estrada* (Tex. Civ. App.), 116 S. W. 113; *Stacy v. Parker* (Tex. Civ. App.), 132 S. W. 532; *Woodsville Guaranty Sav. Bank v. Ricker* (Vt.), 82 Atl. 2. Compare, *Joseph v. Johnson*, 7 Pennewill (Del.) 468, 82 Atl. 30.

⁴⁵ *Boxley v. Gayle*, 19 Ala. 151; *Opp v. Wack*, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743; *Morrell v. Ferrier*, 7 Colo. 22, 1 Pac. 94. But "a general promise or acknowledgment of indebtedness will be taken to relate to the demand in suit; and, wherever a promise or acknowledgment of indebtedness is once proven, the burden shifts to the defendant to show that it relates to some other debt than the one with reference to which the promise presumably was made." *Blackmore v. Neale*, 15 Colo. App.

49, 60 Pac. 952; *Cook v. Martin*, 29 Conn. 63; *Walker v. Griggs*, 32 Ga. 119; *Johnson v. Johnson*, 80 Ga. 260, 5 S. E. 629; *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416; *Bassett v. Noble*, 15 Ill. App. 360; *Norton v. Colby*, 52 Ill. 198; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Stout v. Marshall*, 75 Iowa 498, 39 N. W. 808; *Campbell v. Campbell*, 118 Iowa 131, 91 N. W. 894; *O'Riley v. Finigan*, 9 Kans. App. 889, 58 Pac. 281; *Lehman v. Mahier's Estate*, 34 La. Ann. 319; *Pray v. Garcelon*, 17 Maine 145; *Hardy v. Hardy*, 79 Md. 9, 28 Atl. 887; *Gibson v. Grosvenor*, 4 Gray (Mass.) 606; *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579; *Smith v. Moulton*, 12 Minn. 352 (Gil. 229); *Allen v. Hillman*, 69 Miss. 225, 13 So. 871; *Yarbrough v. Gilland*, 77 Miss. 139, 24 So. 170; *Hodnett v. Gault*, 71 N. Y. S. 831, 64 App. Div. (N. Y.) 163; *Hewes v. Hurff*, 69 N. J. L. 263, 55 Atl. 275; *Hussey v. Kirkman*, 95 N. Car. 63; *Franklin v. Franklin*, 22 Pa. Sup. Ct. 463; *In re Hartranft's Estate*, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. 717; *Ward v. Jack*, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. 744; *Wilcox v. Clarke*, 18 R. I. 324, 27 Atl. 219; *Brailsford v. James*, 3 Strob. (S. Car.) 171; *Mitchell v. Clay*, 8 Tex. 443; *Gruenberg v. Buhring*, 5 Utah 414, 16 Pac. 486; *Young v. Wetzell*, 3 Cranch (U. S.) 359, Fed. Cas. No. 18176; *Prentiss v. Stevens*, 38 Vt. 159; *Cole's Exr. v. Martin*, 99 Va. 223, 37 S. E. 907; *Stafford v. Bryan*, 3 Wend. (N. Y.) 532.

⁴⁶ *Patterson v. Neuer*, 165 Pa. St. 66, 30 Atl. 748. See also, *Chapman v. Barnes*, 93 Ala. 433, 9 So. 589; *Pollak v. Billing*, 131 Ala. 519, 32 So. 639; *In re Lorrillard*, 107 Fed. 677, 46 C. C. A. 553; *In re Lorillard*, 108

ment of the parties or the finding of arbitrators or a jury has been held not sufficient.⁴⁷ Where a conditional or qualified promise or acknowledgment is relied upon, the plaintiff must, in general, establish the fact that there has been a fulfilment of the condition, happening of the contingency or occurrence of the event, as the case may be.⁴⁸ Further, the gen-

Fed. 591, 47 C. C. A. 511; Neustacher v. Schmidt, 25 Ill. App. 626; Neish v. Gannon, 198 Ill. 219, 64 N. E. 1000; Nelson v. Hanson, 92 Iowa 356, 60 N. W. 655, 54 Am. St. 568; Mitchell v. Sellman, 5 Md. 376; Shaw v. Lambert, 14 App. Div. (N. Y.) 265, 43 N. Y. S. 470; Sherrod v. Bennett, 30 N. Car. 309; Moore v. Hyman, 35 N. Car. 272; McBride v. Gray, 44 N. Car. 420; Long v. Jameson, 46 N. Car. 476; Faison v. Bowden, 76 N. Car. 425; Beal v. Adams Exp. Co., 13 Pa. Super. Ct. 143; Huff v. Richardson, 19 Pa. St. 388; In re Gordon's Estate, 3 Pa. Co. Ct. 160; Williamson v. King, 2 McMul. (S. Car.) 505; Cook v. Ashe, Riley (S. Car.) 246; Leigh v. Linthecum, 30 Tex. 100; Liskey v. Paul, 100 Va. 764, 42 S. E. 875; Silberman v. Gurensky, 27 Wash. 410, 67 Pac. 998; Quarrier's Admr. v. Quarrier's Heirs, 36 W. Va. 310, 15 S. E. 154; Holley's Exr. v. Curry, 58 W. Va. 70, 51 S. E. 135, 112 Am. St. 944; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174. And compare, Conway's Exr. v. Reyburn's Exrs., 22 Ark. 290; Lord v. Harvey, 3 Conn. 370; First Nat. Bank v. Woodman, 93 Iowa 668, 62 N. W. 28, 57 Am. St. 287; Turner v. Ellicott, 9 Md. 52; Dinsmore v. Dinsmore, 21 Me. 433; Wright v. Parmenter, 23 Misc. (N. Y.) 629, 52 N. Y. S. 99; Hart v. Boyt, 54 Miss. 547; Eastman v. Walker, 6 N. H. 367; Hazlebacker v. Reeves, 12 Pa. 264; Davis v. Steiner, 14 Pa. 275, 53 Am. Dec. 547; Thompson v. French, 18 Tenn. 452; Hale v. Hale, 23 Tenn. 183.

⁴⁷ *McRae v. Leary*, 46 N. Car. 91.
⁴⁸ *Richardson v. Bricker*, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; *Tridell v. Munhall*, 124 Fed. 802; *Bullock v. Smith*, 15 Ga. 395; *Boone v. A'Hern*, 98 Ill. App. 610; *Mullett v. Shrumph*, 27 Ill. 107; *Parsons v. Northern Illinois Coal & Co.*, 38 Ill. 430; *Hanson v. Towle*, 19 Kans. 273; *Seaward v. Lord*, 1 Greenl. (Maine) 163, 10

Am. Dec. 50; *Mattocks v. Chadwick*, 71 Maine 313; *Guy v. Tams*, 6 Gill (Md.) 82; *Oliver v. Gray*, 1 Har. & G. (Md.) 204; *Robbins v. Otis*, 3 Pick. (Mass.) 4; *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361; *Bidwell v. Rogers*, 10 Allen (Mass.) 438; *McNab v. Stewart*, 12 Gil. (Minn.) 291; *Thyng v. Hussey* (N. H.), 79 Atl. 690; *Betton v. Cutts*, 11 N. H. 170; *Manning v. Wheeler*, 13 N. H. 486; *Stowell v. Fowler*, 59 N. H. 585; *New York Fire Ins. Co. v. Tooker*, 4 N. J. L. 334; *Parker v. Butterworth*, 46 N. J. L. 244, 50 Am. Rep. 407; *Francis v. Rycroft*, 148 App. Div. (N. Y.) 65, 132 N. Y. S. 14; *Howe v. Welch*, 2 How. Pr. (N. S.) (N. Y.) 507, revd. 17 Abb. N. Cas. (N. Y.) 397, 11 Civ. Proc. (N. Y.) 44, 14 Daly (N. Y.) 80, 3 How. Pr. (N. S.) (N. Y.) 465; *Watkins v. Stevens*, 4 Barb. (N. Y.) 168; *Sherman v. Wakeman*, 11 Barb. (N. Y.) 254, revd. 9 N. Y. 85; *Allen v. Trisworfer*, 11 N. Y. St. 674, revd. 15 Daly (N. Y.) 1, 14 N. Y. St. 694, 25 N. Y. St. 754, 4 N. Y. S. 896; *Bates v. Herren*, 95 N. Car. 388; *Laforge v. Jayne*, 9 Pa. St. 410; *Keenan v. Keenan*, 20 R. I. 105, 37 Atl. 632; *Shaw v. Newell*, 1 R. I. 488; *Sweet v. Franklin*, 7 R. I. 355; *Johnson v. Bounethea*, 3 Hill (S. Car.) 15, *Riley (S. Car.)* 9, 30 Am. Dec. 347; *Brown v. Joyner*, 1 Rich. L. (S. Car.) 210; *Shown v. Hawkins*, 85 Tenn. 214, 2 S. W. 34; *Luna v. Edmiston*, 37 Tenn. 159; *Vernor v. Sullivan* (Tex. Civ. App.), 126 S. W. 641; *Lange v. Carothers*, 70 Tex. 718, 8 S. W. 604; *Mitchell v. Clay*, 8 Tex. 443; *Bell v. Morrison*, 1 Pet. (U. S.) 351, 7 L. ed. 174; *Read v. Wilkinson*, 2 Wash. (U. S.) 514, Fed. Cas. No. 11611; *Cummings v. Gasset*, 19 Vt. 308; *Hill v. Kendall*, 25 Vt. 528; *Hayden v. Johnson*, 26 Vt. 768; *Steele v. Towne*, 28 Vt. 771; *Farmers' Bank v. Clark*, 4 Leigh. (Va.) 603. Compare, *Love v. Hackett*, 6 Ga. 486; *Beasley v.*

eral rule seems to be that a new promise sufficient to remove the bar of limitations can not be predicated of an offer to compromise.⁴⁹ Moreover, adopting the requirement of Lord Tenterden's Act,⁵⁰ many of the states in the Union have now made it necessary for a new promise or acknowledgment to be in writing and signed by the party to be charged.⁵¹ As regards the antidotal circumstance of part payment, there is much the same strictness in the matter of the persons by whom and to whom such payment is made and the identification of the same with the debt owing, as there is in the case of a new promise or acknowledgment.⁵² Further, it is only a "conscious and voluntary" payment by the debtor which operates to remove the bar of limitations; one that is coerced or by any other means rendered involuntary is altogether ineffective.⁵³

Evans, 35 Miss. 192; *Stacy v. Parker*, (Tex. Civ. App.), 132 S. W. 532; *Davis v. Van Zandt*, Fed. Cas. No. 3656; *In re Cornwall*, Fed. Cas. No. 3250.

⁴⁹ *Pool's Exr. v. Relfe*, 23 Ala. 701; *Duffie v. Phillips*, 31 Ala. 571; *Pearson v. Darrington*, 32 Ala. 227; *Curtis v. Sacramento*, 70 Cal. 412, 11 Pac. 748; *Edwards v. Bates County*, 55 Fed. 436, revd. 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. 967; *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280; *Hicks v. Thomas*, Dud. (Ga.) 218; *Morehead v. Gallinger*, 9 Iowa 519; *Brenneman v. Edwards*, 55 Iowa 374, 7 N. W. 621; *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Weston v. Hodgkins*, 136 Mass. 326; *Carr v. Carr*, 138 Mich. 396, 101 N. W. 550; *Whitney v. Reese*, 11 Gil. (Minn.) 87; *Chambers v. Rubey*, 47 Mo. 99, 4 Am. Rep. 318; *Moorar v. Moorar*, 69 N. H. 643, 46 Atl. 1052; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Creuse v. Defiganieri*, 23 N. Y. Super. Ct. 122; *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288; *Wolfe v. Fleming*, 23 N. Car. 290; *Cohen v. Aubin*, 2 Bailey (S. Car.) 283; *Allcock v. Ewen*, 2 Hill (S. Car.) 326; *Broddie v. Johnson*, 33 Tenn. 464; *Reynolds Iron Works v. Mitchell* (Tex. Civ. App.), 27 S. W. 508; *Surghenor v. Ayers* (Tex. Civ. App.), 139 S. W. 28; *Goldstein v. Gans* (Tex. Civ. App.),

32 S. W. 185; *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636, 5 Sup. Ct. 56; *Bank of Columbia v. Sweeny*, 3 Cranch (U. S.) 293, Fed. Cas. No. 882; *Neil v. Abbott*, 2 Cranch (U. S.) 193, Fed. Cas. No. 10088; *Ash v. Hayman*, 2 Cranch (U. S.) 452, Fed. Cas. No. 572; *Cross v. Conner*, 14 Vt. 394; *Slack v. Norwick*, 32 Vt. 818. Compare *Rhodes v. Hadfield*, 2 Cranch (U. S.) 566, Fed. Cas. No. 11748. See also, *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Foster v. Smith*, 52 Conn. 449; *Kelly v. Leachman*, 3 Idaho (Hasb.) 629, 33 Pac. 44, affd. 3 Idaho 672, 34 Pac. 813; *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149; *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896; *Lackey v. Macmurdo*, 9 La. Ann. 15; *Walker v. Cruikshank*, 23 La. Ann. 252; *Kohn v. Davidson*, 23 La. Ann. 467; *Brookes v. Chesley*, 4 Gill (Md.) 205; *Royster v. Farrell*, 115 N. Car. 306, 20 S. E. 475; *Gest v. Heiskill*, 5 Rawle (Pa.) 134; *McDonald v. Grey*, 29 Tex. 80; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483. See note in 37 L. R. A. (N. S.) 885.

⁵⁰ Statute 9, George 4, ch. 14, § 1.

⁵¹ See statutes of the several states.

⁵² See ante this section.

⁵³ *Thomas v. Brewer*, 55 Iowa 227, 7 N. W. 571. See also, *Barrett v. Shipp* (Ind. App.), 98 N. E. 310; *Blair*

§ 2671. **Concluding observations—Commencement of action—Limitations against sovereignty.**—Manifestly, where the statute provides that an action shall be barred unless brought within a designated time, the bona fide bringing of an action by the party entitled thereto, against the party liable therein, upon the particular subject-matter in dispute between such individuals, stops the running of limitations. Upon the questions, however, of what constitutes the beginning of suit, or whether the right must be reduced to judgment and of the effect of a second action being necessary, the law can not be formulated into general rules and resort must be had to the several statutes and the specific cases decided thereunder.^{53a} That the United States is immune from limitations,⁵⁴ where the suit is not brought in behalf and to further the interests of private individuals,⁵⁵ and the federal congress has not provided otherwise, admits of no doubt.⁵⁶ So, also, it seems almost equally well settled that where the legislature of a state has not expressly de-

v. Lynch, 105 N. Y. 636, 11 N. E. 947, 1 Silvernail Ct. App. (N. Y.) 439; Kilton v. Providence Tool Co., 22 R. I. 605, 48 Atl. 1039; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271. And compare, Peabody v. Tenney, 18 R. I. 498, 30 Atl. 456.

^{53a} As to the difference in effect of new pleadings when they state a new cause of action and when they are merely amendments, see note to Missouri, K. & T. R. Co. v. Bagley, (65 Kans. 188, 69 Pac. 189), in 3 L. R. A. (N. S.) 257; also Ruiz v. Santa Barbara Gas & Co. (Cal.), 128 Pac. 330; Gilbert v. Gilbert (Minn.), 138 N. W. 943.

⁵⁴ Swan v. Lindsey, 70 Ala. 507; McNamee v. United States, 11 Ark. 148; United States v. Devereux, 90 Fed. 182, 32 C. C. A. 564; United States v. Belknap, 73 Fed. 19; Booth v. United States, 11 Gill & J. (Md.) 373; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Parmilee v. McNutt, 1 Sm. & M. (Miss.) 179; Parks v. State, 7 Mo. 194; United States v. White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374; Ohio State University v. Satterfield, 2 Ohio C. C. 86, 1 Ohio

C. D. 377; Ohio State University v. Ayer, 10 Ohio Dec. 125; Harlock v. Jackson, 3 Brev. (S. Car.) 254, 1 Tread. Const. (S. Car.) 135; Wilson v. Hudson, 16 Tenn. 398; United States v. Nashville, C. & St. L. R. Co., 118 U. S. 120, 30 L. ed. 81, 6 Sup. Ct. 1006; United States v. Insley, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. 485; United States v. Southern Colorado Coal & Town Co., 5 McCrary (U. S.) 563, 18 Fed. 273, revd. 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. 131; Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Lindsey v. Miller's Lessee, 6 Pet. (U. S.) 666, 8 L. ed. 538; United States v. Alexandria, 4 Hughes (U. S.) 545, 19 Fed. 609. Compare, Stanley v. Schwalby, 85 Tex. 348, 19 S. W. 264, revd. 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. 418.

⁵⁵ United States v. Des Moines Val. R. Co., 70 Fed. 435; Curtner v. United States, 149 U. S. 662, 37 L. ed. 890, 13 Sup. Ct. 985.

⁵⁶ San Francisco Sav. Union v. Irwin, 28 Fed. 708, aff'd. 136 U. S. 578, 34 L. ed. 540, 10 Sup. Ct. 1064.

clared as much,⁵⁷ or the mischiefs to be remedied are not of such a nature that the state must necessarily be included,⁵⁸ or the state is not merely the nominal plaintiff, limitations will not run against the commonwealth.⁵⁹ Although it has been declared that "limitation does not run against a county to recover public money wrongfully withheld by one of its fiducial agents,"⁶⁰ and indicated that a suit brought by the county in its "delegated sovereign capacity" will not be affected by the statute,⁶¹

⁵⁷ *Swann v. Lindsey*, 70 Ala. 507; *State v. School Dist. No. 3*, 34 Kans. 237, 8 Pac. 208; *Hardin v. Taylor*, 4 T. B. Mon. (Ky.) 516; *Booth v. United States*, 11 Gill & J. (Md.) 373; *Josselyn v. Stone*, 28 Miss. 753; *Parks v. State*, 7 Mo. 194; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *Commonwealth v. Johnson*, 6 Pa. St. 136; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521, 94 Am. Dec. 123; *Harlock v. Jackson*, 3 Brev. (S. Car.) 254, 1 Tread. Const. (S. Car.) 135; *Wilson v. Hudson*, 16 Tenn. 398; *Governor v. Allbright*, 21 Tex. 753; *Lindsey v. Miller's Lessee*, 6 Pet. (U. S.) 666, 8 L. ed. 538; *State Treasurer v. Weeks*, 4 Vt. 215; *Catlett v. People*, 151 Ill. 16, 37 N. E. 855; *State v. St. Joseph County*, 90 Ind. 359; *Jackson County v. State*, 106 Ind. 270, 6 N. E. 623; *Des Moines County v. Harker*, 34 Iowa 84; *Bardstown & L. Turnpike Co. v. Commonwealth*, 3 Ky. L. (abstract) 623; *Lesassier v. Board of Liquidation*, 30 La. Ann. 611; *Succession of Zacharie*, 30 La. Ann. 1260; *Reed v. Creditors*, 39 La. Ann. 115, 1 So. 784; *State v. New Orleans Debenture Redemption Co.*, 112 La. 1, 36 So. 205; *State v. Piland*, 81 Mo. 519; *Blazier v. Johnson*, 11 Nebr. 404, 9 N. W. 543; *Hagerman v. Territory*, 11 N. Mex. 156, 66 Pac. 526; *Wastenev v. Schott*, 58 Ohio St. 410, 51 N. E. 34; *State v. Lake Shore & Mich. S. R. Co.*, 1 Ohio N. P. 292, 2 Ohio S. & C. P. Dec. 300; *Haehnlen v. Commonwealth*, 13 Pa. St. 617, 53 Am. Dec. 502; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248; *Delta County v. Blackburn*, 100 Tex. 51, 93 S. W. 419; *State v. Brookover*, 38 Va. 476. See also, *Calloway v. Cossart*, 45 Ark. 81; *Comrs. of Sink-*

ing Fund v. Buckner, 48 Fed. 533; *Commonwealth v. Lexington*, 6 Ky. L. (abstract) 520; *Straus v. Commonwealth*, 1 Duv. (Ky.) 149; *Money v. Miller*, 13 Sm. & M. (Miss.) 531; *Brown v. Issaquena County*, 54 Miss. 230; *State v. Pratte*, 8 Mo. 286, 40 Am. Dec. 140; *State v. Finn*, 102 Mo. 222, 14 S. W. 984; *State v. Yellow-jacket Silver Min. Co.*, 14 Nev. 220; *People v. Clarke*, 9 N. Y. 349, *Seld. Notes* (N. Y.) 207; *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189, *revd.* 9 N. Y. 291, *Seld. Notes* (N. Y.) 206; *State v. Bingham*, 14 Ohio C. C. 245, 7 Ohio C. D. 522; *Jamison v. Rumph*, 2 Mill. Const. (S. Car.) 206; *Coleman v. Thurmond*, 56 Tex. 514. Compare, *State v. Purcell's Exr.*, 16 Tex. 305; *State v. City & County of Milwaukee* (Wis.), 138 N. W. 1006.

⁵⁸ *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 20 L. ed. 534.

⁵⁹ *Miller v. State*, 38 Ala. 600; *Molton v. Henderson*, 62 Ala. 426; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Luder's Admr. v. State* (Tex. Civ. App.), 152 S. W. 220; *Wood on Limitations* (3d ed.) § 52. As to how far this rule applies to various agencies of the state, see *Eastern State Hospital v. Winston* (Va.), 52 S. E. 837, 3 L. R. A. (N. S.) 746, and cases reviewed in opinion and note; also note in 22 L. R. A. (N. S.) 921.

⁶⁰ *Fremont County v. Brandon*, 6 Idaho 482, 56 Pac. 264 (syllabus by court). See also, *Pike County v. Cadwell*, 78 Ill. App. 201.

⁶¹ *Shelby County v. Bickford*, 102 Tenn. 395, 52 S. W. 772. See also, *Anderson v. Ritterbusch* (Okla.), 98 Pac. 1002.

the courts have generally taken the position that where the legislature has not expressly spoken to the contrary,⁶² a county is amenable to limitations.⁶³ But when municipal corporations represent the public at large or are seeking to enforce rights pertaining to sovereignty,⁶⁴ it seems that the weight of authority supports the proposition that they are exempt from the operation of the statute. There are cases, however, which in respect to the bar of limitations place municipalities on the same footing as natural individuals,⁶⁵

⁶² *Ward v. Marion County*, 26 Tex. Civ. App. 361, 62 S. W. 557, 63 S. W. 155.

⁶³ *Perry County v. Selma & C. R. Co.*, 58 Ala. 546; *Ouachita County v. Tufts*, 43 Ark. 136; *San Francisco v. Suning*, 73 Cal. 610, 15 Pac. 311; *San Luis Obispo County v. Gage*, 139 Cal. 398, 73 Pac. 174; *San Francisco v. Jones*, 20 Fed. 188; *Bannock County v. Bell*, 8 Idaho 1, 65 Pac. 710, 101 Am. St. 140; *Bedford v. Willard*, 133 Ind. 562, 33 N. E. 368, 36 Am. St. 563; *Bedford v. Green*, 133 Ind. 700, 33 N. E. 369; *Dearborn County v. Lods*, 9 Ind. App. 369, 36 N. E. 772; *Brown v. Painter*, 44 Iowa 368; *Chamberlain v. Lawrence County*, 71 Miss. 949, 15 So. 40; *St. Charles County v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *People v. Miller*, 181 N. Y. 439, 74 N. E. 477; *Armstrong v. Dalton*, 15 N. Car. 568; *Houston & T. C. R. Co. v. Travis County*, 62 Tex. 16; *Link v. Murphy*, 2 Willson Civ. Cas. Ct. App. (Tex.) § 13; *McDonnell v. Callahan County*, 3 Tex. Civ. App. 138, 22 S. W. 981. Compare, *People v. Van Rensselaer*, 8 Barb. (N. Y.) 189, revd. 9 N. Y. 291, Seld. Notes (N. Y.) 206; *Coleman v. Thurmond*, 56 Tex. 514; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 68 L. R. A. 264, 106 Am. St. 890.

⁶⁴ *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161; *Mcartney v. People*, 202 Ill. 51, 66 N. E. 873; *Pew v. Litchfield*, 115 Ill. App. 13; *Greenwood v. La Salle*, 137 Ill. 225, 26 N. E. 1089; *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 749; *Trustees of Male High School v. Auditor*, 80 Ky. 336, 4 Ky. L. 34; *Williams v. St. Louis*, 120 Mo. 403, 25 S. W. 561; *Wilmington v. Cronly*, 122 N. Car. 383, 30 S. E. 9; *Kuhn v. Cleveland*,

25 Ohio C. C. 272; *Magee v. Commonwealth*, 46 Pa. St. 358; *Sewickley v. Watson*, 26 Pittsburgh L. J. (O. S.) 109; *In re Gay St.*, 6 Pa. Co. Ct. 187; *Memphis v. Looney*, 9 Baxt. (Tenn.) 130; *Hogan v. Ingle*, Fed. Cas. No. 6583, 2 Cranch (U. S.) 352; *Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary (U. S.) 158, 16 Fed. 350. See also, 2 Elliott Roads & Sts. (3d ed.) § 1187 et seq. Compare, *Commissioners of Sinking Fund v. Buckner*, 48 Fed. 533; *Burlington v. Burlington & M. R. R. Co.*, 41 Iowa 434; *St. Paul v. Chicago, M. & St. P. R. Co.*, 45 Minn. 387, 48 N. W. 17; *St. Paul M. & M. R. Co. v. Minneapolis*, 45 Minn. 400, 48 N. W. 22; *Callaway County v. Nolley*, 31 Mo. 393; *Jefferson v. Whipple*, 71 Mo. 519; *Galveston v. Menard*, 23 Tex. 349. "The principle, that the sovereign power of a state is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This rule is sometimes of odious application; but it is adopted as incidental to sovereignty, and necessary to preserve against negligence or cupidity, those rights which the state has acquired or retained. This immunity, however, seems to be an attribute of sovereignty only. No case is found in the books, which exempts any other description of person, whether natural or artificial, from the operations of the laws; and none of the reasons for the exemption apply with much force to municipal corporations." *Cincinnati v. First Presbyterian Church*, 8 Ohio 298, 32 Am. Dec. 718, and note.

⁶⁵ *Lane v. Kennedy*, 13 Ohio St. 42.

unless the rights of such artificial persons are expressly saved in the statute.⁶⁶

§ 2672. **Pleading statute as defense.**—In general, where the bar of limitations is counted upon as a defense, such bar must be pleaded,⁶⁷ except, perhaps, where it affirma-

See also, *Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Helena v. Hornor*, 58 Ark. 151, 23 S. W. 966; *District of Columbia v. Johnson*, 3 Mackey (D. C.) 120; *Ft. Scott v. Schulenberg*, 22 Kans. 648; *St. Louis v. Newman*, 45 Mo. 138; *Foxworthy v. Hastings*, 23 Nebr. 772, 37 N. W. 657; *In re Beck St.*, 19 Misc. (N. Y.) 571, 44 N. Y. S. 1087; *Hartman v. Hunter*, 56 Ohio St. 175, 46 N. E. 577; *Cole v. Economy Tp.*, 13 Pa. Co. Ct. 549; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. 19; *Washington & G. R. Co. v. District of Columbia*, 136 U. S. 653, 34 L. ed. 549, 10 Sup. Ct. 1075; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. 834.

⁶⁶ *Mellinger v. Houston*, 68 Tex. 36, 3 S. W. 249; *Forsyth v. Wheeling*, 19 W. Va. 318; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802.

⁶⁷ *Espy v. Comer*, 76 Ala. 501; *Garrison v. Hawkins Lumber Co.*, 111 Ala. 308, 20 So. 427; *Shirey v. Clark*, 72 Ark. 539, 81 S. W. 1057; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002; *Towle v. Sweeney*, 2 Cal. App. 29, 83 Pac. 74; *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Hallett v. New England Roller Grate Co.*, 119 Fed. 873, 56 C. C. A. 403; *Parker v. Irvin*, 47 Ga. 405; *Milner v. Neel*, 114 Ga. 118, 39 S. E. 890; *Peel v. Bryson*, 72 Ga. 331; *Chicago City R. Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029; *Wall v. Chesapeake & O. R. Co.*, 200 Ill. 66, 65 N. E. 632; *Kreiling v. Northrup*, 215 Ill. 195, 74 N. E. 123; *Jockisch v. Hardtke*, 50 Ill. App. 202; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844; *Sleeth v. Murphy*, *Morris* (Iowa) 321, 41 Am. Dec. 232; *Borghart v. Cedar Rapids*,

126 Iowa 313, 101 N. W. 1120, 68 L. R. A. 306; *Belken v. Iowa Falls*, 122 Iowa 430, 98 N. W. 296; *Welch v. McGrath*, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638; *Brush v. Peterson*, 54 Iowa 243, 6 N. W. 287; *Croan v. Baden*, 73 Kans. 364, 85 Pac. 532; *Baker v. Sears*, 2 Kans. App. 617, 42 Pac. 501; *Hayden v. Stone*, 1 Duv. (Ky.) 396; *Otter View Land Co.'s Receiver v. Bolling's Exrx.*, 24 Ky. L. 1157, 70 S. W. 834; *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539; *Ware v. Webb*, 32 Maine 41; *Blendel v. Strobel*, 25 Md. 395; *Banon v. Lloyd*, 64 Md. 48, 20 Atl. 103; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. 513; *Bellows v. Butler*, 127 Mich. 100, 86 N. W. 533, 8 D. L. N. E. 252; *Davenport v. Short*, 17 Minn. 24; *Savage v. Madelia Farmers' Warehouse Co.*, 98 Minn. 343, 108 N. W. 296; *Anderson v. McNeal*, 82 Miss. 542, 34 So. 1; *Whiteside v. Magruder*, 75 Mo. App. 364; *Boyce v. Christy*, 47 Mo. 70; *Alexander v. Meyers*, 33 Nebr. 773, 51 N. W. 140; *Atchison & N. R. Co. v. Miller*, 16 Nebr. 661, 21 N. W. 451; *Dufrene v. Anderson*, 67 Nebr. 136, 93 N. W. 139; *Clinton v. Eddy*, 54 Barb. (N. Y.) 54, 37 How. Pr. (N. Y.) 23; *West Hoboken v. Symms*, 49 N. J. L. 546, 9 Atl. 780; *Albertson v. Terry*, 109 N. Car. 8, 13 S. E. 713; *Battery Park Bank v. Loughran*, 122 N. Car. 668, 30 S. E. 17; *Cone v. Hyatt*, 132 N. Car. 810, 44 S. E. 678; *Catterlund v. Beal*, 12 N. Dak. 122, 95 N. W. 518; *Towsley v. Moore*, 30 Ohio St. 184, 27 Am. Rep. 434; *Heath v. Page*, 48 Pa. 130; *White v. Eddy*, 19 R. I. 108, 31 Atl. 823; *Jones v. Massey*, 9 S. Car. 376; *German Bank v. Haller*, 103 Tenn. 73, 52 S. W. 288; *Merriman v. Canavan*, 9 Baxt. (Tenn.) 93; *Bangs v. Crebbin*, 29 Tex. Civ. App. 385, 69 S. W. 441; *Sanger v. Nightingale*, 122 U. S. 176, 30 L. ed. 1105, 7 Sup. Ct. 1109; *Brown v. Jones*, 2 Gall. (U.

tively appears on the face of the complaint that the time within which the action might have been brought has expired.⁶⁸ In such cases if it appears on the face of the complaint that the time has expired and that the plaintiff was not under disability or within any of the exceptions, advantage of the statute may be taken by demurrer.⁶⁹

S.) 477, Fed. Cas. No. 2017; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160; *Stehn v. Hayssen*, 124 Wis. 583, 102 N. W. 1074; *Malloy v. Chicago &c. R. Co.*, 109 Wis. 29, 85 N. W. 130; *Ward v. Walters*, 63 Wis. 39, 22 N. W. 844; *Lockhart v. Fessenich*, 58 Wis. 588, 17 N. W. 302. Compare, *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996; *Zane v. Zane*, 5 Kans. 134; *Bromwell v. Schubert*, 139 Ill. 424, 28 N. E. 1057; *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174; *Gilbert v. Hewetson*, 79 Minn. 326, 82 N. W. 655, 79 Am. St. 486; *Gilbert v. Gilbert* (Minn.) 138 N. W. 943; *Eayrs v. Nason*, 54 Nebr. 143, 74 N. W. 408; *Taylor v. Parker*, 137 N. Car. 418, 49 S. E. 921; *In re De Haven's Estate*, 25 Pa. Super. Ct. 507; *Boyd v. Ghent*, 95 Tex. 46, 64 S. W. 929; *Reynolds v. Lansford*, 16 Tex. 286; *Finn v. United States*, 123 U. S. 227, 31 L. ed. 128, 8 Super. Ct. 82, 23 Ct. Cl. (U. S.) 486; *Fullerton v. Bailey*, 17 Utah 85, 53 Pac. 1020.

⁶⁸ *Sims v. Canfield*, 2 Ala. 555; *Walter v. Merced Academy Assn.*,

126 Cal. 582, 59 Pac. 136; *Cameron v. San Francisco*, 68 Cal. 390, 9 Pac. 430; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Harper v. Terry*, 70 Ind. 264; *Devor v. Rerick*, 87 Ind. 337; *Chellis v. Coble*, 37 Kans. 558, 15 Pac. 505; *Mitchell v. Ripley*, 5 Kans. App. 818, 49 Pac. 153; *Parker v. Berry*, 12 Kans. 351; *Board v. Jolly*, 68 Ky. 86; *Stillwell v. Leavy*, 84 Ky. 379, 8 Ky. L. 321, 1 S. W. 590; *Blue v. Hoke*, 2 Ohio Dec. 440; *Davis v. Davis*, 20 Ore. 78, 25 Pac. 140; *Scott v. Christenson*, 46 Ore. 417, 80 Pac. 731. Compare, *Rich v. Bray*, 37 Fed. 273, 2 L. R. A. 225; *Hardwick v. Ickler*, 71 Minn. 25, 73 N. W. 519; *Schmitt v. Hager*, 88 Minn. 413, 93 N. W. 110; *Eayrs v. Nason*, 54 Nebr. 143, 74 N. W. 408; *Irvin v. Garretson*, 1 Cin. Sup. Ct. R. (Ohio) 533; *McKinney v. McKinney*, 8 Ohio St. 423; *Bay View Brwg. Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553.

⁶⁹ *Fay v. Costa*, 2 Cal. App. 241, 83 Pac. 275; *Briscoe v. Johnson*, 73 Ind. 573; *French v. Bowling*, 27 Ky. L. 639, 85 S. W. 1182.

CHAPTER LVI.

REMEDIES FOR INTERFERENCE BY THIRD PERSONS.

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|--------------------------------------------------------------|--------------------------------------------------------------------|
| § 2685. Generally. | § 2694. Unlawfulness of interference as dependent upon means used. |
| 2686. Inducing breach of contract by servant. | 2695. Interference by combination or conspiracy. |
| 2687. A review of certain fundamental English cases. | 2696. Interference by voluntary association of dealers. |
| 2688. Inducing breach of contracts of employment generally. | 2697. Strikes. |
| 2689. Inducing breach of contracts other than of employment. | 2698. Boycotts. |
| 2690. Wrongfully preventing performance of contract. | 2699. Blacklists. |
| 2691. Interference with the formation of future contract. | 2700. Injunctive relief. |
| 2692. Malice as an element of the right of action. | 2701. Measure of damages. |
| 2693. Contract terminable at will of one party. | 2702. Criminal liability. |
| | 2703. Justification—Interference for which there is no remedy. |

§ 2685. **Generally.**—As between the parties, a contract creates a right in personam, and the discussion in this work is almost wholly concerning the rights in personam created between the parties to a contract. But when parties enter into a contract, there is created to a certain degree a right in rem, against all the world, such that strangers to the contract owe to the parties the duty not to interfere with its performance.¹ A violation of this duty is a tort, and the remedy for such interference is generally by an action in tort. Though the subject is discussed in this chapter primarily from the standpoint of remedy, yet, as the subject itself is one of tort, and the remedy is entirely that of tort, it will not be amiss to go somewhat fully into the substantive law underlying the remedy. Interference by third parties with contract relations is a subject of comparatively recent consideration in the field of law, and one in which many of the principles are not well settled. The prediction of Mitchell, J., in 1893, that the

¹ See § 1410.

subject is "likely to be one of the most important and difficult which will confront the courts during the next quarter of a century,"² has so far been abundantly realized, and is, it seems, equally as applicable today as when first uttered. In the past few years there have been handed down many carefully prepared and exhaustive opinions dealing with cases concerning one or another phase of the present title, and yet there is very great disagreement among the authorities. However, in spite of disagreement, the tendency of the courts is to increase the duty of a third person to respect the rights of contracting parties to carry out their contract, and to grant a remedy to the party injured by the interference of a third person with his contracts, when formerly the law would have held such interference to be *damnum absque injuria*. Yet, in another direction, the law today allows much more freedom of combination than in former times, and now upholds combinations of persons which would formerly have been held illegal. The development of law on this subject began with the old common-law actions for enticing away a servant, and the English laborers' statute; in recent years it has been much expanded by reason of the growth of labor combinations; and has lately been largely extended in cases where there was no combination or conspiracy. There may be a difference in the rule of law applicable where the interference is by an individual as opposed to interference by a combination or conspiracy of persons; where the interference is with an existing contract as distinguished from interference with the right to make a future contract; where the interference is by inducing a party not to perform, or by making it impossible for him to perform; where the act was done with a malicious intent to injure, or without such intent. In some cases the injured party is entitled to an injunction restraining the third party from interference; in other cases the interfering person may be liable criminally. And various elements may enter into the measure of dam-

² *Bohn Mfg. Co. v. Hollis*, 54 Minn. 21 L. R. A. 337.
223, 55 N. W. 1119, 40 Am. St. 319,

ages. These phases of the general subject will be treated in the succeeding sections.

§ 2686. **Inducing breach of contract by servant.**—The rule seems settled that, where there is a valid contract of employment as servant or apprentice in actual service, the person who, with knowledge of the contract, induces the servant to break it is liable to the master for the damages proximately caused.³ It is usually held that the proper form of action for enticement of a servant is an action on the case,⁴ though sometimes trespass will lie,⁵ and it has been held that the master may waive the tort and bring an action in assumpsit for work and labor.⁶ If the servant has already satisfied the master, no action lies against the third party.⁷ The older cases relate mainly to contracts between a master and a personal or domestic servant, and are of present interest chiefly because the same principle has often been applied recently to the inducing of the breach of his contract by a workman or mechanic, in cases where the action has been brought by the employer against the third person who caused the breach of contract.

³ See cases cited in note 25, § 1410. See *Martin Labor Union*, § 207; 3 Bl. Comm. (Cooley's 4th ed.) 142; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. 367. See *Jackson v. Morgan* (Ind. App.), 94 N. E. 1021; *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 97 Miss. 148, 52 So. 454, 29 L. R. A. (N. S.) 869n; *Jones v. Maher*, 62 Misc. (N. Y.) 388, 116 N. Y. S. 180. See also, *Lumley v. Gye*, 2 El. & Bl. 216; *Perkins v. Pendleton*, 90 Maine 166, 38 Atl. 96, 60 Am. St. 252; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Haskins v. Royster*, 70 N. Car. 601, 16 Am. Rep. 780; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Am. & Eng. Ann. Cas. 885; note in 5 L. R. A. (N. S.) 1094. Some decisions base the right of a master to sue for the enticement of his servant upon the Statute of Laborers, 23 Edw. III.

See *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. 137, and *Jackson v. Morgan* (Ind. App.), 94 N. E. 1020. However, it seems that this doctrine originated at common law. *Brooke's Abr.*, title Laborers, pl. 21; *Walker v. Cronin*, 107 Mass. 555.

⁴ *Brooke Abr.*, title Laborers, pl. 21; *Queen v. Daniell*, 6 Mod. 99, 1 Salk. 380; *Regina v. Collingwood*, 2 Ld. Raym. 1116.

⁵ *Year Book*, Mich. 11, Hen. IV, (a) fol. 23, a, pl. 46; *Regina v. Collingwood*, 2 Ld. Raym. 1116; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, and note.

⁶ *Foster v. Stewart*, 3 Maule & S. 191; *Lightly v. Clouston*, 1 Taunt. 112; *Munsey v. Goodwin*, 3 N. H. 272. *Contra Huff v. Watkins*, 20 S. Car. 477.

⁷ *Bird v. Randall*, 3 Burr. 1345.

§ 2687. A review of certain fundamental English cases.

—The leading case upon the subject of liability for inducing breach of a contract of employment is *Lumley v. Gye*,⁸ decided in 1853. Lumley had made a contract with Johanna Wagner to sing at his theater, and Gye induced her to break the contract by offering her more money to sing at his theater. Lumley enjoined Miss Wagner from singing for Gye, and then brought an action for damages against Gye. in which he recovered, the general holding being that an action would lie for maliciously procuring the breach of a contract for exclusive personal services for a time certain. One of the judges thought that such interference with any contract was a tort; another considered that such interference was a tort only if the contract were one of hiring; another dissented from the general holding and held that the principle applied only to interference with a contract of one who was in the strict sense a servant, and did not apply to the contract of Miss Wagner. The variety of opinions in this case was but a forerunner of various conflicts in the holdings in later cases. In the case of *Bowen v. Hall*,⁹ decided in 1881, where a skilled workman, the possessor of a secret process for making brick, had hired himself to a brickmaker for five years, the court held liable to his employer in damages another brickmaker who had induced the workman to break his contract, holding that a third person who maliciously induces another to break his contract of exclusive personal service with an employer is liable for the injuries naturally caused. In this case, Brett, J., afterwards Lord Esher, used the following language, based upon certain reasoning in *Lumley v. Gye*, and since widely quoted: "Merely to persuade a person to break his contract may not be wrongful in law or fact. * * * But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and fact a wrong act, and therefore a wrongful

⁸ *Lumley v. Gye*, 2 El. & Bl. 216.

⁹ *Bowen v. Hall*, L. R. 6 Q. B. Div. 333.

act, and therefore an actionable act if injury ensues from it." In the case of *Temperton v. Russell*,¹⁰ decided in 1893, a firm of builders refused to obey certain rules laid down by the unions in regard to building operations, and the unions requested the plaintiff, who supplied the builders' firm with building materials, to cease to do so, and upon the plaintiff's refusal the defendants procured persons who had entered into contracts with the plaintiff to furnish him material, to break their contracts and not to enter into further contracts with him, by threatening a withdrawal from work of their employes. It was held that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him, and that the right of action for maliciously procuring a breach of contract is not confined to contracts in the nature of contracts of personal service. In the case of *Allen v. Flood*,¹¹ decided in 1898, the agents of the ironworkers' union told certain shipbuilders that unless the plaintiffs, who were woodworkers, but who had previously worked on iron, a thing contrary to union ethics, were discharged from the shipbuilders' employ, all the ironworkers in their employ would quit work, and, because of this threat, the plaintiffs were discharged. The court held the agents of the union not liable, and held, in opposition to certain statements in the opinions in *Lumley v. Gye*, that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. One distinction between this case and *Lumley v. Gye* is that in this case the act procured to be done was lawful, since the employer had the right to discharge his employes at any time, while in the other case Miss Wagner had no right herself to break her contract.

¹⁰ *Temperton v. Russell* (1893), 1 Q. B. 715, 62 L. J. Q. B. 412, 4 Rep. 376, 69 L. T. 78, 41 Wkly. Rep. 565, 57 J. P. 676.

¹¹ *Allen v. Flood* (1898), A. C. 1, 67 L. J. Q. B. 119, 77 L. T. 717.

In the case of *Quinn v. Leathem*,¹² decided in 1901, where the plaintiff employed only nonunion men, the defendants, members of a union, induced certain persons to refrain from dealing with him, and caused some of his customers and servants to break their contracts, because he would not employ union men, and the court held that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, or continue in his employment, is, if it results in damage to him, actionable. The court stated as the vital distinction between this case and *Allen v. Flood* that "in *Allen v. Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas, in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.' " The court further held that *Lumley v. Gye* and *Temperton v. Russell* were rightly decided, because in each instance the act was wrongful for which damages were granted, but it was said that certain statements in those opinions which made the defendants' liability depend on motive or intention alone, whether anything wrong was done or not, went too far. In the case of *South Wales Miners' Federation v. Glamorgan Coal Company*,¹³ where miners employed in collieries, in breach of their contracts of employment, and without notice to their employers, abstained from working on certain days upon the order of a federation of miners given by their executive council, acting honestly, with the object only of keeping up the price of coal by which the wages were regulated, and without malice or illwill toward

¹² *Quinn v. Leathem* (1901), A. C. 495, 70 L. J. P. C. (N. S.) 76, 65 J. P. 708, 50 Wkly. Rep. 139, 85 L. T. (N. S.) 289, 17 Times L. 749, 1 Rul. Cas. 197.

¹³ *South Wales Miners' Federation*

v. Glamorgan Coal Company, L. R. (1905) A. C. 239, 74 L. J. K. B. 525, 53 Wkly. Rep. 593, 92 L. T. (N. S.) 710, 21 Times L. 441, 1 Rul. Cas. 1, and note 2 Am. & Eng. Ann. Cas. 436.

the employers, it was held that an action for damages lay by the employers against the federation and its officers, no justification for their action being shown, and that procuring a breach of contract is an actionable wrong, unless there be justification for interfering with the legal right. These English cases have been reviewed somewhat fully, because they form the foundation on which most of our American decisions have been based. Though the English courts have characterized as dicta and unnecessary statements some of the language found in the opinions of *Lumley v. Gye*, *Bowen v. Hall* and *Temperton v. Russell*, these very statements, especially the words of Lord Esher previously quoted, have been adopted and followed in many American jurisdictions, while other jurisdictions are inclined to follow the later English decisions. Much of the effect of these decisions in England has been nullified by the English Trade Disputes Act of 1906, ch. 47, § 3, which provides that, "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills." But where a delegate of a labor union caused an employé to be discharged by threats to call a strike of the union men unless he were discharged, and the threats were uttered in order to compel the plaintiff to pay a union fine, to punish him for not paying it, and to prevent him from getting or keeping employment, it was held that the delegate's acts were not done in contemplation or furtherance of a trade dispute, within the meaning of the act, so as to relieve him from liability.¹⁴

§ 2688. Inducing breach of contracts of employment generally.—The cases in England and this country without exception hold that to interfere with the performance of a

¹⁴ *Conway v. Wade* (1909), A. C. 506.

contract by an unlawful act to the injury of a party is an actionable tort. It is perhaps safe to state, as a general rule, that one who unjustifiably procures the breach of a contract of employment of any character is liable in damages to the injured party, whether employé or employer.¹⁵ The question then is; When is it unjustifiable to procure an employé to leave his employer, or break his contract of employment, or to procure the employer to discharge the employé? Good faith is not always a justification,¹⁶ nor does a malicious motive always make such procuring actionable.¹⁷ Some courts make the question of justification one of fact.¹⁸ The most of the cases under the present head have arisen out of interference with employment as a laborer or mechanic, in a factory or mine,¹⁹ but the courts

¹⁵ Cooley Torts (3d. ed.), 590; *Martin Labor Unions*, § 203; *Brauch v. Roth*, 10 Ont. L. 284, 4 Am. & Eng. Ann. Cas. 1024; *Read v. Friendly Society of Operative Stonemasons*, L. R. (1902) 2 B. 88, 732, 71 L. J. K. B. 994, 87 L. T. 493; *Lumley v. Gye*, 2 El. & Bl. 216; *Cooke Combinations* (2d. ed.) § 27; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. 367; *Jones v. Blocker*, 43 Ga. 331; *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539; *Perkins v. Pendleton*, 90 Maine 166, 38 Atl. 96, 60 Am. St. 252; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499; *Walker v. Cronin*, 107 Mass. 555; *Mealey v. Bemidji Lumber Co.* (Minn.), 136 N. W. 1090; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. 727, 9 Am. & Eng. Ann. Cas. 698; *Booth v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966n, 139 Am. St. 718; *Jones v. Stanley*, 76 N. Car. 355; *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. 779; *J. S. Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453, 73 S. W. 800; *Angle v. Chicago & C. R. Co.*, 151

U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240, revg. 39 Fed. 912. See § 1410. See also, *Chambers v. Probst*, 145 Ky. 381, 140 S. W. 572, 36 L. R. A. (N. S.) 1207, in which a laborer was held to have a right of action in damages against one who procured his discharge by malicious intermeddling, solely with the intent to injure him; and see opinion for distinction between this and earlier decisions of the same court, such as *Chambers v. Baldwin*, 91 Ky. 121, 12 Ky. L. 699, 15 S. W. 60, 11 L. R. A. 545, 34 Am. St. 165.

¹⁶ See cases cited in note 78, § 2692.

¹⁷ See cases cited in note 77, § 2692.

¹⁸ *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499; *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966n, 139 Am. St. 718.

¹⁹ See note 62, L. R. A. 714-718. Where an employé of a depot company was injured by an engine of a railway company, and after his recovery, the railway company induced the depot company to refuse to re-employ him unless he released the railroad company from liability for his injury, which he refused to do, the railway company was liable to him in damages for preventing his employment. *Joyce v. Great Northern R. Co.*, 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756. Where

have also held actionable in damages interference causing the breach of contracts to sing in theaters,²⁰ to become a cropper on a farm,²¹ to sell goods on commission,²² to superintend a factory,²³ to care for a person in consideration of weekly wages and a legacy,²⁴ to work as a teamster,²⁵ or to act as sales manager.²⁶ But some cases hold that interference with a contract of employment, other than as servant, is not actionable, and the rule was applied in a case where an actress was persuaded to break her engagement, the circumstances being almost exactly similar to those in the case of *Lumley v. Gye*.²⁷

§ 2689. Inducing breach of contracts other than of employment.—It was seen in the review of the leading English cases that the principle of liability to respond in damages for causing the breach of a contract has been extended to contracts other than those of employment, and may be said to cover wrongfully or unjustifiably inducing the breach of any contract.²⁸ In a leading American case it was held that

a servant who had been injured while working for a company insured in a casualty company against damage for injuries to employes brought suit for such injuries, which the casualty company defended, and the servant was discharged at request of casualty company on the ground that it did not propose to let him work to earn money to fight it with, and did not propose to have him work there or anywhere else, if it could be prevented, the casualty company was held liable in damages. *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539. *London Guarantee & Accident Co. v. Horn*, 101 Ill. App. 355, revd. 206 Ill. 493, 69 N. E. 526, 99 Am. St. 185; *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N. W. 377; *Lucke v. Clothing Cutters' & Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. 421; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. 289; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499; *Damverburg v. Ashley*, 50 Ohio C. D. 40. See

the greater number of cases cited in succeeding sections.

²⁰ *Lumley v. Gye*, 2 El. & Bl. 216.

²¹ *Haskins v. Royster*, 70 N. Car. 601, 16 Am. Rep. 780.

²² *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. 914.

²³ *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. 367.

²⁴ *May v. Wood*, 172 Mass. 11, 51 N. E. 191.

²⁵ *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81, Ann. Cas. 1912B, 1158.

²⁶ *McGurk v. Cronenwett*, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561n.

²⁷ *Bourlier v. Macauley*, 91 Ky. 135, 12 Kv. L. 737, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. 171.

²⁸ *Cooley Torts* (3d. ed.), 592. See § 1410; note 62 L. R. A. 678-682. See also, *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Morehouse v. Terrill*, 111 Ill. App. 460; *Hollenbeck v. Ristine*, 114 Iowa 358, 86 N. W. 377; *Gore v. Condon*, 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. 352; *Wheeler-Stenzel Co. v. Amer-*

a manufacturing ice company was liable to an ice consumer in damages for injuries caused by its compelling an ice jobber to break his contract to furnish ice to the consumer, the means used being a threat to take away the jobber's right to handle the manufacturer's ice, on which right the jobber's business success depended, the object being to secure to the manufacturer the trade of the consumer directly.²⁹ It has been held that an action in damages will lie for interference with contracts of landlord and tenant,³⁰ with contracts of sale or purchase,³¹ where either vendor,³² or vendee,³³ is induced to break his contract with a concern for the manufacture of goods to order,³⁴ with a railway construction contract,³⁵ with contracts with a carrier of goods,³⁶ or passengers,³⁷ or the aiding of one to re-engage in business, who has covenanted not to engage in such business,³⁸ or interfering wrongfully with contracts between a

ican Window Glass Co., 202 Mass. 471, 89 N. E. 28; Walker v. Cronin, 107 Mass. 555; De Jong v. B. G. Behrman Co., 148 App. Div. (N. Y.) 37, 131 N. Y. S. 1083; Jones v. Stanly, 76 N. Car. 355; Chicago, R. I. & P. R. Co. v. Armstrong, 30 Okla. 134, 120 Pac. 952; West Va. Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. 895; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; notes 28 L. R. A. (N. S.) 615, 16 L. R. A. (N. S.) 746. Defendant is liable for damages resulting to plaintiff from withdrawal by a bonding company from plaintiff's bond as bank cashier, if defendant induced withdrawal by writing false statements to company that defendant was "spending money too fast" and was likely to become insane, but defendant is not liable if the statements were true, though malicious. McClure v. McClintock, 150 Ky. 265, 150 S. W. 332. See also, Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201n; Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. 914; Angle v. Chicago &c. R. Co., 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240, revg. 39 Fed. 912.

²⁹ Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746, and note.

³⁰ Gore v. Condon, 87 Md. 368, 40 L. R. A. 382, 67 Am. St. 352, 39 Atl. 1042; Aldridge v. Stuyvesant, 1 Hall (N. Y.) 210; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.

³¹ Heath v. American Book Co., 97 Fed. 533; Morehouse v. Terrill, 111 Ill. App. 460; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 580.

³² Green v. Button, 2 Crompt. M. & R. 707; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

³³ Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869.

³⁴ Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869.

³⁵ Angle v. Chicago &c. R. Co., 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240, revg. 39 Fed. 912.

³⁶ Jones v. Stanly, 76 N. Car. 355.

³⁷ Nashville &c. R. Co. v. McConnell, 82 Fed. 65.

³⁸ Mahoney v. Roberts, 86 Ark. 130,

110 S. W. 225; Fleckenstein Bros. v. Fleckenstein, 76 N. J. L. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913.

merchant and his customers,³⁹ or contracts of agency,⁴⁰ or advertising.⁴¹

But, on the other hand, it is not every procuring of the breach of a contract that gives a right of action even in the jurisdictions which have carried the doctrine of liability of a third person for interference with contracts to its fullest extent.⁴² The exercise of an absolute legal right, legitimate business competition or other considerations must often make damage nonactionable which results from such interference with contract rights. It is said that if a lady has contracted to marry one person, and, it is presumed upon a pressing invitation, changes her mind, and marries another, the rejected suitor should not have a cause of action against the successful one,⁴³ and it has been held that a lady has no right of action against the father of her fiancé, who causes him to break his engagement to her, unless there was slander.⁴⁴ It is held that one who has leased rooms in a hotel has no right of action against a third party, who induces the landlord to eject him;⁴⁵ that where a tobacco grower has agreed to sell a crop of tobacco to a certain party, and a third party induces the grower to sell to him, the original purchaser can not recover against the third party,⁴⁶ and that where one who owed an account to an undertaker, applied to him for service, and was refused, and the other undertakers in the city, who had entered

³⁹ *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263.

⁴⁰ *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. 203; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201n.

⁴¹ *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881.

⁴² See § 1410. See § 2703. *Rigby, L. J.* in *Exchange Tel. Co. v. Gregory* (1896) 1 Q. B. 147; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, 96 L. T. (N. S.) 218; *Glencoe Land & Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 40 S. W. 93, 60 Am. St. 560, 36 L. R. A. 804; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Biggers v.*

Matthews, 147 N. Car. 299, 61 S. E. 55; *Payne v. Gebhard* (Tex.), 136 S. W. 1118; *Davidson v. Oakes* (Tex.), 128 S. W. 944; *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. 882; *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 Pac. 441.

⁴³ *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, 96 L. T. (N. S.) 218.

⁴⁴ *Leonard v. Whetstone*, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. 252.

⁴⁵ *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

⁴⁶ *Chambers v. Baldwin*, 91 Ky. 121, 12 Ky. L. 699, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. 165.

into an organization and agreed not to serve any one who owed a member of the organization, also refused him, the party refused had no right against the undertaker whom he owed.⁴⁷ And it is held no action lies to recover for the loss of his bargain by one who had contracted to purchase property against another who induced the vendor to break his contract and transfer title to him, unless the vendor acted against his will or contrary to his purpose by coercion or deception.⁴⁸

§ 2690. Wrongfully preventing performance of contract.

—The reasoning which holds a party liable for inducing a breach of a contract by wrongful conduct, in many of the cases already cited, affords still stronger grounds for holding liable one who by his wrongful act prevents performance of a contract. In a leading case the plaintiff had a contract for the construction of a line of railroad, and the defendant, a rival company, procured the stock of the other company to be transferred to it, withdrew the engineers from the work, without whom it could not proceed, and by issuing notices caused the contractor's tools and supplies to be seized, and his workmen to leave, and it was held that the plaintiff had a remedy in damages.⁴⁹ And in a case where a real estate agent had made a sale of realty between the vendor and the vendee, upon the consummation of which the vendor was to pay him a commission, and the vendee failed to perform, it was held that the agent might recover damages of the vendee.⁵⁰ And the principle that one is liable for wrongfully preventing the performance of a contract has much bearing upon the boycott and strike cases discussed in later sections. But the one who wrongfully prevented the performance of a contract has not in every case been held liable.⁵¹ Where the plaintiff, an

⁴⁷ *Brewster v. Miller's Sons Co.*, 101 Ky. 368, 19 Ky. L. 593, 41 S. W. 301, 38 L. R. A. 505.

⁴⁸ *Swain v. Johnson*, 151 N. Car. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *Biggers v. Matthews*, 147 N. Car. 299, 61 S. E. 55.

⁴⁹ *Angle v. Chicago &c. R. Co.*, 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240, revg. 39 Fed. 912.

⁵⁰ *Livermore v. Crane*, 26 Wash. 529, 67 Pac. 221, 57 L. R. A. 401.

⁵¹ *Jackson v. Morgan* (Ind. App.), 94 N. E. 1021.

owner of real estate, lost his tenant because the defendant entered on the land and built there a fence, it was held that the defendant, in the absence of fraud, was not liable,⁵² and where one who had agreed to support the plaintiff had been disabled, by negligence of the defendant, it was held that no action would lie by the plaintiff for the damages occasioned to him.⁵³ So, where one was to furnish the plaintiff with electricity over the plaintiff's wire, but under a contract whereby it was not liable for an interruption of the current without its fault, and the defendant wrongfully cut the wire, it was held that the plaintiff could not recover for the damages caused by the interruption of the current.⁵⁴

§ 2691. **Interference with the formation of future contracts.**—In all the cases so far considered there has been an interference with an existing contract. But many cases allow recovery of damages when a third person prevents the making of a future contract upon the ground of unjustifiable interference with one's business. In most of the cases the general governing principle seems to be that any interference with the business of another to his injury with knowledge that it will prevent the formation of future contracts or business relations, unless such interference is a part of legitimate competition, or is in the exercise of an absolute legal right, is actionable, or may in certain cases be enjoined.⁵⁵ But there is some conflict among the authorities. Where an employer has threatened to discharge an employé for trading with a certain merchant, it has been held that the employer is liable to the merchant.⁵⁶ The exact contrary has also been held.⁵⁷ It is held that no action will lie by a store owner against a teacher who persuades pupils

⁵² *Walden v. Conn*, 84 Ky. 312, 8 Ky. L. 281, 1 S. W. 537, 4 Am. St. 204.

⁵³ *Brink v. Wabash R. Co.*, 160 Mo. 87, 60 S. W. 1058, 53 L. R. A. 811, 83 Am. St. 459.

⁵⁴ *Byrd v. English*, 117 Ga. 191, 43 S. E. 419, 64 L. R. A. 94.

⁵⁵ *Passaic Print Works v. Ely &*

Walker Dry Goods Co., 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673, and note 62 L. R. A. 694-714.

⁵⁶ *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 49 Am. St. 366, 27 L. R. A. 416, 16 So. 806.

⁵⁷ *Payne v. Western & C. R. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

not to trade with him,⁵⁸ and that if one refuses to employ any person who rents a house from the plaintiff, the latter has no right of action against one so refusing,⁵⁹ and that where competitors cut rates to break up a rival's business, they can not be enjoined.⁶⁰ And it has been held that one company is not liable in equity for driving away the customers of another, by circulating statements of its insolvency.⁶¹ However, the general rule, applied mostly in cases involving combinations, is that those who employ threats and intimidation or other similar means to procure one's customers to withdraw, not for their own benefit in the exercise of the right of free competition, but for the purpose of injuring the business of the other, are liable in damage.⁶² So, it has been held that one who wrongfully entered plaintiff's place of business, forbade the sale of goods there, and threatened the purchasers with prosecution, thus driving away customers, and stopping business, was liable to the plaintiff in damages.⁶³ And in a rather extreme case it was held that where a complaint stated that a banker, the defendant, maliciously set up a barbershop, employed a barber and used his influence to divert and did divert customers from plaintiff's barbershop for the sole purpose of maliciously injuring the plaintiff, a cause of action was stated.⁶⁴

⁵⁸ *Guethler v. Altman*, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. 313.

⁵⁹ *Heywood v. Tillson*, 75 Maine 225, 46 Am. Rep. 373.

⁶⁰ *Passaic Print Works v. Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673.

⁶¹ *Citizens' Light & Co. v. Montgomery & Co.*, 171 Fed. 553.

⁶² *Evenson v. Spaulding*, 150 Fed. 517, 9 L. R. A. (N. S.) 904n; *Economist Furnace Co. v. Wrought-Iron Range Co.*, 86 Fed. 1010; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 26 Ky. L. 544, 82 S. W. 271, 11 Am. St. 331; *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656, 18 So. 707, 49 Am. St. 436; *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791; *Ertz v.*

Produce Exchange, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. 433; *Stroud v. Smith*, 194 Pa. 502, 45 Atl. 329; *Brown v. American Freehold Land Mortg. Co.*, 97 Tex. 599, 80 S. W. 985, 67 L. R. A. 195; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. 746; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. 895. See note 22 L. R. A. (N. S.) 1224. See cases cited in § 2698, and § 2694.

⁶³ *Sparks v. McCreary*, 156 Ala. 382, 47 So. 332, 22 L. R. A. (N. S.) 1224n.

⁶⁴ *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599n, 131 Am. St. 446.

§2692. **Malice as an element of the right of action.**—It was said in *Lumley v. Gye*,⁶⁵ that an action would lie for the malicious procurement of the breach of any contract, if by the procurement damage was intended to result and did result to the plaintiff, and in *Bowen v. Hall*⁶⁶ that persuasion of one to break his contract, used for the indirect purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff is a malicious act, and therefore in law and fact wrongful, and actionable if injury result. In *Allen v. Flood*⁶⁷ it was held that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer liable in a civil action. Yet in that opinion the case of *Lumley v. Gye* was not overruled, and it has since been followed.⁶⁸ Around the rock of malice the current of decisions has been divided, one branch following the doctrine announced in *Lumley v. Gye*, the other that of *Allen v. Flood*. Necessarily, all are agreed that wrongful and unlawful interference with a contract is actionable, but they differ as to whether the motive to injure may make otherwise lawful interference actionable. It was said in *Jackson v. Morgan*,⁶⁹ by Adams, J., that: "Malice, in the sense of ill will or bad motive, can not change a lawful act into an actionable tort, any more than a good motive or kindly intention can justify the invasion of another's rights; that motive can not constitute, in itself, a cause of action, nor supply the injuria which would otherwise be wanting." This view has the support of many strong authorities.⁷⁰ Mr. Dowling, in an article in the *Central Law Journal*,⁷¹ states the rule thought by him to be sustained by reason and the best authorities "that

⁶⁵ *Lumley v. Gye*, 2 El. & Bl. 216.

⁶⁶ *Bowen v. Hall*, L. R. 6 Q. B. Div. 333.

⁶⁷ *Allen v. Flood* (1898), A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. 717, 46 Wkly. Rep. 258.

⁶⁸ *South Wales Miners' Fed. v. Glamorgan Coal Co.*, L. R. (1905) A. C. 239; *Quinn v. Leathern*, L. R. (1901) A. C. 495.

⁶⁹ *Jackson v. Morgan* (Ind. App.), 94 N. E. 1020.

⁷⁰ "Crucial Issues in Labor Litigation," Smith, 20 Harv. L. Rev. 253, 451-455; *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008. See cases cited in note 77, § 2692.

⁷¹ "Wanton Interference with Contract and Business Relations," 54 Cent. L. J. 429. See also, Cooley Torts (3d ed.), 587.

every one has a natural right to conduct his trade, business, profession or legal relationship arising out of contract free from all intentional and wanton interference on the part of those whose sole object is to damage him by reducing his patronage, withdrawing his employés or interrupting the valuable relations into which he by contract has entered." There has been in the language used in the opinions and text-books a confusion in the use of the terms "malice" and "intent." The term "malice" is capable of being used with so many meanings and has been so used, that it is the opinion of the best authorities today that the term should not be used in the discussion of the present subject.⁷² "Intent" has been used as meaning either the immediate object, or consequence or effect aimed at by the doer of an act, and also to denote the reason for aiming at that object or motive inducing the act.⁷³ By using the word "intent" in only the former sense, and supplying the word "motive" wherever it is used in the latter sense, many apparently conflicting opinions may be clarified and simplified, and we shall endeavor to use the terms in such senses in the remainder of our discussion, and shall use the term "malice" in the sense of motive to injure. One is usually judged in law by his intent, that is, by the immediate act which he does. One who does an act which interferes with a contract right of another and damages that other is necessarily held to have intended such damage, and is liable unless his act is justifiable. Now, one may do precisely the same act with precisely the same injury to a third party, but the motive may be in one case the advancement of his own personal rights, in the other the injury of some other person, while his intent is the same in both cases. The question then becomes; Does the existence of a motive to injure make that actionable which would otherwise be lawful? It seems that the necessity for relying upon the doctrine of bad mo-

⁷² Lord Lindley in *South Wales Miners' Federation v. Glamorgan Coal Co.*, L. R. (1905) A. C. 239; "Crucial Issues in Labor Litigation," Smith, 20 Harv. L. Rev. 255; "How

Far an Act May be a Tort Because of Wrongful Motive of the Actor," Ames, 18 Harv. L. Rev. 411, 422.

⁷³ "Crucial Issues in Labor Agitation," Smith, 20 Harv. L. Rev. 259.

tive would be largely obviated by adopting the hypothesis of Mr. Jeremiah Smith and others, namely, that certain clear legal rights, such as the right to enter into or quit employment terminable at will, or to refuse to enter into business relations with others, must be correlated with the similar rights of others, and the rights of society, and must not be exercised in such a manner as to interfere unduly with the similar rights of others; and further, while one, himself, may have clearly a right to quit an employment, or refrain from business dealings with another, yet he has no right in all instances to induce another to do the same thing, knowing and intending that the result will be to damage the one with whom they refuse to deal, or procure discharge of those who refuse to quit their employment.⁷⁴ Thus, under this theory, what is in some cases called malice may be reduced to the doing of an act which would be rightful if it did not interfere unduly with the rights of others. Still, this does not explain all the decided cases, and it may be safely stated that it is the strong tendency of recent authority to hold that interference with the property right in a contract relationship from a wanton intention, or motive to injure another, is actionable, even where the interference would not have been actionable save for the bad motive.⁷⁵ Many

⁷⁴ Smith, 20 Harv. L. Rev. 259-279. Martin Labor Unions, § 205; "Crucial Issues in Labor Agitation," Compare note 29 L. R. A. (N. S.) 869.

⁷⁵ See § 1410. Martin Labor Unions, § 203 et seq.; "Tort Because of Wrongful Motive," Ames, 18 Harv. L. Rev. 411; note on "Effect of bad motive to make actionable what would otherwise not be," 62 L. R. A. 673; Bowen v. Hall, 6 Q. B. D. 333; Quinn v. Leathern (1901), L. R. A. C. 495; Temperton v. Russell (1893), L. R. 1 Q. B. 715; Nashville &c. R. Co. v. McConnell, 82 Fed. 65; Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. 367; Employing Printers' Club v. Dr. Blosser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. 137; London Guarantee & Acci-

dent Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. 185, affg. 101 Ill. App. 355; Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263; Hollenbeck v. Ristine, 114 Iowa 358, 86 N. W. 377; Graham v. St. Charles St. R. Co., 47 La. Ann. 214, 16 So. 806, 27 L. R. A. 416, 49 Am. St. 366; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 65 L. R. A. 260, 102 Am. St. 341; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330; McGurk v. Cronenwett, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561n; Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599n, 131 Am. St. 446; Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co., 97 Miss. 148, 52 So. 454, 29 L. R. A.

of the cases state that malice is the gist of the action.⁷⁶ Other cases hold that merely an ill motive can not make actionable civilly the doing of something which one had a legal right to do, or which would not be actionable otherwise.⁷⁷ On the other hand, it is settled that procuring the breach of a contract may be actionable without malice in the sense of an ill motive, that is, the act done may be held unlawful, though the motive was not injury of the party to the contract.⁷⁸ Some courts hold that what is malice is a

(N. S.) 869, and note; Wesley v. Native Lumber Co., 97 Miss. 814, 53 So. 346; Huskie v. Griffin, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966n, 139 Am. St. 718; Parker v. Bricklayers' Union, 10 Ohio Dec. (reprint) 458, 21 Wkly. L. Bul. 223; Schonwald v. Ragains, 32 Okla. 223, 122 Pac. 203; Stroud v. Smith, 194 Pa. St. 502, 45 Atl. 329; Brown v. American Freehold Mortg. Co., 97 Tex. 599, 80 S. W. 985, 67 L. R. A. 195; Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091. See note 16 L. R. A. (N. S.) 746; note 103 Am. St. 499, et seq.

⁷⁶ See § 1410. Willner v. Silverman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895; Wheeler-Stenzel Co. v. American Window Glass Co., 202 Mass. 471, 89 N. E. 28. Reasonable cause for interference with another's right is a justification, but where the only reason is a malicious wish to injure the other, there is no justification. Huskie v. Griffin, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966n, 139 Am. St. 718. See also, Joyce v. Great Northern R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756; McCann v. Wolff, 28 Mo. App. 447.

⁷⁷ Cooke Combinations (2d ed.) § 11; Allen v. Flood (1898), A. C. 1; Tennessee Coal, Iron & R. Co. v. Kelly, 163 Ala. 348, 50 So. 1008; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; McCune v. Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; Jackson v. Morgan (Ind. App.), 94 N. E. 1021; Guethler v. Altman, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. 313; Kelly v. Chicago, M. & S. P. R. Co.,

93 Iowa 436; Chambers v. Baldwin, 91 Ky. 121, 12 Ky. L. 699, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. 165; Kline v. Eubanks, 109 La. 241, 33 So. 211; Perkins v. Pendleton, 90 Maine 166, 38 Atl. 96, 60 Am. Rep. 252; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319; Glencoe Land & Co. v. Hudson Bros. Com. Co., 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. 560; Pickard v. Collins, 23 Barb. (N. Y.) 444; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Swain v. Johnson, 151 N. Car. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856, and cases cited in note; Wilson v. Berg, 88 Pa. St. 167; Arnold v. Moffitt, 30 R. I. 310, 75 Atl. 502; Payne v. Western & C. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; South Royalton Bank v. Suffolk Bank, 27 Vt. 505. See note 16 L. R. A. (N. S.) 749. "Malice," as used in some cases, "means merely the intentional doing of a wrongful act. To break a contract is wrongful, and, when a third person, with knowledge of the contract, without legal excuse therefor, induces a party thereto to breach the same, his act is said to be malicious." Note, 16 L. R. A. (N. S.) 747.

⁷⁸ South Wales Miners' Federation v. Glamorgan Coal Co. (1905), L. R. A. C. 239; Read v. Friendly Society of Operative Stonemasons (1902), L. R. 2 K. B. 88, 71 L. J. K. B. 634, 86 L. T. 593, 50 Wkly. Rep. 619, 18 Times L. R. 577; Smithies v. Nat. Assn. Operative Plasterers (1909), L. R. 1 K. B. 310; Cotter v. Osborne, 18 Manitoba L. 471; Brauch v. Roth, 10 Ont. L. 284, 4 Am. & Eng. Ann.

question of fact,⁷⁹ and others that it may be inferred from the proved absence of another motive,⁸⁰ while in some jurisdictions where proof of malice may be essential to the success of an action, it is held that intentional interference without justification with a known contract right is sufficient malice.⁸¹ A few cases hold that the right of competition in trade does not justify interference with the rights of another under existing contracts.⁸² A recent text-writer states that the true test of liability is "whether the act was the natural incident or outgrowth of some lawful relation."⁸³ And even, though denied by many authorities, it seems that since an action for malicious prosecution is based on a malicious motive, and since the weight of authority holds that one is liable for the use of his land, not for any benefit to himself, but purely to the detriment of his neighbor, as by draining⁸⁴ his spring, there is no undue extension of the

Cas. 1024; *Motley Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389; *Lucke v. Clothing Cutters' & Trimmers' Assn.*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. 421; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499.

⁷⁹ *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499; *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. 718.

⁸⁰ *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966n, 139 Am. St. 718.

⁸¹ *Tubular River & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824, 86 C. C. A. 648; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201n; *Joyce v. Great Northern R. Co.*, 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756; *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. 727, 9 Am. & Eng. Ann. Cas. 698; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Holder v. Cannon Mfg. Co.*, 135 N. Car. 392, 47 S. E. 481, revd. 138 N. Car. 308, 50 S. E. 681; *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854.

⁸² *Sperry v. Pommer*, 199 Fed. 309; *Barnes & Co. v. Chicago Typographical Union No. 16*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, 72 N. J. Eq. 653, 66 Atl. 953.

⁸³ *Cooke Combinations* (2d ed.), § 10.

⁸⁴ "Tort Because of Wrongful Motive," Ames, 18 Harv. L., 411, 415; *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. 35; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175; *Barclay v. Abraham*, 121 Iowa 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. 365; *Stevens v. Kelly*, 78 Maine 445, 6 Atl. 868, 57 Am. Rep. 813; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Stillwater Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. 666; *Wyandot Club v. Sells*, 4 Ohio Dec. 254, 3 Ohio N. P. 210; *Williams v. Ladew*, 161 Pa. St. 283, 29 Atl. 54, 41 Am. St. 891; *Miller v.*

principles of tort when it is held that a bad motive may make actionable the interference with a contract relationship to the injury of a plaintiff, when the act would not otherwise be actionable. The difference between the courts is largely a difference in terms, for what some courts hold actionable because of a malicious motive, other courts hold clearly wrongful in itself, though this difference does not explain the effect of all decisions.

§ 2693. Contract terminable at will of one party.—Where a contract is terminable at the option of one party, such as a contract for employment for no definite time, some authorities hold that there is no right of action for inducing a party to terminate the contract, since he is only doing what he has a legal right to do, and the other party to the contract would have no remedy against him.⁸⁵ So, there are cases holding that it is not actionable to procure or cause the breach or nonperformance of a contract terminable at the will of one party,⁸⁶ or of optional performance,⁸⁷ or not legally enforceable.⁸⁸ But it may be said that the great weight of authority holds such interference actionable as a tort, when it would be a tort if the contract were for some definite time,⁸⁹ the fact that the contract was of indefinite duration and terminable at any time, going to the amount of recovery and not to the right of action. So, it is held that it is actionable to induce an employer to discharge an employé whom he might discharge at will at

Black Rock &c. Co., 99 Va. 747, 40 S. E. 27, 86 Am. St. 924. Contra, Chatfield v. Wilson, 28 Vt. 49; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. 933.

⁸⁵ Allen v. Flood (1898), L. R. A. C. 1; Hetzler v. Morrell, 82 Iowa 562, 48 N. W. 938.

⁸⁶ McGuire v. Gerstley, 26 App. D. C. 193, affd. 204 U. S. 489, 51 L. ed. 581, 27 Sup. Ct. 332.

⁸⁷ Davidson v. Oakes (Tex. Civ. App.), 128 S. W. 944.

⁸⁸ Roberts v. Clark (Tex. Civ. App.), 103 S. W. 417.

⁸⁹ Cooley Torts (3d ed.), 590; London Guarantee & Accident Co. v.

Horn, 101 Ill. App. 355, affd. 206 Ill. 493, 69 N. E. 526, 99 Am. St. 183; Perkins v. Pendleton, 90 Maine 166, 38 Atl. 96, 60 Am. St. 252; Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. 421; Lopes v. Connolly, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986. "The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages." Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499.

the end of any day or week.⁹⁰ And it is also held actionable to combine to coerce or otherwise unjustifiably procure one's customers, who are in the habit of dealing with him, to quit him.⁹¹

§ 2694. Unlawfulness of interference as dependent upon means used.—It is often held, especially in cases involving combinations and boycotts, though the principle may be applied in other cases, that the unlawfulness of interference with contract relations is dependent on the means of interference used.⁹² And in most cases where the courts have held that unlawful means have been used, they have granted an injunction against their continuance. So, it has been held that combinations refusing to handle or use the product of the plaintiff, thus boycotting his goods, are unlawful.⁹³ Other courts have seen no more than legitimate competition in such combinations, and have held them lawful.⁹⁴ The refusal to work on the same job with employers on an unfair list is held lawful.⁹⁵ And in a recent case it was held that striking employes can not be enjoined from inducing employes, in factories by which their former employer is attempting to get work done to fill his contracts,

⁹⁰ *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. 727, 9 Am. & Eng. Ann. Cas. 698.

⁹¹ See cases cited in § 2698, and in § 2694.

⁹² "Crucial Issues in Labor Litigation," Smith, 20 Harv. L. Rev. 253, 345, 429. See generally, note 1, Rul. Cas. 259-274; *Macauley v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. 770, 33 Atl. 1; note 16 L. R. A. (N. S.) 85.

⁹³ *Irving v. Joint Dist. Council*, 180 Fed. 896; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C. C. A. 311, *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. 322; *Piano & Co. O. Workers' International Union of America v. Piano & Organ Supply Co.*, 124 Ill. App. 357; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W.

997, 22 L. R. A. (N. S.) 607, 128 Am. St. 492; *Moore v. Bricklayers' Union*, 10 Ohio Dec. (reprint) 665; *Purvis v. Local No. 500, U. B. C. & J.*, 214 Pa. St. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642n, 112 Am. St. 757, 6 Am. & Eng. Ann. Cas. 275.

⁹⁴ *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. 770; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330; *Searle Mfg. Co. v. Terry*, 56 Misc. (N. Y.) 265, 106 N. Y. S. 438; *Albro J. Newton Co. v. Erickson*, 126 N. Y. S. 949.

⁹⁵ *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988, 32 L. R. A. (N. S.) 792n; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477.

to refuse to work on it, even though it causes the owners of such factories to break their contracts.⁹⁶ But there are cases holding practically the opposite view.⁹⁷ A mere request to the public not to patronize certain persons is lawful, if no false or libelous matter is circulated, or there is no coercion or intimidation.⁹⁸ Yet there are cases holding a somewhat contrary view.⁹⁹ What is known as a secondary boycott, that is, a threat to boycott persons who patronize the plaintiff, is held actionable.¹ Still, some cases hold the secondary boycott lawful.² Physical intimidation is unlawful.³ It has been held that interference with the right to a free market is actionable,⁴ and upon this basis boycotts have been declared unlawful. Cases discussing the blacklist as an unlawful means of interference with the right to form contract relations will be considered in suc-

⁹⁶ *Martin Labor Unions*, § 62; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

⁹⁷ *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. (N. Y.) 221, 124 N. Y. S. 289.

⁹⁸ *Beck v. Ry. Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477; *Marx & Co. Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. 440. Publishing a circular declaring a merchant to be on the unfair list will not be enjoined. *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707n, 127 Am. St. 722; *Foster v. Retail Clerks' & Assn.*, 39 Misc. (N. Y.) 48, 78 N. Y. S. 860; *Butterick Pub. Co. v. Typographical Union No. 6*, 50 Misc. (N. Y.) 1, 100 N. Y. S. 292; *Sinsheimer v. United Garment Workers*, 77 Hun (N. Y.) 215, 28 N. Y. S. 321; *Richter Bros. v. Journeymen Tailors' Union*, 11 Ohio Dec. (reprint) 45, 24 Wkly. L. Bul. 189.

⁹⁹ *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193; *Longshore*

Printing & Publishing Co. v. Howell, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640.

¹ *State v. Stockford*, 77 Conn. 237, 58 Atl. 769, 107 Am. St. 28; *Rocky Mountain Bell T. Co. v. Montana Federation of Labor*, 156 Fed. 809; *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. 119, 13 Am. & Eng. Ann. Cas. 82; *Matthews v. Shankland*, 25 Misc. (N. Y.) 604, 56 N. Y. S. 123; *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163.

² *Pierce v. Stablemen's Union*, Local No. 8760, 156 Cal. 70, 103 Pac. 324.

³ *Goldberg v. Stableman's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. 145, 9 Am. & Eng. Ann. Cas. 1219; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Butterick Pub. Co. v. Typographical Union No. 6*, 50 Misc. (N. Y.) 1, 100 N. Y. S. 292; *People v. Kostka*, 4 N. Y. Crim. 429; *Foster v. Retail Clerks' & Assn.*, 39 Misc. (N. Y.) 48, 78 N. Y. S. 860; *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302.

⁴ *Booth v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226 (a very carefully and logically considered case).

ceeding sections. Generally, it has been said that simple persuasion, by a single individual defendant, to induce a party to break a contract with a plaintiff, will not support an action, but temporal inducement from a defendant to a party to a contract, whether in the form of money or other property reward, or in the form of an offer to exercise, or refrain from exercising one's individual right to work for an employer, may be actionable; that where a defendant has induced an outsider merely to persuade an employer to break contract relations with the plaintiff, he is not liable, but if he has induced an outsider to bring temporal inducement to bear upon the employer, or on another party to induce the employer to break the contract, then the defendant may be liable; that in case of a combination, inducement of members, by threat of expulsion, to abide by the organization is lawful, but to fine them is unlawful.⁵

§ 2695. Interference by combination or conspiracy.—A number of persons may combine and conspire to induce or compel a party to break a contract, or refrain from making future contracts. Their conduct is certainly actionable when unlawful means are used,⁶ and has in other cases been held actionable because of the object of the combination, when the means used might otherwise have been lawful.⁷ In

⁵ "Crucial Issues in Labor Litigation," Smith, 20 Harv. L. Rev. 259-279, 346-356.

⁶ Cooley Torts (3d ed.), 593; "Crucial Issues in Labor Agitation," Smith, 20 Harv. L. Rev. 345-362. See cases cited in § 2694. Wyeman v. Dedy, 79 Conn. 414, 65 Atl. 129, 118 Am. St. 152, 8 Am. & Eng. Ann. Cas. 375; Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995.

⁷ Cooke Combinations (2d ed.), § 14; Martin Labor Unions, § 29; Metallic Roofing Co. v. Jose, 12 Ont. L. 200; Wyeman v. Dedy, 79 Conn. 414, 118 Am. St. 152, 65 Atl. 129, 8 Am. & Eng. Ann. Cas. 375; American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 32 L. R. A. (N. S.) 749; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28

C. C. A. 99; Thomas v. Cincinnati, N. O. & T. P. R. Co., 62 Fed. 803; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. 203; Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; Hines v. Whitehead, 124 Iowa 262, 99 N. W. 1064; Albro J. Newton Co. v. Erickson, 126 N. Y. S. 949; W. P. Davis Machine Co. v. Robinson, 41 Misc. (N. Y.) 329, 84 N. Y. S. 837; Purvis v. Local No. 500, U. B. C. & J., 214 Pa. 348, 63 Atl. 585, 112 Am. St. 757, 12 L. R. A. (N. S.) 642n, 6 Am. & Eng. Ann. Cas. 275. The attempt by members of a union to establish a "closed shop" has been held an unlawful object, and enjoined. Reynolds v. Davis, 198 Mass.

many cases the doing of things by a number of persons combined together has been held actionable when the doing of the same things by any one of their number would not, the reason being that by their very numbers and the force of their united action an element of compulsion or coercion arises which makes that wrong which would not be wrong in the case of an individual. Many of the cases so holding are boycott cases.⁸ Other cases hold that whatever one may do, all may do, and whatever one may do singly, all may do in concert.⁹ The former rule was that a combination between employes to raise wages,¹⁰ or between employers to keep down wages,¹¹ was illegal. The present rule is that a combination of workmen for the purpose of raising wages, or reducing hours of employment, is legal,

294, 84 N. E. 457, 17 L. R. A. (N. S.) 162n. *Contra*, *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640, and *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28.

⁸ *Cooke Combinations* (2d ed.), § 16; *Temperton v. Russell* (1893), 1 Q. B. 715, 62 L. J. Q. B. 412, 4 Rep. 376, 69 L. T. 78, 41 Wkly. Rep. 565, 57 J. P. 676; *Mogul S. S. Co. v. McGregor* (1892), A. C. 25, 61 L. J. Q. B. 295, 66 L. T. 1, 40 Wkly. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; *Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor*, 156 Fed. 809; *Oxley Stave Co. v. Coopers' Internat. Union*, 72 Fed. 695; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, 150 Fed. 155; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193; *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. (N. S.) 90, 106 Am. St. 137; *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. (N. S.) 339, 79 Am. St. 330; *Bohn v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. 492; *Martin v. McFall*,

65 N. J. Eq. 91, 55 Atl. 465; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. 496; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. 746; See *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091; *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. (N. S.) 470, 5 Am. & Eng. Ann. Cas. 371, and note.

⁹ *Cooley Torts* (3d ed.), 593; *Martin Labor Unions*, § 29; *Meier v. Speer*, 96 Ark. 618, 132 S. W. 988, 32 L. R. A. (N. S.) 792n; *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; *Vegelehn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. 443; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707n, 127 Am. St. 722; *Sleeper v. Baker* (N. Dak.), 134 N. W. 716, 39 L. R. A. (N. S.) 864; *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. 817, 17 Am. & Eng. Ann. Cas. 96.

¹⁰ *Hilton v. Eckersley*, 6 El. & Bl. 47; *Rex v. Mawbey*, 6 T. R. 619. See *Cooke Combinations*, (2d ed.), § 53; *Martin Labor Unions*, §§ 2, 3, 4.

¹¹ See *Martin Labor Unions*, § 266 et seq.; *Hilton v. Eckersley*, 6 El. & Bl. 47.

so long as no illegal methods are used.¹² So, peaceful persuasion to laborers to quit work may be justified,¹³ but the contrary is also held.¹⁴ Where a labor organization procures the discharge of a laborer for a justifiable cause, there is no liability,¹⁵ but there is a conflict as to what is a justifiable cause.¹⁶ It is held that interference by a combination of persons to procure the discharge of a workman because he refuses to join their union can not be justified as part of the competition of workmen with one another, in a recent case,¹⁷ in which there was no constraint nor coercion, but the discharge was merely in pursuance of a contract by the employer, not to employ nonunion men, and not to retain men to whom the union objected. In other cases such contracts have been upheld.¹⁸ Others have held a combination invalid which deprives one of the right to work in an entire city,¹⁹ or

¹² *Martin Labor Unions*, §§ 6, 10, 31; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. See §§ 882, 883.

¹³ *Jones v. Maher*, 62 Misc. (N. Y.) 388, 116 N. Y. S. 180.

¹⁴ *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, 72 N. J. Eq. 653, 66 Atl. 953.

¹⁵ See *Kemp v. Division No. 241, Amalgamated Assn. &c. of America*, 255 Ill. 213, 99 N. E. 389, in which it was held that an injunction would not be granted against the acts of a labor union in attempting to procure the discharge of certain employes who had quit the union, and that no action in damages would lie if discharge was accomplished. Three opinions were prepared in the case, three judges out of seven dissenting and the variety of reasoning employed in this case clearly shows the unsettled condition of the law regarding interference with contracts by labor unions.

¹⁶ *Cooley Torts* (3d ed.), 597; *Martin Labor Unions*, § 145; *Quinn v. Leatham* (1901), A. C. 495; *Pope Motor Car Co. v. Keegan*, 150 Fed. 148; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. 443; *Beck v. Railway Teamsters' Protective Union*, 118

Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Brown Mfg. Co. v. Local Union*, 12 Ohio Dec. 748.

¹⁷ *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499. See § 884. *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. 496. See also, *London Guarantee & Accident Co. v. Horn*, 101 Ill. App. 355, affd. 206 Ill. 493, 69 N. E. 526, 99 Am. St. 185; *Martin Labor Unions*, §§ 152-160; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. 496. See contra *Kemp v. Division No. 241 Amalgamated Assn. &c. of America*, 255 Ill. 213, 99 N. E. 389.

¹⁸ *Perrault v. Grauthier*, 28 Can. S. C. 241; *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. 730; *Mills v. United States Printing Co.*, 99 App. Div. (N. Y.) 605, 91 N. Y. S. 185. See § 884.

¹⁹ *Thomas v. Mutual Protective Union*, 49 Hun (N. Y.) 171, 17 N. Y. St. 51, 2 N. Y. S. 195, reversed upon another ground in 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. 496.

where threats or intimidation were used.²⁰ It is held that a central labor union is not liable for unauthorized conduct on the part of its servants.²¹ If the object and means adopted by a combination are both lawful, it is held that there is no conspiracy and the fact of combination is immaterial.²²

§ 2696. Interference by voluntary association of dealers.

—Under present conditions we often find voluntary associations of persons, whose members agree not to deal with those who are not members of the association, or not to deal with certain persons or associations of persons. The effect of such associations is often to decrease the profits or destroy the business of one not a member, but the courts do not agree as to whether such a one has a right of action against the association or a right to injunction. It was said in a leading case,²³ "It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has already been said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice." So, many cases, following this doctrine, have denied the right to damages or an injunction to nonmembers injured by the action of the association.²⁴ But, while every man may have the right to

²⁰ Lucke v. Clothing Cutters' & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. 421.

²¹ Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assn., L. R. (1906) A. C. 384, 5 Am. & Eng. Ann. Cas. 591.

²² Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. 770.

²³ Bohn Mfg. Co. v. Hollis, 54 Minn.

223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319.

²⁴ National Fire Proofing Co. v. Mason Builders Assn., 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148n; Ward v. South Dakota Retail Merchants' & Hardware Dealers' Assn., 150 Fed. 413; Downes v. Bennett, 63 Kans. 653, 66 Pac. 622, 55 L. R. A. 560, 88 Am. St. 256; Brewster v. Miller's Sons Co., 101 Ky. 368, 19 Ky. L. 593, 41 S. W. 301, 38 L.

deal with others as he sees fit, he must recognize, to a certain extent at least, the similar right of others. So, in some jurisdictions it is held that the conduct of such voluntary associations is unlawful if it is intended to wreck the business of others by inducing persons not to trade with them, or if coercion is employed against nonmembers, and is actionable in damages, or may usually be enjoined.²⁵ It is also held that coercion of a minority of the members of an association by the majority, through the usual system of fines or expulsion, is actionable,²⁶ though other cases uphold such fines or expulsion.²⁷ It is held that an individual member of a trade combination may be held personally liable for an injury to a boycotted dealer.²⁸

§ 2697. **Strikes.**—The general rule is that workmen may combine for the purpose of stopping work and refuse to work further until their demands are met, and that a strike

R. A. 505; *Macauley Bros. v. Tierney*, 19 R. I. 253, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. 770.

²⁵ See *Cooley Torts* (3d ed.), 600; *Broun v. Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. 126; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 68 Am. St. 203; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Klingel's Pharmacy v. Sharp*, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976n, 118 Am. St. 399, 9 Am. & Eng. Ann. Cas. 1184; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 65 L. R. A. 260, 102 Am. St. 341; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. 746; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. 895; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. See *Evenson v. Spaulding*, 150 Fed. 517, 9 L. R. A. (N. S.) 904n; *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791; *Hawarden v. Youghiogheny & L. Coal Co.*, 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828. See also, *Broun v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. 126; *Employing Printers' Club v. Dr. Bloss-*

ser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. 137, 2 Am. & Eng. Ann. Cas. 694. Where the plaintiff who was not a member of an association of ice dealers, had stored ice and made contracts to sell to customers, and defendants, members of the association, told the customers that the members of the association would not sell ice to them, and that after a time plaintiff's store of ice would give out and they would be unable to obtain ice, and thus defendants procured plaintiff's customers to break their contracts, such conduct was unreasonable, unfair, coercive, and unjustifiable, the object being to destroy plaintiff's business, and plaintiff could recover damages. *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854.

²⁶ *Purrrington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. 322; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 76 Am. St. 746, 43 L. R. A. 803.

²⁷ *Downes v. Bennett*, 63 Kans. 653, 66 Pac. 623, 55 L. R. A. 560, 88 Am. St. 256.

²⁸ *Purrrington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. 322.

is in itself not illegal, at least if existing contracts of a definite duration are not broken.²⁹ But the weight of authority holds that if an employé is discharged, merely because other workmen refuse to work unless he is discharged, he has a right of action against those who procured his discharge.³⁰ Many cases hold that it is unlawful to induce a strike which will cause the breaking of contracts.³¹ It has also been held that where union men refuse to work with nonunion men, no injunction will be granted merely for such reason, since such a strike may be held merely a protective measure in lawful competition, and the union members may strike to prevent the employment or procure the discharge of nonunion men, and where a union requires certain qualifications of its members as to their

²⁹ *Cooke Combinations* (2d ed.), § 57. It is lawful for the members of a labor union to strike in order to secure to themselves the work of pointing the buildings in which they lay the brick and stone, even though the general contractor can employ professional pointers at a greater advantage, and these pointers would be deprived of employment by the success of the strike. *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n, 116 Am. St. 272. *Martin Labor Unions*, § 30; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n, 116 Am. St. 272, 7 Am. & Eng. Ann. Cas. 638; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Am. & Eng. Ann. Cas. 798. See *Saulsberry v. Coopers' International Union* (Ky.), 143 S. W. 1018.

³⁰ *Martin Labor Unions*, §§ 40-44; *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756. See *Cooke Combinations* (2d ed.), §§ 60, 71. A foreman who was discharged by his employer because of the action of a labor union in requesting such discharge may bring action against the union. See *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756. See *Wyeman v. Deady*, 79 Conn. 414, 65 Atl. 129, 118 Am.

St. 152, 8 Am. & Eng. Ann. Cas. 375; *Lucke v. Clothing Cutters' & Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 421, 39 Am. St. 421; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995. See cases cited in notes 17, 19, 20, § 2695. See § 2695. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899n, 108 Am. St. 499. See *Perkins v. Pendleton*, 90 Maine 166, 38 Atl. 96, 60 Am. St. 252; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330; *People v. Smith*, 10 N. Y. St. 730, 5 N. Y. Crim. 509, 512; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. 783.

³¹ *Quinn v. Leathem*, L. R. (1901) A. C. 495; *Thomas v. Cincinnati & C. R. Co.*, 62 Fed. 803; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Am. & Eng. Ann. Cas. 885. See § 886; *Taff Vale R. Co. v. Amalgamated Society of Railway Servants*, L. R. (1901) A. C. 426; *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28; *Barnes v. Berry*, 156 Fed. 72; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. 49; *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162n; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 772, 57 Am. St. 443.

fitness for the work they are doing, they may refuse to assume the risk of working with those not so qualified.³² The coercion of an employer by threats to call a strike and intimidation of his workmen is often held unlawful and enjoined, even in some cases where an actual strike would not be unlawful.³³ Sympathetic strikes, that is, strikes whose purpose is not to settle a trade dispute between strikers and employers, but is to compel the employers to bring influence upon another employer to settle a trade dispute between him and other combinations, whether of his own employes or others, a dispute not a natural incident or outgrowth of the relation of master and servant, have usually been held unlawful.³⁴ The usual rule is that peaceful picketing is lawful, but where violence, coercion or intimidation is used, picketing is unlawful.³⁵

³² *Martin Labor Unions*, §§ 12, 35-39; *Atchison, T. & S. F. R. Co. v. Gee*, 140 Fed. 153; *Kemp v. Division No. 241, Amalgamated Assn. &c. of America*, 255 Ill. 213, 99 N. E. 389; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Searle Mfg. Co. v. Terry*, 56 Misc. (N. Y.) 265, 106 N. Y. S. 438; *National Protective Union v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. 648; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Am. & Eng. Ann. Cas. 798.

³³ *March v. Bricklayers' Union*, 79 Conn. 7, 63 Atl. 291, 4 L. R. A. (N. S.) 1, 198, 118 Am. St. 127, 6 Am. & Eng. Ann. Cas. 848; *Toledo A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Toledo A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 746; *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994, 26 L. R. A. 158, *affd.* 57 Fed. 85, 6 C. C. A. 258; *Waterhouse v. Comer*, 55 Fed. 149, 19 L. R. A. 403; *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219, 3 Am. & Eng. Ann. Cas. 967; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330; *Carew v. Rutherford*, 106

Mass. 1, 8 Am. Rep. 287; *Purvis v. Local 500, United Brotherhood*, 214 Pa. 348, 63 Atl. 585, 112 Am. St. 757, 6 Am. & Eng. Ann. Cas. 275, *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. 783.

³⁴ See 1 *Eddy, Combination*, § 520; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *In re Higgins*, 27 Fed. 443; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387; *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. 783. The leading case holding this doctrine is *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n, 116 Am. St. 272; *Mauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. 770. See *Cooke, Trade and Labor Combinations*, (2d ed.) § 8. *Contra*, *Cooke Trade and Labor Combinations* (2d ed.), § 58. Acts which would be lawful persuasion where employes are striking to better the terms and conditions of their employment, may not be lawful where employes have no complaint, but a strike is directed by officials of an extended labor organization to secure its recognition. *Tunstall v. Stearns Coal Co.*, 192 Fed. 808.

³⁵ *Cooke, Trade and Labor Combinations* (2d ed.), §§ 85, 86, 87. See cases in notes, 57-61, § 2700.

§ 2698. **Boycotts.**—A boycott, that is, “a combination of several persons to cause a loss to a third person by causing others, against their will, to withdraw their beneficial business intercourse, through threats * * * of injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs,”³⁶ will be restrained by injunction,³⁷ and it is held that the intent to injure makes it unlawful.³⁸ But there are cases holding to the contrary.³⁹ Where one's business is ruined or injured by boycotting, those responsible are liable in damages.⁴⁰ Boycotts are

³⁶ *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. 477 and note, 1 Am. & Eng. Ann. Cas. 171 and note.

³⁷ *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. (N. Y.) 221, 124 N. Y. S. 289. See *Martin Labor Unions*, §§ 70-109; *Cooke Combinations* (2d ed.), § 95; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. 119, 13 Am. & Eng. Ann. Cas. 82; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. 1301; *Crump v. Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. 895. See too, *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. 145, 9 Am. & Eng. Ann. Cas. 1219; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C. C. A. 311; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 62 Fed. 803; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. 322; *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482, 111 Am. St. 262, 4 Am. & Eng. Ann. Cas. 780;

My Maryland Lodge No. 186 of Machinists v. Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752.

³⁸ See note on *Boycotting*, 103 Am. St. 488-503; *Metallic Roofing Co. v. Jose*, 12 Ont. L. R. 200; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477.

³⁹ *Cooke Combinations* (2d ed.), § 25; *American Federation of Labor v. Buck's Stove & Range Co.*, 33 App. D. C. 83, 32 L. R. A. (N. S.) 749 and note; *Ward v. South Dakota Retail Merchants' &c. Assn.*, 150 Fed. 413; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707n, 127 Am. St. 722; *Longshore Printing & Publishing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. 640. See note on *Boycotting*, 103 Am. St. 488-503.

⁴⁰ *Temperton v. Russell* (1893), 1 Q. B. 715; *Giblan v. National Amalgamated Laborers' Union*, L. R. (1903) 2 K. B. 600; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. 203; *Standard Oil Co. v. Doyle*, 118 Ky. 622, 26 Ky. L. 544, 82 S. W. 271, 111 Am. St. 331.

often discussed under the divisions of boycotts of capital and boycotts of labor, but the general principles of law applicable are the same. The right to labor is a property right, entitled to the same protection as capital, and it is said that labor is the poor man's capital.⁴¹ A boycott of labor is actionable in damages or will be enjoined under practically the same circumstances as a boycott of capital.⁴² Many cases involving boycotts were considered in the section on "Unlawfulness of Interference as Dependent upon the Means Used."^{42a}

§ 2699. **Blacklists.**—Combinations of employers to prevent certain workmen from obtaining employment present questions which are the converse of those brought up by strikes and boycotts of capital. Employers' associations sometimes use what is known as the "blacklist," that is, refuse to employ certain persons, who have taken part in a strike against any one of the association, whose names are circulated among the members of the association, and where such circulation of a blacklist causes damage, by preventing one from obtaining employment, or causing his discharge, there has often been held a right of recovery.⁴³ It is also held, however, that since an employer may fix the terms and conditions of the employment of his servants, blacklisting will not be enjoined.⁴⁴ Some cases hold that

⁴¹ *Wanton Interference with Business and Contract Relations*, Henry M. Dowling, 54 Cent. L. J. 426; *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. 241; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339; 79 Am. St. 330; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. 477; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; *Jersey City Printing Co. v. Cassidy*, 63 N. J. E. 759, 53 Atl. 230; *Brace v. Evans*, 5 Pa. Co. Ct. 163.

⁴² *Martin Labor Unions*, §§ 131-144. See cases cited in note 41, § 2698; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n,

116 Am. St. 272, 7 Am. & Eng. Ann. Cas. 638; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Brennan v. United Hatters*, 73 N. J. L. 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. 729, 9 Am. & Eng. Ann. Cas. 698; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. 1301.

^{42a} See ante, § 2694.

⁴³ *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895; *Mattison v. Lake Shore & C. R. Co.*, 3 Ohio Dec. 526, 2 Ohio N. P. 276; *Mulholland v. Waiters' Local Union*, 13 Ohio Dec. 342. See generally, note 4 L. R. A. (N. S.) 1119.
⁴⁴ See note in 4 L. R. A. (N. S.) 1118; *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Atkins v. W. A. Fletcher Co.*, 65 N. J. Eq. 658, 55

in the absence of malice no action will lie,⁴⁵ and that black-listing is actionable where malice exists.⁴⁶ A few cases have denied the existence of any civil remedy.⁴⁷ It is also held that where an employer refuses to employ one who has not a reference card from his former employer, one refused employment for lack of such has no right of action against the former employer, since there is no obligation upon the employer to furnish such card.⁴⁸ But if an employer assigns on his books or certificate a false reason for the discharge of an employé, which prevents him from obtaining employment, the former employer is liable for the damages caused, the gist of the action seeming to be slander or libel.⁴⁹ Where the officers of one railroad were asked by the officers of another about a certain man's standing, and he was reported to them to be a labor agitator, and this caused his discharge, it was held that there was no actionable injury, where the statement was true.⁵⁰ If letters which do not state facts are circulated among the members of an association of employers which prevent an employé discharged by one from getting work from the others, the first employer is liable in damages.⁵¹ A corporation may lawfully circulate among its own employés a list of objectionable employés who have been discharged, so as to

Atl. 1074. See also, *Cooke Combinations* (2d ed.), §§ 43, 105; *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. 294.

⁴⁵ *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177, 1 Am. & Eng. Ann. Cas. 472; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181; *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. 794.

⁴⁶ *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384; *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177, 1 Am. & Eng. Ann. Cas. 472; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181.

⁴⁷ *Boyer v. Western Union Tel. Co.*, 124 Fed. 246.

⁴⁸ *Cooley Torts* (3d ed.), 588; *Cleveland, C., C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. 296; *New York & C. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036, 62 L. R. A. 931, 87 Am. St. 878.

⁴⁹ *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177, 1 Am. & Eng. Ann. Cas. 472; *Hundley v. Louisville & C. R. Co.*, 105 Ky. 162, 20 Ky. L. 1085; 48 S. W. 429, 63 L. R. A. 289, 88 Am. St. 298.

⁵⁰ *Wabash R. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091.

⁵¹ *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895.

prevent their reemployment.⁵² In some states blacklisting is prohibited by statute.⁵³

§ 2700. Injunctive relief.—An injunction will not be granted against a mere peaceable strike.⁵⁴ In some jurisdictions it will be granted against a concerted and systematic attempt to prevent other persons from entering into future business relations,⁵⁵ or against inducing employés to quit work.⁵⁶ Generally, an injunction will be granted where violence is used or threatened against workmen who take the place of strikers.⁵⁷ An injunction will be

⁵² *Hunt v. Great Northern R. Co.* L. R. (1891) 2 Q. B. 189, 60 L. J. Q. B. 498, 55 J. P. 648; *Hebner v. Great Northern R. Co.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. 387; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. 794.

⁵³ *Kansas*, Gen. Stat. (Dassler) (1909), §§ 4661-4663; *Minnesota*, Laws 1895, ch. 174; *Missouri*, Rev. Stat. 1909, § 4719; *Montana*, Political Code (1895), §§ 3390-3392; *North Dakota*, Rev. Code (1899), § 7042; *Oklahoma*, Laws (1909), §§ 2788, 2789; *Virginia*, *Hurst's Code* (1898), § 3845b. (*Acts* 1891-92) 976; *Wisconsin*, Rev. Stat. (1898), § 4466b. See *State v. Justus*, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. 550. See also, *Code Alabama* (1907), §§ 6396-6399; *Gen. Stat. Conn.* (1902), § 1298; *Rev. Civ. Stat. Texas* (1911) Art. 594; *Compiled Laws Utah* (1907), §§ 1340-41. See *Martin Labor Unions*, §§ 277-278; *Colorado*, 1 *Mills Ann. Stat.*, ch. 15, 487, §§ 239-240; 2 *Georgia Code* (1895), § 1873, 3 *Georgia Code* (1895), § 128; *Indiana*, 1 *Burns' Ann. Stat.* (1908), 2259; *Iowa Code* (1907), §§ 5027, 5028.

⁵⁴ Courts of equity will not enjoin one from quitting the personal service of another. *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. See also, *Cooke Combinations* (2d ed.), § 98; *Martin Labor Union*, § 52; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n, 116 Am. St. 272, 7 Am. & Eng. Ann. Cas. 638; *Everett Waddey Co. v. Richmond Typograph-*

ical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Am. & Eng. Ann. Cas. 798.

⁵⁵ See *Aluminum Castings Co. v. Local No. 84*, 197 Fed. 221 (which case considers the rights of striking employés and acts which are unlawful and will be enjoined); *Barnes v. Berry*, 156 Fed. 72; *New York Cent. Iron Works Co. v. Brennan*, 105 N. Y. S. 865. To same effect, *Cooke Combinations* (2d ed.), §§ 100, 101; *Wanton Interference with Contract and Business Relations*, *Dowling*, 54 Cent. L. J. 426; *Barnes & Co. v. Typographical Union No. 16*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018.

⁵⁶ *Southern R. Co. v. Machinists' Local Union*, 111 Fed. 49; *United States v. Weber*, 114 Fed. 950; *United States v. Haggerty*, 116 Fed. 510; *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. 137; *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. 443; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Davis Machine Co. v. Robinson*, 41 Misc. (N. Y.) 329, 84 N. Y. S. 837.

⁵⁷ *Martin Labor Unions*, § 63; *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. 248; *Underhill v. Murphy*, 117 Ky. 640, 25 Ky. L. 1731, 78 S. W. 482, 111 Am. St. 262, 4 Am. & Eng. Ann. Cas. 780 and note; *New York, Lake Erie & Western R. Co. v. Wenger*, 9 Ohio Dec. (reprint) 815, 17 Wkly. L. Bul. 306;

granted against picketing if accompanied with violence,⁵⁸ or sometimes if there is merely an apparent display of force and threats, although no physical violence is used.⁵⁹ In some states peaceful picketing is held rightful,⁶⁰ in others enjoined, as in itself intimidation.⁶¹ The right to compete in business in lawful ways by lawful means is sacred, and will not be interfered with by injunction.⁶² But there is much conflict as to what is a lawful means. Injunction will sometimes issue to restrain interference by a single

O'Neil v. Behanna, 182 Pa. St. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. 702 and note.

⁵⁸ Knudsen v. Benn, 123 Fed. 636; Southern R. Co. v. Machinists' Local Union No. 14, 111 Fed. 49; Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. 235; Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. (N. S.) 787n; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. 443; Connett v. United Hatters of North America, 76 N. J. Eq. 202, 74 Atl. 188; Badger Brass Mfg. Co. v. Daly, 137 Wis. 601, 119 N. W. 328. See Cooke Combinations (2d ed.), § 104; Reinecke Coal Min. Co. v. Wood, 112 Fed. 477; Union Pac. R. Co. v. Ruef, 120 Fed. 102; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Am. & Eng. Ann. Cas. 798.

⁵⁹ Goldberg v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. 145, 9 Am. & Eng. Ann. Cas. 1219; Otis Steel Co. v. Local Union 218, 110 Fed. 698; Underhill v. Murphy, 117 Ky. 640, 25 Ky. L. 1731, 78 S. W. 482, 111 Am. St. 262, 4 Am. & Eng. Ann. Cas. 780; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Herzog v. Fitzgerald, 74 App.

Div. (N. Y.) 110, 77 N. Y. S. 366, 11 N. Y. Ann. Cas. 208.

⁶⁰ In Atkins v. W. A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074, an injunction was asked to restrain employers from interfering with picketing, but was denied. Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn., 59 N. J. Eq. 49, 46 Atl. 208. See also, Martin Labor Unions, § 169 et seq.; Christensen v. Kellogg & Co., 110 Ill. App. 61; W. A. Fletcher Co. v. International Assn. of Machinists (N. J. Eq.), 55 Atl. 1077; Kerbs v. Rosenstein, 56 App. Div. (N. Y.) 619, 67 N. Y. S. 385, 9 N. Y. Ann. Cas. 1; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Am. & Eng. Ann. Cas. 798.

⁶¹ Martin Labor Unions, § 168; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Atchison, T. & S. F. R. Co. v. Gee, 139 Fed. 582; Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; George Jonas Glass Co. v. Glass Bottle Blowers' Assn., 72 N. J. Eq. 653, 66 Atl. 953; W. P. Davis Machinery Co. v. Robinson, 41 Misc. (N. Y.) 329, 84 N. Y. S. 837 (peaceful picketing in aid of an unlawful strike is unlawful). Argument or persuasion to prevent persons from taking place of strikers in order to coerce employers to accede to demands of union is unlawful. Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302 and note.

⁶² Sperry v. Pommer, 199 Fed. 309.

individual or corporation with the business or contract rights of another, when there is no adequate remedy at law.⁶³ Thus, where the plaintiff had an exclusive contract with the management of the Inside Inn at the Jamestown Exposition to act as its New England agent, and the defendant persuaded the Inside Inn Company to grant him a similar contract dividing the agency, with no malicious motive, but for the purpose of increasing his own business, an injunction was issued restraining him from acting as agent.⁶⁴ So, a law-publishing house was enjoined from inducing and attempting to induce the subscribers to publications of a rival house to violate their contracts by refusing to continue their subscriptions to certain of its publications.⁶⁵ So, injunction often issues to protect against interference by third parties inducing the violation of contract rights, such as the exclusive right of sale of certain goods in certain localities,⁶⁶ or contract rights as to the sale of manufactured goods under certain restrictions; for example, to sell patent medicines no lower than an agreed price, or to certain retailers,⁶⁷ or contracts restricting the use of machinery sold.⁶⁸ Where one has contracted not to

⁶³ Where a coal company had a contract with a mining company to take all its coal, but the mining company was not liable for failure to deliver, caused by strikes, it was held that the coal company could enjoin strikers from preventing persons working for the mining company and thus interfering with contracts with the coal company. *Chesapeake & O. Coal Agency Co. v. Fire Creek &c. Coke Co.*, 119 Fed. 942; *Carroll v. Chesapeake &c. Coal Agency Co.*, 124 Fed. 305, 61 C. C. A. 49; *Kinney v. Scarborough Co.* (Ga.), 74 S. E. 772, 40 L. R. A. (N. S.) 473; *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. 443; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067n, 116 Am. St. 272.

⁶⁴ *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201n.

⁶⁵ *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. (N. Y.) 396, 84 N. Y. S. 225.

⁶⁶ *New York Phonograph Co. v. Jones*, 123 Fed. 197; *New England Phonograph Co. v. Edison*, 110 Fed. 26; *New York Phonograph Co. v. National Phonograph Co.*, 112 Fed. 822.

⁶⁷ *Dr. Miles Medical Co. v. Goldthwaite*, 133 Fed. 794; *Wells v. Abraham*, 146 Fed. 190; *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, revd. 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, affd. 210 U. S. 339, 52 L. ed. 1086, 147 Fed. 15, 77 C. C. A. 607, 28 Sup. Ct. 722, 15 L. R. A. (N. S.) 766.

⁶⁸ *New York Bank Note Co. v. Hamilton Bank Note Engraving & P. Co.*, 83 Hun (N. Y.) 593, 31 N. Y. S. 1060, 28 App. Div. (N. Y.) 411, 50 N. Y. S. 1093, revd. on another point, 180 N. Y. 280, 73 N. E. 48; *Heaten Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

enter into business for a certain time in a certain place, injunction will lie against third parties for inducing him to enter again into business or for entering into business with him, in violation of the contract.⁶⁹ An injunction was issued to protect a school-teacher in her contract with a school district by restraining another teacher from teaching in such district under a later contract.⁷⁰ An injunction was granted to restrain the representative of a labor union from attempting to induce apprentices to violate their contract not to join a union.⁷¹ Where there is a valid lighting contract between a city and a gas-light company, there may be an injunction to restrain the city and another lighting company from making a contract which breaks the former contract.⁷² A manufacturing company which has a contract with a retail dealer to handle its pattern exclusively, may enjoin a rival pattern house from making a contract with such dealer.⁷³ In one case where a deed was deposited in escrow, interference with the completion of a contract for the purchase of real estate was enjoined.⁷⁴ Even without the express existence of a malicious motive, the interference with lawful and valid contracts between the complainant and its customers has been enjoined.⁷⁵ It is the general rule that the issuance by a combination of statements, libelous to business, will be enjoined.⁷⁶ Besides

⁶⁹ *A. Booth v. Davis*, 127 Fed. 875; *Acker, Merrill & Condit Co. v. McGaw*, 144 Fed. 864; *Fleckenstein Bros. Co. v. Fleckenstein*, 66 N. J. Eq. 252, 57 Atl. 1025; *A. Booth v. Seibold*, 37 Misc. (N. Y.) 101, 74 N. Y. S. 776.

⁷⁰ *Turner v. Hampton*, 30 Ky. L. 179, 97 S. W. 761.

⁷¹ *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. 779.

⁷² *Newport v. Newport Light Co.*, 84 Ky. 166, 8 Ky. L. 22.

⁷³ *Standard Fashion Co. v. Siegle-Cooper Co.*, 30 App. Div. (N. Y.) 564, 52 N. Y. S. 433, affd. 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. 749.

⁷⁴ *Wilkins v. Somerville*, 80 Vt. 48,

66 Atl. 893, 11 L. R. A. (N. S.) 1183n, 130 Am. St. 906n.

⁷⁵ See *Sperry v. Pommer*, 199 Fed. 309; *Kinney v. Scarbrough Co. (Ga.)*, 74 S. E. 772, 40 L. R. A. (N. S.) 473.

⁷⁶ *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193; *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Broun v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. 126; *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. 119, 13 Am. & Eng. Ann. Cas. 82; *Chicago Typographical Union v. Barnes*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Am. & Eng. Ann. Cas. 54; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E.

the many examples here given in which injunctive relief has been granted against interference with the existence of present or the formation of future contract relations, many of the cases cited in the preceding sections upon Unlawfulness of Interference as Dependent upon the Means Used, Combinations, Conspiracies, Strikes and Boycotts have been those in which injunctions have issued, and reference is here made to those sections.

§ 2701. **Measure of damages.**—Where a servant is enticed away from a master, or a workman from an employer, it is held that the measure of damages includes not only the loss of services during the absence of the one enticed, but all injury sustained by the employer on account of his leaving.⁷⁷ Other cases modify the rule, holding the measure of damages to be such an amount as will fairly compensate an employer for the direct loss of service, that is, the expense and value of time consumed in procuring a workman to take the place of the one who left, the difference in wages paid, if any, and the direct damage by delay.⁷⁸ In other cases the average net profits from the servant's labor have been added.⁷⁹ Some cases allow greater damages where the injury was caused from a malicious motive.⁸⁰ Exemplary damages have also been allowed where there was a wanton or malicious interference with another's business or contract of employment.⁸¹ In certain cases of wrongful interference, as where one set up an unfounded assignment of wages, and thus procured the discharge of

307, 9 Am. St. 689; *Steinert & Sons Co. v. Tagan*, 207 Mass. 394, 93 N. E. 584, 32 L. R. A. (N. S.) 1013n; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492.
⁷⁷*Hewitt v. Ontario Copper Lightening Rod Co.*, 44 U. C. Q. B. 287; *Gunter v. Astor*, 4 J. B. Moore 12, 16 E. C. L. 357; *Armistead v. Chatters*, 71 Miss. 509, 15 So. 39; *Chrestman v. Russell*, 73 Miss. 452, 18 So. 656; *Dubois v. Allen*, Anth. N. P.

(N. Y.) (2d ed. 128) 94; *McCutchin v. Taylor*, 11 Lea (Tenn.) 259. See note 5 L. R. A. (N. S.) 1100.

⁷⁸*Parker v. Bricklayers' Union No. 1*, 10 Ohio Dec. 458, 21 Wkly. L. Bul. 223.

⁷⁹*Lee v. West*, 47 Ga. 311; *Smith v. Goodman*, 75 Ga. 198.

⁸⁰*Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

⁸¹See *Sparks v. McCreary*, 156 Ala. 382, 47 So. 332, 22 L. R. A. (N. S.) 1224n; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. 367.

an employé, damages have been allowed to the employé for mental distress and injured feelings.⁸² Even though the employment is terminable at will of the employer, the discharged employé may be entitled to the fair value of his contract of service and any loss of time attributable to the tortious acts of the one procuring his discharge.⁸³ It seems that the measure of damages for causing the breach of a contract for sale is usually the market-price of the goods.⁸⁴ Where damages are sought for maliciously inducing persons to break business contracts with the plaintiff, the amount to be allowed as general damages is limited to what will flow in the ordinary course of things from the invasion of the plaintiff's right by the defendant.⁸⁵

§ 2702. Criminal liability.—In several states it is made a penal offense by statute to induce a laborer, renter or cropper to leave his employer or the leased premises without the consent of the employer or landlord.⁸⁶ In West Virginia it is a penal offense to prevent persons from working in or about mines by threat or intimidation.⁸⁷ In some jurisdictions a conspiracy to injure the business of another may be criminal,⁸⁸ even, it has been held, where unlawful means were not used.⁸⁹ Picketing is criminal in some

⁸² *Lopes v. Connolly*, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986.

⁸³ *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756; *De Minico v. Craig*, 207 Mass. 593, 94 N. E. 317; *Lopes v. Connolly*, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986.

⁸⁴ *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30.

⁸⁵ *Gurney Foundry Co. v. Western Foundry Co.*, 6 Ont. W. Rep. 959.

⁸⁶ *Alabama*, Code (1907), § 6850; *Arkansas Acts* (1905), Act 298, 726; *Sturdivant v. Follette*, 84 Ark. 412, 105 S. W. 1037; *Georgia Code* (1911), § 3712; *Lee v. State*, 3 Ala. App. 131, 57 So. 1032; *Linton v. State*, 3 Ala. App. 105, 57 So. 1020; *Wyeman v. Deady*, 79 Conn. 414, 65 Atl. 129, 118 Am. St. 152, 8 Am. & Eng. Ann. Cas. 375; *McBride v. O'Neal*, 128 Ga. 473, 57 S. E. 789; *Jones v. Roughton*, 1 Ga. App. 759, 57 S. E.

1061; *Mississippi Laws* (1900), ch. 102, 140; *Sneed v. Gilman* (Miss.), 44 So. 830.

⁸⁷ *West Virginia Code* (1906), 171, § 413; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Am. & Eng. Ann. Cas. 885.

⁸⁸ *State v. Stockford*, 77 Conn. 227, 58 Atl. 769, 107 Am. St. 28; *People v. McFarlin*, 43 Misc. (N. Y.) 591, 18 N. Y. Cr. Rep. 412, 89 N. Y. S. 527; *State v. Van Pelt*, 136 N. Car. 633, 49 S. E. 177, 68 L. R. A. 760; *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. 817, 17 Am. & Eng. Ann. Cas. 96; *Aikens v. Wisconsin*, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. 3.

⁸⁹ *Crump v. Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. 895; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

states.⁹⁰ In former times many combinations were punishable in England as criminal conspiracies.⁹¹ Blacklisting is subject to a penalty in some states.⁹²

§ 2703. Justification—Interference for which there is no remedy.—It was previously stated that it is only unjustifiable interference with contract relations by third parties which is actionable, and in the preceding sections reference has been made to many cases which have denied a right of recovery for interference. No case goes so far as to hold that all interference in any sense by third persons with the contracts of others resulting in their breach is an actionable wrong; and interference may be justified on the ground of business competition, or that the object in interfering was primarily to benefit the person interfering, and the injury was caused by his exercise of an absolute right.⁹³ Honest advice which prevents the performance of or causes the breach of a contract is, as a rule, not actionable.⁹⁴ Nor is it unlawful for one by fair means and argument or persuasion to interfere with the contractual relations of another, if such interference is with the honest intent of bettering one in his own business, and not with the object of wrongfully injuring a competitor, for legitimate competition is lawful.⁹⁵

⁹⁰ Alabama Code (1907), § 6395.

⁹¹ *Cooke Combinations* (2d ed.), § 13.

⁹² See cases cited in note 53, § 2699.

⁹³ *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 Pac. 441. "It is immaterial by what motive one is prompted in the exercise of a clear legal right or the performance of a duty." *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856, 1 Am. & Eng. Ann. Cas. 248, holding that a passenger who from a motive of ill will, reported an employé of a railroad company for a breach of duty, and thus procured his discharge, was not liable to the discharged employé. *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, 96 L. T. (N. S.) 218; *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008; *Sweeney v. Smith*, 167 Fed. 385, 171

Fed. 645, 96 C. C. A. 91; *Jackson v. Morgan* (Ind. App.), 94 N. E. 1021; *Dunshee v. Standard Oil Co.* (Iowa), 126 N. W. 342; *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 97 Miss. 148, 52 So. 454, 29 L. R. A. (N. S.) 869n; *Holder v. Cannon Mfg. Co.*, 138 N. Car. 308, 50 S. E. 681; *Biggers v. Matthews*, 147 N. Car. 299, 61 S. E. 55.

⁹⁴ *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903), 1 K. B. 118; *Legrís v. Marcotte*, 129 Ill. App. 67; *McCann v. Wolff*, 28 Mo. App. 447.

⁹⁵ *Cooley Torts* (3d ed.), 607. "The existence of the relation of trade competitor justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure one's rival." *Cooke Combinations* (2d ed.), § 31; "Competition and the Law," Wyman,

So, where one believed that the father of plaintiff, a pupil attending a convent under a contract, was afflicted with a contagious disease, and to protect her own children in school, in good faith, by making the above statement, had the plaintiff discharged, it was held that no action would lie.⁹⁶ It has been held not an actionable wrong to make a second contract with a promisor, though knowing he has a prior contract on the same subject with another and though the making of the second contract is a breach of the first.⁹⁷ Nor is it, ordinarily, actionable without ill motive to cause one to break a contract to purchase property.⁹⁸ And the damage to one from interference with contract relations by a third person may be too remote to support an action.⁹⁹ But it is said that legitimate competition only exists when there is actually a conflict of rights, a legitimate interest of the defendant to be directly served and substantially advanced, and the damage to the plaintiff is not excessive in proportion to the benefit to the defendant.¹ The same authority holds further, that it is never right to induce by temporal means a third person to interfere with the plaintiff. However, it is also said that merely to refuse to deal with another person or to induce by persuasion another to refuse to deal, is not unlawful.² It is generally held that peaceable argument and persuasion to join a union is lawful.³ What

15 Harv. L. Rev. 427; *Schonwald v. Ragains*, 32 Okla. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854.

⁹⁶ *Legris v. Marcotte*, 129 Ill. App. 67.

⁹⁷ *Sweeney v. Smith*, 167 Fed. 385, 171 Fed. 645, 96 C. C. A. 91.

⁹⁸ *Biggers v. Matthews*, 147 N. Car. 299, 61 S. E. 55; *Swain v. Johnson*, 151 N. Car. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *Davidson v. Oakes* (Tex.), 128 S. W. 944.

⁹⁹ *MacKenzie v. Iron & Co. Employers' Ins. Assn.* (1910), Sc. Ct. Sess. 79; *Payne v. Gebhard* (Tex.), 136 S. W. 1118. A physician chosen by employes from whose wages sums are deducted for hospital and medical services can not maintain an action for damages against the employer for refusing to pay the dues

to him upon the theory that the employer maliciously caused the employes to violate their contract with the physician. *Banks v. Eastern R. & Lumber Co.*, 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. (N. S.) 485.

¹ See, "Crucial Issues in Labor Litigation," *Smith*, 20 Harv. L. Rev. 356-362, 429-451.

² *Cooke Combinations* (2d ed.), ch. IV.

³ *Martin Labor Unions*, § 19; *Hitchman Coal Co. v. Mitchell*, 172 Fed. 963; *Garges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; *Mv Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; *Beck v. Railway Teamsters' Pro-*

is called justification is said to be an exceptional fact, which shows that no tort has been committed,⁴ and the justification must cover not only the object sought, but also the means to attain the object.⁵ It is sometimes held that justification depends upon the facts in each case.⁶ A wrong understanding of one's own rights, or an act done in good will, or even the motive of benefiting the person who brings the action is not necessarily a justification.⁷

tective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. 421; Zieger v. Nolan, 1 N. Y. City Ct. Rep. 54; Dayton Mfg. Co. v. Metal Polishers' Union, 11 Ohio Dec. 643, 8 Ohio N. P. 574.

⁴Booth v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226.

⁶Martell v. White, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. 341, 64 L. R. A. 260.

⁵Glamorgan Coal Co. v. South Wales Miners' Federation, 89 L. T. 393, 72 L. J. K. B. 893 (1903), 2 K. B. 545.

⁷Read v. Friendly Society of Operative Stonemasons (1902), 2 K. B. 88, 71 L. J. K. B. 634, 86 L. T. 593, 50 Wkly. Rep. 619, 18 Times L. 577. See cases cited in note 78, § 2692.

CHAPTER LVII.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

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2749. Impairment of marriage contracts.
2750. Impairment of contracts with reference to public offices.
2751. Impairment by change in appraisement laws.
2752. Impairment by changes in redemption laws.
2753. Impairment by change of exemption or homestead laws.
2754. Impairment by change of law as to notice.
2755. Impairment of contracts by tax laws generally.
2756. Impairment by statute allowing debtor to pay taxes of creditor and deduct same from debts.

- § 2757. Impairment by withdrawal of exemptions from taxation.
2758. Impairment by withdrawal of exemptions from taxation—Illustrations.
2759. Impairment of tax sale contracts.
2760. Impairment of grants of rights in streams.
2761. Impairment of public land contracts.
2762. Impairment by amendment of charters of municipal corporations.
2763. Impairment of municipal obligations.
2764. Laws affecting securities issued by the state.
2765. Statutes relating to insolvency.
- § 2766. Statutes relating to preference of creditors.
2767. Impairment of contracts by imposition of penalties.
2768. Betterment laws not impairment of conveyances.
2769. Effect of scaling laws.
2770. Withdrawal of personal exemption from public service as impairment.
2771. Statutes relating to insurance.
2772. Change in method of payment of wages.
2773. Statutes affecting defenses and parties.
2774. Statutes relating to pleadings and changes in law of evidence.

§ 2715. Provision and effect of article 1, section 10, of Constitution of United States—In general.—The federal constitution¹ provides that: “No state shall * * * pass any * * * law impairing the obligation of contracts,” and similar provisions have found their way into many of the state constitutions. The purpose of the provision, no doubt, was to correct a practice that had become quite prevalent in some of the states after the revolution and before the adoption of the constitution. Such provision has been very prolific of litigation on account of the difficulty arising in its application. The clause is not a limitation upon the power of the United States to impair the obligations of contracts.² It is held that congress, in the

¹ United States Constitution, art. 1, § 10. It is a general rule that contracts valid when made can not be invalidated by subsequent legislation. *Home Tel. Co. v. Sarcoux Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124n.

² *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900, *affd.* 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. 758; *In re Herrman*, 106 Fed. 987, 46 C. C. A. 77, *affg.* 102 Fed. 753; *Michigan Cent. R. Co. v. Slack*, Fed. Cas. No. 9527A; *Hopkins v. Jones*, 22 Ind. 310; *Ansley v. Ainsworth*, 4 Ind. Ter. 308, 69 S. W. 884; *Loud v. Pierce*, 25

Maine 233; *Cutter v. Folsom*, 17 N. H. 139; *Union Pac. R. Co. v. United States* (Sinking Fund Cases), 99 U. S. 700, 25 L. ed. 496, 14 Ct. Cl. 594; *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. 122; *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. 170, 312; *McFadden v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. 758; *Bloomer v. Stolley*, 5 McLean (U. S.) 158, Fed. Cas. No. 1559; *Evans v. Eaton*, Pet. C. C. (U. S.) 322, Fed. Cas. No. 4559, *revd.* 3 Wheat. (U. S.) 454, 4 L. ed. 433; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

exercise of its power over interstate commerce, has authority to enact a statute rendering unenforcible a prior contract, valid when made, by which a railroad company agreed to issue an annual pass for life in consideration of a release of a claim for damages, since the constitutional inhibition against impairment of contracts is not binding on the federal government.³ This principle is especially exemplified in the National Bankruptcy Act,⁴ the Legal Tender Act,⁵ and acts relating to interstate commerce.⁶ It has often been held that whether the state statute⁷ or a state constitution⁸ impairs the obligation of a contract is a federal question, and that the decisions of the state courts thereon are not binding on the federal courts. And, as will be seen,⁹ a legislative act may constitute a contract between the state and a person who, or a corporation¹⁰ which

³ *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. 265, revg. 133 Ky. 652, 118 S. W. 982.

⁴ *In re Herrman*, 106 Fed. 987, 46 C. Ct. A. 77, affg. 102 Fed. 753; *Loud v. Pierce*, 25 Maine 233; *Cutter v. Folsom*, 17 N. H. 139; *Parker v. Davis*, 12 Wall. (U. S.) 457, 20 L. ed. 287.

⁵ *George v. Concord*, 45 N. H. 434; *Knox v. Lee*, 12 Wall. (U. S.) 457, 20 L. ed. 287, *Legal Tender Cases*.

⁶ *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70.

⁷ *Pierce v. Somerset R. Co.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. 64. See also, *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 590, 52 L. ed. 633, 28 Sup. Ct. 341; *Grand Trunk & C. R. Co. v. South Bend* (U. S.), 33 Sup. Ct. 303.

⁸ A state can not impair the obligation of a contract, either by statute or constitutional provision. *Westerly Water-Works v. Westerly*, 75 Fed. 181; *Southwest Missouri Light Co. v. Joplin*, 113 Fed. 817; *German Ins. Co. v. Commonwealth*, 141 Ky. 606, 133 S. W. 793; *People v. Noelke*, 94 N. Y. 137, 1 N. Y. Cr. 495; 46 Am. Rep. 128; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26

L. R. A. 270, affd. 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. 718; *Skaneateles Water-Works Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; *Mitchell v. Clark*, 110 U. S. 663, 28 L. ed. 279, 4 Sup. Ct. 170; *New Orleans Gas-Light Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329; *St. Tammany Water-Works v. New Orleans Water-Works*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Hamilton & Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. 603, affg. 89 Tex. 340, 34 S. W. 746; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. 610, revg. 90 Tex. 607, 40 S. W. 402; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. 73; *Detroit v. Detroit City R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410.

⁹ See post, §§ 2720, 2733.

¹⁰ The contract clause of the Constitution applies equally to persons and corporations. *Shreveport Trac-*

has derived rights under it, and are subject to the contract clause of the federal constitution. The word "contract" in article 1, section 10, of the federal constitution, is used in its ordinary sense, and signifies the meeting of the minds of the contracting parties by which they agree to do or refrain from doing certain acts,¹¹ and the provision of the constitution relates only to contracts in existence when the statute is passed,¹² and has no application to torts.¹³ It relates only to legislative acts of the state, and not to other acts of the state which are alleged to impair the obligations of contracts.¹⁴

§ 2716. Governments affected by this constitutional provision.—As we have seen in the preceding section, the contract clause of the United States constitution does not apply to the federal government, and hence is not binding on the congress. It is well settled that the contract clause of the federal constitution applies to the states of the Union, even when the state is in rebellion against the Union;¹⁵ and it is also held that it does not apply to the acts of the states before they become parts of the Union.¹⁶ However,

tion Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. 345.

¹¹ Love v. Cavett, 26 Okla. 179, 109 Pac. 553. But it includes executed contracts such as a grant from a state. Vol. 1, § 1, note 4.

¹² Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916. The obligation of a contract can only be affected by legislation subsequent to the making of the contract, enacted by the state or by a municipality on which legislative power has been conferred. American Tel. & T. Co. v. New Decatur, 176 Fed. 133. Where a warrant issued to a judge for salary contained the clause "subject to any claim of the county," which warrant was indorsed in collecting it, and the statute under which it was issued was subsequently declared unconstitutional, but the statute was thereafter validated by a constitutional amendment, it was held that such statute was not violative of the Constitution as impairing the obligations of the contract. Ham-

mond v. Clark, 136 Ga. 313, 71 S. E. 479; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. 389; Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984; Sawyer v. El Paso & N. E. R. Co., 49 Tex. Civ. App. 106, 108 S. W. 718.

¹³ Sawyer v. El Paso & N. E. R. Co., 49 Tex. Civ. App. 106, 108 S. W. 718.

¹⁴ Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. 6; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. 80; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. 1051; Ford v. Delta & Pine Land Co., 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230, affg. 43 Fed. 181; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. 464.

¹⁵ White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716.

¹⁶ Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124; League v. De-Young, 11 How. (U. S.) 185, 13 L.

there are a few cases which hold to the contrary.¹⁷ But, whether it applies to acts of the territorial government is a more difficult question. It has been held that the territories of Missouri and Kansas had no right to impair the obligations of contracts.¹⁸ Of course, the provision has no application to foreign governments, and effect must be given to their laws in the enforcement of contracts in this jurisdiction which are governed by foreign laws, even though such laws impair the obligations of contracts,¹⁹ but it is well settled that it does apply to municipal corporations which are mere agencies or arms of the state government.²⁰

§ 2717. Laws affected by this constitutional provision.

—The clause of the federal constitution forbidding any state to pass any law impairing the obligation of contracts embraces acts of the state legislature,²¹ and also applies to city ordinances²² when such ordinances are enacted by authority of the state.²³ And orders and resolutions of a city

ed. 657; *Herman v. Phalen*, 14 How. (U. S.) 79, 14 L. ed. 334.

¹⁷ *Territory v. Reyburn*, *McCahon* (Kans.) 134, 1 Kans. (Dass. Ed.) 551; *Baird v. United States*, Dev. Ct. Cl. (U. S.) 89, § 333.

¹⁸ *Morton v. Sharkey*, 1 Kans. 535 (Dass. ed.), *McCahon* (Kans.) 113; *Ruggles v. Washington County*, 3 Mo. 496.

¹⁹ *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. 363.

²⁰ *Iron Mountain R. Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410; *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.*, 99 Fed. 812; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Grand Trunk & C. R. Co. v. South Bend* (U. S.), 33 Sup. Ct. 303, and numerous cases there cited in the opinion; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460.

²¹ *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Chicago Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681; *Mobile, O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. 968; *Beers v. Haughton*, 1 McLean (U. S.) 226,

Fed. Cas. No. 1230; *National Bank of Western Arkansas v. Sebastian County*, 5 Dill. (U. S.) 414, Fed. Cas. No. 10040. The Workmen's Compensation Law of New York was held not authorized by the reserved power of the state to amend or alter corporate charters. *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162n, affg. 140 App. Div. (N. Y.) 921, 125 N. Y. S. 1125, affg. 68 Misc. (N. Y.) 643, 124 N. Y. S. 920.

²² *Iron Mountain R. Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410; *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.*, 99 Fed. 812; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Cumberland Tel. & T. Co. v. Memphis*, 198 Fed. 955; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460; *Penn Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. 223. Ordinances of a city are laws of the state within the meaning of this provision of the Constitution. See also, *Grand & C. R. Co. v. South Bend* (U. S.), 33 Sup. Ct. 303 and cases cited.

²³ And if a contract is alleged to

council have been held to be legislative acts within the constitutional provision forbidding impairment of contracts.²⁴ A state constitution is a "law" within the clause of the federal constitution forbidding a state to pass any law impairing the obligation of contracts,²⁵ and it results from a parity of reasoning that a constitutional amendment is a law within the meaning of such clause of the constitution.²⁶ And the fact that congress imposed certain conditions upon the application of Georgia for readmission to the Union, under the constitution of 1868, did not make such constitution an act of congress so as to take the constitution out of the operation of the contract clause of the federal constitution.²⁷

§ 2718. Who may take advantage of this constitutional provision.—Only those who have contract rights which are impaired by a subsequent law have the right to take advantage of such provision of the constitution,²⁸ and such right

have been impaired by a city ordinance, it must be shown that the authority to pass the ordinance was granted subsequent to the contract; or, if granted prior to the contract, that it was a continuing authority. *American Tel. & T. Co. v. New Decatur*, 176 Fed. 133. A city ordinance does not constitute action of the state through the municipality, so as to come within the constitutional inhibition against the impairment of contracts, unless the ordinance is enacted by authority of the state. *City and County of San Francisco v. United Railroads of San Francisco*, 190 Fed. 507, 111 C. C. A. 339.

²⁴ *Minneapolis St. R. Co. v. Minneapolis*, 189 Fed. 445.

²⁵ *Oakland Pav. Co. v. Barstow*, 79 Cal. 45, 21 Pac. 544; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860; *Lejee v. Continental Pass. R. Co.*, 10 Phila. (Pa.) 362, 32 Leg. Int. 386; *Lewis v. Woodfolk*, 2 Baxt. (Tenn.) 25; *Nelson v. Haywood County*, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; *Delmas v. Merchants' Ins. Co.*, 14 Wall. (U. S.) 661, 20 L. ed. 757; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36, 22 L. ed. 282; *New*

Orleans Gas-Light Co. v. Louisiana Light & Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329; *St. Tammany Water-Works v. New Orleans Water-Works*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; *Bier v. McGehee*, 148 U. S. 137, 37 L. ed. 397, 13 Sup. Ct. 580; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. 610, revg. 90 Tex. 607, 40 S. W. 402; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736.

²⁶ *Lehigh Val. R. Co. v. McFarlan*, 31 N. J. Eq. 706; *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401; *Mechanics' & Traders' Bank v. Debolt*, 18 How. (U. S.) 380, 15 L. ed. 458; *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436, 17 L. ed. 173; *Ohio & M. R. Co. v. McClure*, 10 Wall. (U. S.) 511, 19 L. ed. 997; *Marsh v. Burroughs*, 1 Woods (U. S.) 463, Fed. Cas. No. 9112.

²⁷ *Marsh v. Burroughs*, 1 Woods (U. S.) 463, Fed. Cas. No. 9112.

²⁸ *Coffin v. Portland*, 27 Fed. 412;

is not extended to those whose rights are merely incidentally affected.²⁹ It has been held that the purchase of the husband's lands by judgment creditors at a sale under their judgments, at a price which satisfies the judgments, can not be attacked by them on the ground that the sale was authorized by a statute enacted after the accrual of the debts, but before the sale, and providing that on judicial sale of the husband's lands the inchoate interest of the wife in such lands shall vest in her.³⁰ So, one not a party to a mortgage, who purchases the property at foreclosure sale after the passage of the statute, affecting the right of redemption, can not complain that his rights are impaired, whatever may have been the rights of the mortgagor under such statute. A statute authorizing the sale of decedent's lands to pay his debts can not be attacked by the purchaser at such sale as impairing the obligation of the contract, because it applies to debts created prior to its passage, since no contract obligation was violated so far as the purchaser is concerned.³¹ And it has been held that where a corporation and its stockholders have accepted a subsequent modification of its charter, they can not thereafter complain that their rights have been impaired by the amendatory statute.³² A statute changing the manner of taxation can not ordinarily be attacked by a county as impairing the obligation of contracts, on the ground that its bondholders are entitled to have its taxing power unimpaired as it existed when the bonds were issued,³³ and it has been held

New Orleans Canal & Navigation Co. v. New Orleans, 12 La. Ann. 364; Moore v. New Orleans, 32 La. Ann. 727. See also, Sioux Falls v. Farmers Loan & T. Co., 136 Fed. 721, 69 C. C. A. 373.

²⁹ Smith v. Inge, 80 Ala. 283; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, affd. 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. 617; Browne v. Turner, 176 Mass. 9, 56 N. E. 969; People v. Brooklyn, Flatbush & Coney Island R. Co., 89 N. Y. 75; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. 663; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047,

18 Sup. Ct. 617; Vought v. Columbus, H. V. & A. R. Co., 176 U. S. 481, 44 L. ed. 554, 20 Sup. Ct. 398, affg. 58 Ohio St. 123, 50 N. E. 442.

³⁰ Currier v. Elliott, 141 Ind. 394, 39 N. E. 554.

³¹ Sullivan v. Berry's Admr., 83 Ky. 198, 7 Ky. L. 402, 4 Am. St. 147. See also, Cowley v. Shields (Ala.), 60 So. 267.

³² State v. Montgomery Light Co., 102 Ala. 594, 15 So. 347; Phinney v. Hospital, 88 Md. 633, 42 Atl. 58.

³³ State v. Essex County Free holders, 16 Vroom (N. J. L.) 504. But compare, People v. Chicago & C. R. Co. (Ill.), 100 N. E. 35.

that one whose land was incidentally benefited by its proximity to a canal can not attack a statute abrogating a contract between the canal company and the state.³⁴ A statute authorizing the removal of dead bodies from the burial grounds of religious societies can not be attacked on the ground that it impairs the obligation of contracts, by pew-holders of the church, or by one who has relatives buried in the grounds, but to authorize such attack on the statute, the plaintiff must show that he has a contract relation with the church or burial rights in the grounds.³⁵

§ 2719. **Effect of change of judicial decision.**—Is a judicial decision a “law” within the meaning of the contract clause of the federal constitution forbidding a state to pass any law impairing the obligation of contracts? Mr. Justice Brown, of the Supreme Court of Texas, in a well-considered case says: “In no case decided by the Supreme Court of the United States, nor, do we believe, in any case decided by any state court, has it ever been held that a decision which overruled a former decision of the same court was obnoxious to the provision of the Constitution of the United States, or of the state, which prohibits a state from enacting any law that violates the obligation of a contract. On the contrary, in every instance where the question has come before the Supreme Court of the United States in the exercise of appellate jurisdiction over the Supreme Court of a state, and in which the Federal Supreme Court was confined in the determination of the question to definite constitutional and legal principles, it has been held that a decision of a court is not a law, within the provisions of the Constitution of the United States.”³⁶ And in an opinion delivered by Mr. Justice Gray, of the United States Supreme Court, it is said: “In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation

³⁴ *Vought v. Columbus, H. V. & A. R. Co.*, 176 U. S. 481, 44 L. ed. 554, 20 Sup. Ct. 398, affg. 58 Ohio St. 123, 50 N. E. 442.

³⁵ *Craig v. First Presby. Church*, 88 Pa. St. 42.

³⁶ *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only."³⁷ Mr. Justice Miller, of the Supreme Court of the United States, in a dissenting opinion with reference to change of judicial decisions said: "I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason."³⁸ So, where a city court of appeals held that a tax bill issued in pursuance of a resolution of the city council for street improvements was valid, tax certificates subsequently issued by the city clerk, in reliance on such decision, do not constitute contracts which were impaired by a subsequent decision of the Supreme Court holding such certificates invalid.³⁹ Justice Brown in the opinion above referred to⁴⁰ reviews many of the decisions of the Supreme Court of the United States on the question of the effect in the change of judicial decisions, and divides them into four classes, viz.: (1) "Those which hold that, where the contract was valid when made, under a statute recognized as valid by the officers of the different departments of the state government, such contract will be sustained as against a decision of the highest court of that state declaring the law void, if made subsequently to

³⁷ *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. 80. See also, *National Mut. Building & Loan Assn. v. Braham*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. 532, affg. 80 Miss. 407, 31 So. 840, 57 L. R. A. 793. *New Water Works Co. v. Louisiana Sugar Refiner Co.*, 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. 741. See also, *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161, 5 Am. St. 502; *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860; *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Bedford v. Eastern Bldg. & C. Assn.*, 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. 597.

90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Bacon v. Texas*, 163 U. S. 207, 41 Law ed. 132, 16 Sp. Ct. 1023.

³⁸ *Gelpecke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520. See also, *Swanson v. Ottumwa*, 131 Iowa 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860; *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678; *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Bedford v. Eastern Bldg. & C. Assn.*, 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. 597.

³⁹ *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

⁴⁰ *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

the time when the contract was entered into.⁴¹ (2) Another class of cases embraces those in which the Supreme Court of the state has made a decision construing a statute or the constitution of the state, and thereafter contracts were entered into which, according to the construction placed upon the law by the existing decisions of the Supreme Court, were valid, but subsequently thereto the same court overruled the former decision, and held such contracts to be void. In this class of cases the Supreme Court of the United States has in some instances held that the latter decision of the state court was violative of the obligation of a contract, relying upon the quotation from the opinion of Chief Justice Taney, and that therefore they would follow the decision under which the contract was made.⁴² (3) The third class of cases consists of those in which the court has held that, where there is a conflict in the decisions of the Supreme Court of the state, the United States courts will, in the exercise of their independent jurisdiction, decide according to their own judgment of the law.⁴³ (4) The last class that we notice consists of those cases in which the Supreme Court of the United States was in the exercise of its appellate jurisdiction by writ of error to the Supreme Court of a state; and in this class that court has uniformly held that the decision of a state court is not a law within the meaning of the Constitution of the United States, wherein it prohibits a state from passing a law impairing the obligation of contracts."⁴⁴ In commenting on this classification of the decisions of the Supreme Court of the United States, Mr. Justice Brown

⁴¹ *Pine Grove v. Talcott*, 19 Wall. (U. S.) 666, 22 L. ed. 227; *Olcott v. Fond du Lac*, 16 Wall. (U. S.) 678, 21 L. ed. 382; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. ed. 997.

⁴² *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 19 L. ed. 725; *Gelpecke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520.

⁴³ *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 34 L. ed. 864, 11

Sup. Ct. 215; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. 10.

⁴⁴ *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. 80; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Knox v. Exchange Bank*, 12 Wall. (U. S.) 379, 20 L. ed. 287, 414; *Mississippi & M. R. Co. v. McClure*, 10 Wall. (U. S.) 511, 19 L. ed. 997.

further says: "The first three classes of cases mentioned above originated in federal courts whose jurisdiction was concurrent with and independent of the courts of the state, and thence carried to the Supreme Court of the United States. In the greater number of those cases the proposition laid down by Chief Justice Taney, which we have quoted, is cited, and would appear, upon casual reading, to be the basis of the decision of the court; but an examination of the opinions in the several cases will bring one to the conclusion that the real ground upon which each of the decisions rests is that the federal courts do not consider themselves bound to follow the state courts in the determination of questions of which they have concurrent and independent jurisdiction, and that, in determining what the law of the state is as to the matter under consideration, they will follow or disregard the decisions of the state court, as they may deem best. It follows that the decisions of the Supreme Court of the United States in those cases are not binding upon the state courts as authority in the determination of like questions. However unfortunate such a conflict may be, the state courts can not afford to surrender the independent exercise of their judicial power over such questions. In the fourth class of cases stated above, the jurisdiction of the Supreme Court of the United States was appellate, and exercised by writ of error to the Supreme Court of the state. In such cases its decisions are binding as authority upon the state courts, and must be followed." But the position of the Supreme Court of the United States is left in some doubt by another decision,⁴⁵ which in effect holds that a contract which, when made, was authorized by the constitution of the state, as then construed, can not be affected by a subsequent change in a decision of the court. But, since this case arose in a federal court, the apparent conflict with previous decisions may

⁴⁵ *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736. Compare also, *Loeb v. Columbia Tp.*, 179 U. S.

472, 45 L. ed. 280, 21 Sup. Ct. 174. And see on the general subject the note in 40 L. R. A. (N. S.) 393-402.

be explained, perhaps, by the rule that in such cases the Supreme Court of the United States is not bound to follow the latest decisions of the state court. It has been held by the United States Supreme Court in a large number of cases that the construction of a state statute by the highest court of the state, in so far as it affects contracts made under it as so construed, will be deemed correct, and that the validity of such contracts can not be impaired by a subsequent change in the decision of the state court.⁴⁶ And the United States Supreme Court has held that where, at the time one acquired title to a lot abutting on a street, the state courts had held that the purchaser was entitled to unimpaired access and uninterrupted circulation of light and air as against structures erected for the exclusive use of a private corporation, a subsequent decision denying compensation to an abutting owner for the erection by the city, in a street, of an elevated viaduct for general public use, does not impair the obligation of contracts, since the decision belongs to a distinct class.⁴⁷ Many of the state courts have, also, held that the obligation of a contract

⁴⁶ *Farrior v. New England Mortg. Security Co.*, 92 Ala. 176, 9 So. 532, 12 L. R. A. 856; *Allen v. Allen*, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; *Union Bank v. Oxford*, 90 Fed. 7; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. 6; *Union Bank v. Geary*, 5 Pet. (U. S.) 99, 8 L. ed. 60; *Thomson v. Lee County*, 3 Wall. (U. S.) 327, 18 L. ed. 177; *Butz v. Muscatine*, 8 Wall. (U. S.) 575, 19 L. ed. 490; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. ed. 594; *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Weightman v. Clark*, 103 U. S. 256, 26 L. ed. 392; *Taylor v. Upsilanti*, 105 U. S. 60, 26 L. ed. 1008; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. 10; *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329; *Anderson v. Santa Ann*, 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. 413;

St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. 159; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. 958; *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684, 16 Sup. Ct. 500; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. 134; *Rowan v. Runnels*, 5 How. (U. S.) 134, 12 L. ed. 85; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. ed. 997; *Gelpecke v. Dubuque*, 1 Wall. (U. S.) 175, 17 L. ed. 520; *Havemeyer v. Iowa County*, 3 Wall. (U. S.) 294, 18 L. ed. 38; *Lee County v. Rogers*, 7 Wall. (U. S.) 181, 19 L. ed. 160; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477, 19 L. ed. 725; *Olcott v. Fond du Lac*, 16 Wall. (U. S.) 678, 21 L. ed. 382.

⁴⁷ *Sauer v. New York*, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. 686, affg. 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717.

made under a law as construed by a state court ought not to be impaired by a subsequent change in the decision of the court.⁴⁸ And, indeed, there is much equity and justice in the principle that contracts made under the decision of the highest court of the state ought not to be annulled or impaired by a subsequent change in the decision of such court. After the validity of a statute authorizing contracts for the purpose of public service, has been affirmed, and after services under such a contract have been performed, a subsequent decision of the Supreme Court declaring such statute unconstitutional, does not prevent recovery for services rendered under such contract made prior to the subsequent decision.⁴⁹ If the decision of the highest court of the state does not relate to the construction of a statute, it does not enter into and become a part of contracts made thereafter, and the obligations of such contracts are not impaired by a subsequent change of decision.⁵⁰ It has also been held that principles laid down by the United States Court do not apply to decisions of the state court based upon general principles of common law and not upon the construction of a statute.⁵¹

§ 2720. What is the obligation of a contract.—The word “contract,” as used in the contract clause of the Federal Constitution, means an obligation which has arisen by agreement of the parties, and has no application to torts or to rights which have been acquired merely by operation

⁴⁸ *Farrior v. New England Mortg. Security Co.*, 92 Ala. 176, 9 So. 532, 12 L. R. A. 856; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. 161, 5 Am. St. 502; *Ruf v. Mueller* (Ind. App.), 96 N. E. 612; *Wisconsin Lumber Co. v. State*, 97 Miss. 571, 54 So. 247; *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616; *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. 922; *Walker v. State* (Bond Debt Cases), 12 S. Car. 200; *McLure v. Melton*, 24 S. Car. 559, 58 Am. Rep. 272; *Smith v. Elliott*, 39 Tex. 201.

⁴⁹ *Thomas v. State*, 76 Ohio St. 341, 81 N. E. 437, 10 L. R. A. (N. S.) 1112, 118 Am. St. 884.

⁵⁰ *Springer v. Citizens' Nat. Gas. Co.*, 145 Pa. St. 430, 22 Atl. 986; *Agerter v. Vandergrift*, 138 Pa. St. 576, 21 Atl. 202; *Mertz v. Vandergrift*, 138 Pa. St. 576, 20 Atl. 1067; *Ray v. Western Pa. Nat. Gas. Co.*, 138 Pa. St. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. 922. See also note in 40 L. R. A. (N. S.) 393, et seq.

⁵¹ *Ray v. Western Pa. Nat. Gas. Co.*, 138 Pa. St. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. 922.

of law.⁵² A statute which simply acts upon property which is the subject of contracts is not unconstitutional as impairing the obligations of contracts; but, in order to be unconstitutional, the statute must act upon the contract itself.⁵³ It has also been held that an unconstitutional law is not a "contract" within the constitutional inhibition against the impairment of contracts.⁵⁴ The provision of the federal constitution prohibiting a state from passing any law impairing the obligation of contracts, does not give validity to contracts which are properly prohibited by statute, but applies only to contracts which confer rights which are recognized by courts of law.⁵⁵ So, a statute authorizing the withdrawal of liquor tax certificates issued to hotels which do not comply with the law, does not impair the obligation of the contract.⁵⁶ And it has been held that, although the police power of the government can not be contracted away, yet where rights, privileges and immunities are granted and accepted, and money has been expended on the faith of the grant, a binding contract is created which must be observed.⁵⁷ The contract clause of the federal constitution has been held not to embrace charters of municipal corporations;⁵⁸ but a city ordinance granting a right becomes an irrevocable contract, when accepted and acted upon by the grantee.⁵⁹ Where a contract was executed

⁵² In the contract clause in the Federal Constitution the word "contract" is used in its ordinary sense and signifies the meeting of the minds of the contracting parties, supported by a consideration, by which they agree to do or not to do certain acts. *Love v. Cavett*, 26 Okla. 179, 109 Pac. 553. An obligation imposed by a colonial grant to the board of trustees of a town, and ratified by the Legislature, can not be impaired by the state. *People v. Hand*, 135 N. Y. S. 192.

⁵³ *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

⁵⁴ *Brearly School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, affg. 138 App. Div. (N. Y.) 833, 123 N. Y. S. 614.

⁵⁵ *State v. Griffith*, 83 Conn. 1, 74 Atl. 1068.

⁵⁶ *People v. Flynn*, 184 N. Y. 579,

77 N. E. 1194, affg. 110 App. Div. (N. Y.) 279, 96 N. Y. S. 665; *People v. Flynn*, 48 Misc. (N. Y.) 159, 98 N. Y. S. 653, revd. 110 App. Div. (N. Y.) 279, 96 N. Y. S. 655.

⁵⁷ *Colorado & S. R. Co. v. Ft. Collins (Colo.)*, 121 Pac. 747. See also, *Grand Trunk & C. R. Co. v. South Bend (U. S.)*, 33 Sup. Ct. 303.

⁵⁸ *People v. Board of Assessors of Town of Oswego*, 134 N. Y. S. 177.

⁵⁹ *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. 345. See also, *Williams v. Citizens' St. R. Co.*, 130 Ind. 73, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. 201; *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. 572; *Detroit v. Detroit United Ry. (Mich.)*, 139 N. W. 56. "The rule is well settled that an

by a city with the state under authority of statute, whereby the city agreed to build an extension of a street and bridge a channel within eighteen months, provided the work could be done at a cost not greater than the estimate of the city engineer, and providing that if the city failed to do the work the state might do so and exact from the city the reasonable expense, not exceeding the estimate made by the city engineer, and the city, although repeatedly requested by the state to do the work, failed to do so, and for thirty years the state failed to exercise its option to do the work, the contract was rendered unenforcible, and its obligation was not impaired by a subsequent statute requiring the city to construct another street and bridge such channel.⁶⁰ And it has been held that, since a municipal corporation is merely an agent of the state, it can not make a contract with a telephone company, which is not subject to the public utilities law.⁶¹ The obligation of an ex-clerk of the supreme and appellate courts of the state, to account for fees and costs, has been held to be of such a nature as comes within the federal constitution forbidding impairment of contracts.⁶² But a statute which requires a corporation to give to discharged employes a written statement of the reasons for their discharge, was held not to impair the obligation of a contract.⁶³ And it has been held that a contract does not arise under the express undertaking in a replevin bond, which is protected by the contract clause in the federal constitution.⁶⁴ So, it has been held that where, after one began the study of the law, the requirements for admission to the bar were changed, he did not have the right to admission to the bar under the law as it existed when he began the study of the law, but that he could only

ordinance or resolution of a municipality, the effect of which is merely to deny liability upon or repudiate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding." *American Tel. & T. Co. v. New Decatur*, 176 Fed. 133.

⁶⁰ *Wheelwright v. Boston*, 188 Mass. 521, 74 N. E. 937.

⁶¹ *Kenosha v. Kenosha Home Tel. Co.*, 149 Wis. 338, 135 N. W. 848.

⁶² *State v. Hess*, 174 Ind. 495, 91 N. E. 732.

⁶³ *St. Louis Southwestern R. Co. v. Hixon (Tex.)*, 126 S. W. 338.

⁶⁴ *Love v. Cavett*, 26 Okla. 179, 109 Pac. 553.

be admitted under the law as subsequently changed.⁶⁵ A statute requiring a foreign corporation to pay an annual franchise tax to the state, based on the amount of capital employed in the state, was held not to impair the obligation of the contract as to corporations which have theretofore complied with previous laws relating to licenses to do business within the state.⁶⁶ But it is held that the power retained after the grant of a right does not include authority to change, alter or impair the right granted, but is merely the retention of the right to regulate the exercise of the right granted.⁶⁷ The question has been raised whether a license is a contract within the meaning of the contract clause of the federal constitution. And on that question the courts have held that a license to conduct a moving picture show does not constitute a contract,⁶⁸ and that the repeal of a statute under which licenses have been granted to conduct certain games does not violate the constitutional provision against the impairment of contracts, such licenses being mere permits under the police power of the state, and not contracts;⁶⁹ that a license granted by a board of health of a city in pursuance of a statute, permitting one to erect and maintain a stable does not constitute a contract between the licensee and the city;⁷⁰ that a license to sell intoxicating liquors is not a contract, but is a mere permit which the city may withdraw at any time;⁷¹ that a license issued by the state to a foreign corporation to do business in the state is not protected by the clause of the federal constitution prohibiting the im-

⁶⁵ *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519.

⁶⁶ *Southern R. Co. v. Greene*, 160 Ala. 396, 49 So. 404.

⁶⁷ *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. 345.

⁶⁸ *Dreyfus v. Montgomery* (Ala.), 58 So. 730.

⁶⁹ *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

⁷⁰ *Lowell v. Archambault*, 75 N. E. 65, 189 Mass. 70, 1 L. R. A. (N. S.) 458.

⁷¹ *People v. Kaelber*, 253 Ill. 552,

97 N. E. 1068; *Carbondale v. Wade*, 106 Ill. App. 654; *McKinney v. Salem*, 77 Ind. 213; *State v. Corron*, 73 N. H. 434, 62 Atl. 1044; *People v. Flynn*, 48 Misc. (N. Y.) 159, 96 N. Y. S. 653, affd. 184 N. Y. 579, 77 N. E. 1194; *Arie v. State*, 23 Okla. 166, 100 Pac. 23. Where a license to sell intoxicating liquors has been forfeited by a local option election, the holder of the license has no contract right which is impaired thereby. *Gordon v. Corning*, 174 Ind. 337, 92 N. E. 59.

pairment of contracts, and hence a state statute prohibiting trusts and monopolies, and providing for the forfeiture of a license issued to foreign corporations which are guilty of a violation of such statute, is a legitimate exercise of the police power of the state, and is not unconstitutional as impairing the obligation of contracts;⁷² that permissions granted to foreign insurance companies to do business in the state, even if they create contracts between such companies and the state, do not prevent the state from regulating the business of such companies by subsequent legislation.⁷³ And it is held that a statute under which a license is granted may be repealed without impairing the obligation of a contract,⁷⁴ and that a city ordinance imposing a license tax on lawyers does not impair the obligation of the state's contract with a lawyer.⁷⁵ But it has also been held that a license to practice a profession, when regularly obtained, is a privilege or right in the nature of property, and is protected by the principle that applies to property rights lawfully acquired.⁷⁶ As will be seen in a subsequent section, a statute granting a charter to a private corporation, when accepted, constitutes a contract between the corporation and the state,⁷⁷ and the same principle is true of a franchise granted by a municipal corporation.⁷⁸ State constitutions are held to be "laws" within the contract clause of the federal constitution,⁷⁹ and such clause of the constitution is also applied to land grants.⁸⁰

§ 2721. Impairment of obligation of contracts—Illustrative cases.—A statute providing that deposits which have

⁷² *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁷³ *State v. American Surety Co.* (Nebr.), 135 N. W. 365, revg. 90 Nebr. 154, 133 N. W. 235.

⁷⁴ *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

⁷⁵ *Baker v. Lexington*, 21 Ky. L. 809, 53 S. W. 16.

⁷⁶ *Czarra v. Board of Medical Suprs.*, 25 App. D. C. 443.

⁷⁷ See § 2733.

⁷⁸ See § 2734.

⁷⁹ *State v. Jersey City*, 49 N. J. L. 540; *Mississippi & M. R. Co. v. McClure*, 10 Wall. (U. S.) 511, 19 L. ed. 997; *White v. Hart*, 13 Wall. (U. S.) 646, 20 L. ed. 685; *Delmas v. Merchants' Mut. Ins. Co.*, 14 Wall. (U. S.) 661, 20 L. ed. 757; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 477; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329.

⁸⁰ See § 2761.

been inactive and unclaimed for thirty years, where the depositor can not be found or is unknown, shall be paid to the treasurer and receiver general, to be held in trust for his legal representatives, was held not to impair the contract between the savings bank and depositors.⁸¹ But a statute providing that any county may redeem any of its bonds issued to railroad companies after ten years from the day of issuance, was held void as to stock subscribed for by a county prior to the enactment of such statute, and paid for by the issuance of county bonds payable in thirty years.⁸²

Where a special act of the legislature required a street railroad company to maintain the surface of the street between the rails of its tracks in good repair, but provided that in case of permanent improvement of a street it should not be required to bear any part of the expense, and, afterwards, such agreement was embodied in a contract between the city and the street railroad company, and was ratified by resolution of the common council on a new consideration moving from the street railroad company, such contract was held not to be impaired by a subsequent special act of the legislature authorizing the city to assess the property of the street railroad company for the expense of paving between the railroad tracks.⁸³ A city ordinance which violates a contract made between the city and a gas company, and imposes penalties for its violation, impairs the obligations of the contract and is unconstitutional.⁸⁴ "The rule is well settled that an ordinance or resolution of a municipality, the effect of which is merely to deny liability upon or repudiate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and

⁸¹ *Provident Institution for Savings in Town of Boston v. Malone*, 221 U. S. 660, 55 L. ed. 899, 34 L. R. A. (N. S.) 1129, 21 Sup. Ct. 661, affg. *Attorney-General v. Provident Institution for Savings in Town of Boston*, 201 Mass. 23, 86 N. E. 912.

⁸² *Clark County v. Woodbury*, 187 Fed. 412, 109 C. C. A. 244.

⁸³ *Rochester v. Rochester R. Co.*, 98 App. Div. (N. Y.) 521, 91 N. Y. S. 87, revd. 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

⁸⁴ *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500.

binding.”⁸⁵ A city ordinance granting to one and his assignees the right to establish and maintain a packing house on certain premises, on the faith of which grant the grantee expended a large sum of money in improving the property, was held to be a mere temporary license which the city might subsequently revoke, and not a contract.⁸⁶ Where a stage company’s charter does not confer the right to use stages for advertising purposes, an ordinance forbidding the display of exterior advertisements on the stages was held not to impair the obligation of contracts, there having been in existence, at the time advertising contracts were made, an ordinance almost similar in terms.⁸⁷

A statute which simply acts upon property which is the subject of contracts is not unconstitutional as impairing the obligation of contracts, but in order to be unconstitutional the statute must act upon the contract itself.⁸⁸ So, a statute providing for proceedings for the redemption of ground rents in certain cases, and that the costs shall be paid from the proceeds of redemption, was held not to impair the obligations of a lease contract.⁸⁹ A statute permitting administration of estates of persons legally dead because of absence from the state was held not to impair the obligation of contracts because it permitted the administration after the running of the seven years statutory period, whether before or after the passage of the act.⁹⁰ But it has been held that a statute affecting the relative rights of the vendor and the purchaser of articles upon conditional sale, on default of payment, can not be made applicable to conditional sales made prior to the enactment of the statute without impairing the obligation of contracts.⁹¹ The diminishing of a mortgage security of

⁸⁵ *American Tel. & T. Co. v. New Decatur*, 176 Fed. 133.

⁸⁶ *Portland v. Cook*, 48 Ore. 550, 87 Pac. 772.

⁸⁷ *Fifth Avenue Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. 709, affg. 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744.

⁸⁸ *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

⁸⁹ *Kingan Packing Assn. v. Lloyd*, 110 Md. 619, 73 Atl. 887.

⁹⁰ *Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475, 22 L. R. A. (N. S.) 221.

⁹¹ *Haefelein v. Jacob*, 106 App. Div. (N. Y.) 163, 94 N. Y. S. 466.

land, by the imposition of a tax for public purposes, does not constitute the impairment of the mortgage contract within the meaning of the constitution.⁹² Where an action was brought under the existing law to recover a penalty of an administratrix for failure to file an inventory, the statute enacted during the pendency of the action which limited recovery in such actions to one dollar and costs was held not invalid as impairing the obligation of the contract existing between the plaintiff and the state under the prior law.⁹³ The constitutional provision against the impairment of obligations of contracts does not prevent the legislature from abrogating obligations due to the public.⁹⁴ Under the state and federal constitutions forbidding the impairment of the obligations of contracts, a local society of a benefit association has no power, by resolution, to sever its relations with the association and assume the payment of benefit certificates of its members.⁹⁵ A statute which provides for the automatic revocation of the charter of a social club on a judgment to the effect that the club was conducted for the purpose of violating and evading the laws of the state relating to the licensing and sale of intoxicating liquors does not impair the obligation of a contract between the state and the club.⁹⁶ Although the legislature may regulate a corporation where the public interest demands it, yet the legislature can not wholly take away the power of the corporation to contract.⁹⁷ The obligation of a contract existing between the corporation and its stockholders is impaired by the issuance of preferred stock without authority of law and against the objection of a shareholder.⁹⁸

Condemnation of a right of way over land dedicated to

⁹² *Olyphant v. Egreski*, 29 Pa. Super. Ct. 116.

⁹³ *Atwood v. Buckingham*, 78 Conn. 423, 62 Atl. 616. See also, *Supreme Ruling v. Snyder* (U. S.), 33 Sup. Ct. 292.

⁹⁴ *Cortelyou v. Anderson*, 73 N. J. L. 427, 63 Atl. 1095, revd. 75 N. J. L. 532, 68 Atl. 118.

⁹⁵ *Kern v. Arbeiter Unterstuetz-*

ungs Verein, 139 Mich. 233, 102 N. W. 746.

⁹⁶ *Cosmopolitan Club v. Commonwealth*, 208 U. S. 378, 52 L. ed. 536, 28 Sup. Ct. 394.

⁹⁷ *Union Sawmill Co. v. Felsenthal*, 85 Ark. 346, 108 S. W. 217.

⁹⁸ *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624, 70 Atl. 295.

a public use does not impair the obligation of the contract by which the land was dedicated.⁹⁹ So, a contract between a nonresident and resident managing agent, calling for a weekly salary, is not impaired by a subsequent statute imposing a license tax on the domestic business carried on by the agent.¹ The clause of the federal constitution, forbidding the impairment of contracts by a state, applies, however, to bonds which constitute contracts between the purchasers and the school district.²

An employers' liability act providing that the acceptance of benefits by an employé who had joined the relief department of a railroad company should not release the railroad company from liability, but that such sum might be set off against any recovery of damages by the employé, was held not to impair the obligation of a contract with the employé who joined the relief department prior to the passage of the act.³ So, the employers' liability act was held not to impair the obligation of the contract of an engineer with a railroad company, as affecting his right of action, where no express contract of employment was shown, but a contract was merely implied from long continued service.⁴

The Negotiable Instruments Act, which is construed to apply to the renewal of a note given before the passage of the act, has been held not unconstitutional as impairing the obligation of the contract, since the renewal extinguishes the old debt.⁵ And the contract rights of a citizen are not impaired by the diversion of public funds from one use to another.⁶ Nor does a statute affecting the jurisdiction of courts in land contest cases impair the obligations of contracts.⁷ Until a former owner

⁹⁹ *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390, 56 L. ed. 481, 32 Sup. Ct. 267, affg. 82 Ohio St. 466, 92 N. E. 1111.

¹ *Kehrer v. Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. 403, affg. 117 Ga. 969, 44 S. E. 854.

² *Welch v. Getzen*, 85 S. Car. 156, 67 S. E. 294.

³ *Washington v. Atlantic Coast*

Line R. Co., 136 Ga. 638, 71 S. E. 1066.

⁴ *Pittsburgh, C. C. & St. L. R. Co. v. Lighteiser*, 168 Ind. 438, 78 N. E. 1033.

⁵ *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086.

⁶ *Miller v. Henry (Ore.)*, 124 Pac. 197.

⁷ *Craycroft v. Superior Court of*

of land, forfeited for failure to enter the same on the tax books, has actually redeemed by payment and decree, a contract between him and the state, which is protected from impairment, does not arise.⁸ A statute confirming a Mexican land grant and imposing upon the claimant the duty of having the land surveyed by the county or district surveyor, and of returning the field notes to the land office which is required to issue a patent, was held not to impair contract obligations, although the state under such statute had recovered a portion of the land called for by the survey which was outside the boundaries of the Mexican grant.⁹ In view of the constitution of New York, article 1, section 17, providing that nothing shall affect or annul any grant of land by the King of England prior to October 14, 1775, a grant thus made constitutes a contract which can not be impaired by statute.¹⁰ The statute making it the duty of the attorney-general to bring such suits as may be necessary to recover from persons in possession of lands and claiming title from the Spanish or Mexican governments under certain conditions was held not violative of the constitution as impairing the obligation of contracts under the confirmation act.¹¹ An amendment to the general transfer tax law, the effect of which is to reduce an estate upon the exercise of a power of appointment conferred by deed executed prior to the enactment of the amending statute, was held not to impair the obligation of contracts.¹² And a statute incorporating a society with the same name as that previously granted by a foreign benevolent society to the local society, after the foreign society had withdrawn a charter of the local society, and conferring upon the local society so incorporated the exclusive right of granting subcharters in the state, does not impair the

Kern County, 18 Cal. App. 781, 124 Pac. 1042.

⁸ State v. King, 64 W. Va. 546, 63 S. E. 468.

⁹ Sullivan v. Texas, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. 215.

¹⁰ Trustees, &c. of Town of Brook-

haven v. Smith, 90 N. Y. 646, 98 App. Div. (N. Y.) 212.

¹¹ Sullivan v. State, 41 Tex. Civ. App. 89, 95 S. W. 645, affd. 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. 215.

¹² Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. 550.

obligation of a contract.¹³ So, a statute making combination in restraint of trade unlawful, and fixing a penalty for each day the offense is continued, does not impair the obligation of contracts relating to combinations which existed prior to the enactment of the statute, but were continued after the statute went into effect, since the offense consists in the persistence of the combination after the statute took effect, and not to the original contract under which it was formed.¹⁴ A mortgagee has no vested right in the equitable rule that a borrower seeking equitable relief against a usurious mortgage must offer to pay legal interest in addition to the principal debt, and hence a subsequent statute providing that a borrower at a usurious rate of interest shall not be required to pay more than the principal does not impair the obligation of the contract.¹⁵ But where, under a statute, tolls for passing through a subway were pledged to secure the payment of interest and principal of bonds issued for the construction of the subway, a contract was created and the toll can not be diminished by statute without impairing the obligation of the contract.¹⁶ Under the statute giving a city authority to collect its arrearage of taxes and authorizing the city attorney to select associate counsel to bring actions against delinquent taxpayers, counsel so selected does not sustain such a contract relation to the city as was impaired by the repeal of the statute.¹⁷ An act of congress requiring United States currency, at the rate prescribed by the act, to be accepted in discharge of an obligation incurred in the purchase of a plantation in Porto Rico, in 1894, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso of indebtedness, was held not to impair the obligation of the contract.¹⁸

¹³ *National Council Junior Order United American Mechanics v. State Council*, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. 46.

¹⁴ *State v. Missouri, K. & T. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. 783.

¹⁵ *Barclift v. Fields*, 145 Ala. 264, 41 So. 84.

¹⁶ *In re Opinion of the Justices*, 190 Mass. 605, 77 N. E. 1038.

¹⁷ *Wilmington v. Bryan*, 141 N. Car. 666, 54 S. E. 543.

¹⁸ *Serralles' Succession of Esbri*, 200 U. S. 103, 50 L. ed. 391, 26 Sup. Ct. 176.

Neither the drain commissioner nor persons interested in drains have such rights under the law that the duties of the commissioner may not be enlarged, restricted or suspended at any time.¹⁹ A local statute relating to the location and establishment of drains within a certain county, and providing that it shall not apply to drains already constructed, was held not to impair the obligation of contracts.²⁰ The contract created by a statute and acts amendatory thereof, whereby the state accepted the conditions and benefits of a grant by congress, which related to the maintenance of an agricultural college, was held not impaired by a subsequent act abolishing such college, where the congressional grant especially authorized the state legislature to prescribe the manner in which the branches of learning in agricultural and mechanical arts should be taught.²¹ So, the removal by a court of equity of an absconding trustee does not impair the obligation of a contract, nor does the substitution by statute, for such purpose, of a summary proceeding for the plenary one.²² Where a statute, providing for the forfeiture of a convict's "good time" earned, on a subsequent conviction before the time has elapsed for his release under the first judgment, is made a part of the contract in which the state consents to a reduction of the sentence in consideration of the convict's good behavior, the subsequent incarceration of the convict under such act has been held not to constitute the impairment of a contract.²³

§ 2722. Priority between contract and statute.—The importance of the question of priority between the statute and the contract rests upon the principle that only contracts entered into after the passage of the statute can, ordinarily, be affected by the statute.²⁴ But, as will be seen in a subse-

¹⁹ *Rice v. Ionio* Probate Judge, 141 Mich. 692, 105 N. W. 17.

²⁰ *Rice v. Ionio* Probate Judge, 141 Mich. 692, 105 N. W. 17.

²¹ *State v. Bryan*, 50 Fla. 293, 39 So. 929.

²² *Marshall v. Kraak*, 23 App. D. C. 129.

²³ *Ex parte Russell*, 92 N. Y. S. 68.

²⁴ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Beers v. Haughton*, 1 McLean (U. S.) 226, Fed. Cas. No. 1230, affd. 9 Pet. (U. S.) 329, 9 L. ed. 145.

quent section,²⁵ this principle has been modified by the reservation of the power by the state to alter or repeal corporate charters and laws under which corporate charters have been granted. In applying the principle of priority of the statute and the contract, the date of the passage of the law is what determines the question, and not the date on which the statute goes into effect, where it is to take effect subsequently to its passage.²⁶ But the fact that a contract was entered into prior to the passage of the act must be affirmatively shown, and will not be presumed.²⁷ If the contract has not been actually consummated before the passage of a statute, but is merely in process of negotiation, it is not affected by the contract clause of the constitution.²⁸ Thus, the rights of prospective purchasers of public land have been held not impaired by a subsequent statute withdrawing the land from sale, unless they have so far complied with the law as to acquire rights in the land before its withdrawal.²⁹ So, a statute making valid a stipulation in a contract between a railroad company and an employé requiring notice of the claim by the employé for damages for personal injuries was held not to apply to contracts made before the act took effect, and hence is not

²⁵ See post, § 2733.

²⁶ *Wrightman v. Boone County*, 88 Fed. 435; *Hedger v. Rennaker*, 3 Met. (Ky.) 255; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *Ludwig v. Stewart*, 32 Mich. 27; *Price v. Hopkin*, 13 Mich. 318; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *O'Brien v. Gaslin*, 20 Nebr. 347, 30 N. W. 274; *Horbach v. Miller*, 4 Nebr. 31; *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. 516; *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 75 N. W. 244, 66 Am. St. 653; *Korn v. Browne*, 64 Pa. St. 55; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. 206; *Virginia Dev. Co. v. Iron Co.*, 90 Va. 126, 17 S. E. 806, 44 Am. St. 893; *Eaton v. Manitowoc County*, 40 Wis. 668.

²⁷ *Blair v. Ostrander*, 109 Iowa 204, 80 N. W. 330, 47 L. R. A. 469, 77 Am. St. 532; *Williams v. Donough*, 65 Ohio St. 499, 63 N. E. 84, 56 L. R. A. 766.

²⁸ *Campbell v. Wade*, 132 U. S. 34, 33 L. ed. 240, 10 Sup. Ct. 9.

²⁹ *American Assn. v. Innis*, 109 Ky. 595, 22 Ky. L. 1196, 60 S. W. 388; *Lytle v. Arkansas*, 9 How. (U. S.) 314, 13 L. ed. 153; *Campbell v. Wade*, 132 U. S. 34, 33 L. ed. 240, 10 Sup. Ct. 9; *Stark v. Starrs*, 6 Wall. (U. S.) 402, 18 L. ed. 925; *Hutchings v. Low*, 15 Wall. (U. S.) 77, 21 L. ed. 82; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Frisbie v. Whitney*, 9 Wall. (U. S.) 187, 19 L. ed. 668; *State v. Bridges*, 22 Wash. 64, 60 Pac. 60, 79 Am. St. 914; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606.

invalid as impairing the obligation of contracts.³⁰ And a Workmen's Compensation Law was held not unconstitutional as to contracts of employment which extend beyond the day of the taking effect of such law or as to employes' right to sue for damages for possible future torts.³¹ But, after the application for a loan from a foreign loan association has been approved, a subsequent statute restricting the right of such loan association to do business within the state can not affect the contract relations between the applicant and the association, although the loan was not actually made until after the passage of the statute.³² If a statute, which was in force when a contract was made, is subsequently repealed, and afterwards re-enacted, its re-enactment, without modification, has been held not to impair the obligation of a contract.³³ In determining what is a reasonable time for the enforcement of obligations by a statute, when the time for bringing suit has been shortened, it is held that the time for bringing suit must be computed from the date of the passage of the statute.³⁴ Where a contract was made after an act had passed both houses of the legislature, but prior to its approval by the Governor, it was held that it could not be impaired by such statute.³⁵

§ 2723. Laws affecting contracts of the state with individuals.—The contract clause of the federal constitution is also held to apply to contracts between the state and individuals.³⁶ Thus, acts performed under a constitutional

³⁰ *Missouri, K. & T. R. Co. v. Hudgins* (Tex. Civ. App.), 127 S. W. 1183.

³¹ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209.

³² *Bedford v. Eastern Bldg. & Loan Assn.*, 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. 597.

³³ *Knights Templar's &c. Indem. Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108.

³⁴ *Wrightman v. Boone County*, 88 Fed. 435; *Hedger v. Rennaker*, 3 Metc. (Ky.) 255; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *O'Brien v.*

Gaslin, 20 Nebr. 347, 30 N. W. 274; *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. 516; *Ludwig v. Stewart*, 32 Mich. 27; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118.

³⁵ *Wartman v. Philadelphia*, 33 Pa. St. 202.

³⁶ *Woodruff v. State*, 3 Ark. (3 Pike) 285; *Myers v. English*, 9 Cal. 341; *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379; *Franklin County Court v. Deposit Bank of Frankfort*, 87 Ky.

act of the legislature are held to constitute a contract which can not be impaired by a subsequent statute.³⁷ But in Louisiana it is held that the state may repeal a statute which constitutes a contract with an individual, without impairing the contract clause of the federal constitution, on the theory that a state can not be coerced into the payment of its debts without its consent.³⁸ Most of the states, however, have made provision whereby claims against the state may be enforced. It has been held that where a state contracted with an individual whereby he was to perform certain duties for a specific time, at a certain compensation, he was entitled to the stipulated compensation, although prior to the expiration of the period the state repealed the statute which formed the basis of the contract.³⁹ But a statute providing for the issuance of bonds for the refunding of outstanding state warrants was held not to contravene the contract clause of the federal constitution as impairing the rights of warrant holders, where it is optional with them whether they will accept the bonds.⁴⁰ So, a statute providing for county official newspapers, and also providing that no newspapers shall be so designated which have not been published for at least two years, was held not unconstitutional as impairing the obligation of contracts.⁴¹ The construction and maintenance by a telephone company of lines in streets of a city, under authority of a statute, amount to an acceptance of the provisions of the statute, and constitute a contract between the state and the telephone company.⁴² If in the operation of a drainage law an attempt is made to impair vested rights, such attempt will be set aside on a proper

370, 10 Ky. L. 506, 9 S. W. 212; *Baldwin v. Commonwealth*, 11 Bush (Ky.) 417; *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. Co.*, 4 Gill & J. (Md.) 1; *Clements v. State*, 76 N. Car. 199; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. ed. 939; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302.
³⁷ *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379.

³⁸ *State v. Lanier*, 47 La. Ann. 110, 16 So. 647.

³⁹ *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302.

⁴⁰ *Post Printing & Publishing Co. v. Shafroth (Colo.)*, 124 Pac. 176.

⁴¹ *Dollar v. Wind*, 135 Ga. 760, 70 S. E. 335.

⁴² *Sunset Tel. & T. Co. v. Pamona*, 172 Fed. 829. See also, *Portland Ry., Light & Co. v. Portland*, 201 Fed. 119.

showing.⁴³ Although, when bonds were issued, there was no legal authority for calling in state bonds for payment, a subsequent statute making it the duty of the treasurer of state to issue a call for valid past-due city bonds for payment, and providing that unless such bonds are presented within the time specified they shall become invalid, does not impair the obligation of contracts.⁴⁴ Legislative grants of land by the state have also been held to come within the clause of the federal constitution forbidding the state to pass any law impairing the obligation of contracts.⁴⁵ But it has been held that the offering of a bounty on certain articles manufactured within the state does not constitute a contract which can not be impaired or abrogated by the state by subsequent repeal of the statute, since such action rests within the sound discretion and public policy of the state.⁴⁶ However, where a statute is enacted which provides for the payment of a bounty to soldiers who enlist in the United States army on a call of the President of the United States, it has been held that, as between the state and those who have enlisted under such statute, a vested right is created which can not be impaired or destroyed by a subsequent statute.⁴⁷ Whether an annuity granted by a state to an individual constitutes a contract within the contract clause of the federal constitution seems to depend upon the facts of each particular case. Thus, where a statute conferred a military title on one, and provided for the payment of an annuity to him during life for services rendered and loss sustained in war, it was held to create no vested right in the annuity, and that the state might repeal the statute without impairing the obligation of a contract.⁴⁸ But, on the contrary, a statute granting an annuity to a college, on the faith of which

⁴³ *People v. Sacramento Drainage Dist.*, 155 Cal. 373, 103 Pac. 207.

⁴⁴ *Tipton v. Smythe*, 78 Ark. 392, 94 S. W. 678, 7 L. R. A. (N. S.) 714.

⁴⁵ See post, § 2761.

⁴⁶ *East Saginaw Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373, 20

L. ed. 611, affg. *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

⁴⁷ *Smith v. Aplin*, 80 Mich. 205, 45 N. W. 136.

⁴⁸ *Dale v. Governor*, 3 Stew. (Ala.) 387.

large sums were donated and subscribed to the college funds, and providing for a permanent fund, and that "annually and forever thereafter" a certain sum should be granted by the state to the college, was held to amount to a contract binding on the state, which could not be impaired or abrogated by subsequent statute.⁴⁹

The general rule seems to be that a statute of the state locating or relocating a county seat does not create a contract relation between the state and individuals who have donated money or property on the faith of such location or relocation of the county seat, which will prevent the state from relocating the county seat.⁵⁰ And this is true, although the statute locating a county seat provides that such place shall forever continue to be the permanent county seat.⁵¹ But it has been held that where the act of removal or establishment of a county seat was to be effective upon the payment of certain sums of money, which condition has been complied with, the statute and the acts thereunder constitute a contract which can not be impaired or abrogated by a subsequent statute.⁵²

A statute authorizing the county superintendents of the state, by a majority vote, to adopt text-books for use in the common schools of the state, and providing that the books so adopted shall be exclusively used for a period of four years, was held not to constitute a contract with the publishers of the text-books, and not binding on the state so as to compel it to use such text-books for such period, and the state might abrogate or modify the contract.⁵³ But the state has the right to hire its convicts to third persons, and the contract right

⁴⁹ *St. John's College v. State*, 15 Md. 330.

⁵⁰ *Moses v. Kearney*, 31 Ark. 261; *Schwartz v. Lake County*, 158 Ind. 141, 63 N. E. 31; *Elwell v. Tucker*, 1 Blackf. (Ind.) 285; *State v. Jones*, 1 Ired. (N. Car.) 414; *Newton v. Mahoning County Comrs.*, 26 Ohio St. 618, *affd.* 100 U. S. 548, 25 L. ed. 710; *Alley v. Denson*, 8 Tex. 297.

⁵¹ *Armstrong v. Dearborn*, 4 Blackf. (Ind.) 208.

⁵² *State v. Perry County Comrs.*, 5 Ohio St. 497; *Gill v. Scowden*, 14 Phila. (Pa.) 626.

⁵³ *Bancroft v. Thayer*, 5 Sawy. (U. S.) 502, Fed. Cas. No. 835. See also, *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77.

between the state and the person who hires the convicts of the state can not be abrogated or impaired by the state.⁵⁴ And one who hires convict labor has the right to sublet such labor and to recover therefor.⁵⁵ So, where the state contracts for public printing with the lowest bidder, for a certain year, in pursuance of a statute or constitutional provision, such contract is within the protection of the federal constitution forbidding the state to enact any law impairing the obligation of contracts.⁵⁶ And a statute requiring the judges of the Supreme Court to prepare and file a syllabus with each opinion rendered by them, which under the constitution would render the syllabi a part of the record, and "free for publication by any person," was held to impair the obligation of a contract between the publisher and the state, whereby the state was required to take out a copyright for the protection of the publisher.⁵⁷ A statute providing for the abandonment of a canal and the leasing of the canal to a railroad company was held not invalid as impairing the obligation of a contract by the state to maintain a dam at a certain place for mill purposes, where it also provided that the railroad company should not destroy any vested rights of abutting property owners.⁵⁸

§ 2724. Laws affecting contracts of municipalities with individuals.—The contract clause of the federal constitution is also applicable to contracts made between municipal corporations and individuals, and generally prohibits their impairment or abrogation either by subsequent statute or by agent of the state for governmental purposes. So, it is

⁵⁴ Georgia Penitentiary Co. v. Nelms, 71 Ga. 301; Mason & Foard v. Main Jellico Mountain Coal Co., 87 Ky. 467, 10 Ky. L. 440, 9 S. W. 391; Hancock v. Ewing, 55 Mo. 101; Bronk v. Barckley, 13 App. Div. (N. Y.) 72, 43 N. Y. S. 400.

⁵⁵ Mason & Foard Co. v. Main Jellico Mountain Coal Co., 87 Ky. 467, 10 Ky. L. 440, 9 S. W. 391.

⁵⁶ State v. Barker, 4 Kans. 379, 435, 96 Am. Dec. 175; In re Head Notes

to Opinions, 43 Mich. 641, 8 N. W. 552; Jones v. Hobbs, 4 Baxt. (Tenn.) 113.

⁵⁷ In re Head Notes to Opinions, 43 Mich. 641, 8 N. W. 552.

⁵⁸ Vought v. Columbus & C. R. Co., 58 Ohio St. 123, 50 N. E. 442, affd. 176 U. S. 480, 44 L. ed. 554, 20 Sup. Ct. 398; Walsh v. Columbus & C. R. Co., 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. 393.

held that the legislature has no power by the repeal of a municipal charter to invade the rights of the creditors of the municipality.⁵⁹ And it has also been held that a city charter can not be so amended as to impair the obligation of a contract previously made by the city, without violating the contract clause of the constitution.⁶⁰ Where, under the state law, a resolution is as effective for the purpose intended as an ordinance would be, a resolution by a city council directing the removal of street railroad tracks from the streets is a law of the state, in the meaning of the federal constitution forbidding impairment of contracts.⁶¹ But, it is held that a city ordinance does not constitute action of the state through the municipality so as to come within the constitutional inhibition against the impairment of contracts, unless the ordinance is enacted by authority of the state.⁶² A city can not contract away its governmental power by an agreement with a street railroad company in relation to the management of the road and the fares to be charged.⁶³ But it is held that a statute giving a city the right to grant wharfage privileges becomes a part of the consideration in the purchase of such privileges within the city limits, and the purchaser can not be divested of such rights by the city without just compensation.⁶⁴ In the absence of statutory authority so to do, it has been held that a city ordinarily has no right to tax its bonds which are held by nonresidents, since it would impair the obligations of contracts.⁶⁵ For, it is held that municipal

⁵⁹ *Morris v. State*, 62 Tex. 728; *Milner v. Pensacola*, 2 Woods (U. S.) 632, Fed. Cas. No. 9619. Contra, *Shinn v. Cunningham*, 120 Iowa 383, 94 N. W. 941; *Isenberg v. Selvag*, 103 Ky. 260, 19 Ky. L. 1963, 44 S. W. 974; *Wallace v. Sharon Tp.*, 84 N. Car. 164; *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592.

⁶⁰ *City and County of Denver v. New York Trust Co.*, 187 Fed. 890, 110 C. C. A. 24. Although a municipal charter may be amended or repealed yet the rights of creditors acquired thereunder can not be impaired by subsequent statute. *Chalstran v. Board of Education of*

Township High School, 244 Ill. 470, 91 N. E. 712.

⁶¹ *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854.

⁶² *City and County of San Francisco v. United Railroads of San Francisco*, 190 Fed. 507, 11 C. C. A. 339.

⁶³ *South Covington &c. R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28.

⁶⁴ *Crocker v. New York*, 21 Blatchf. (U. S.) 197, 15 Fed. 405.

⁶⁵ *De Vignier v. New Orleans*, 16 Fed. 11. But it has been held that in the absence of express or implied provisions to the contrary a city may tax its bonds in the hands of others without impairing the obligations of contracts. *Bank of Russellville v.*

bonds are contracts within the contract clause of the federal constitution.⁶⁶ So, a right granted by a city for a consideration to sell water within the city was held to be protected by the constitution.⁶⁷ But the grant of a right of way by a city to a railroad company and the conveyance of certain land to be used as a depot was held not to render invalid a subsequent ordinance imposing a license on the railroad company.⁶⁸ A city ordinance imposing yearly rates to be paid by steamers mooring or landing within the limits of a port was held to create a right which was impaired by a subsequent statute changing the rate of wharfage for that year.⁶⁹ So, a statute which attempts to repeal part of another statute forming a wharfage contract between the city and a bridge company was held invalid as in violation of the contract clause of the federal constitution.⁷⁰

A statute providing for the consolidation of two cities, and that the consolidated city shall assume the indebtedness of the city which has been taken over by the other, was held not to impair the obligation of contracts.⁷¹ Constitutional provisions prohibiting the granting of a franchise for a term of more than twenty years, and providing that a city shall not incur indebtedness in any year exceeding the income and revenue for such year, without the consent of two-thirds of the voters of the city, were held not to apply to contracts made prior to the adoption of such constitutional provisions.⁷² But it is held that the obligations of a contract are not impaired by the creation of a new municipality out of territory taken from an existing one, since the latter remains liable for debts created by it.⁷³

Where a viaduct was constructed jointly by two railroad companies and a city, a subsequent ordinance requiring

Russellville, 133 Ky. 637, 118 S. W. 921, 134 Am. St. 479.

⁶⁶ Brodie v. McCabe, 33 Ark. 690; Thornton v. Hooper, 14 Cal. 9.

⁶⁷ Los Angeles v. Los Angeles City Water Co., 61 Cal. 65.

⁶⁸ Los Angeles v. Southern Pac. R. Co., 67 Cal. 433, 7 Pac. 819.

⁶⁹ Municipality No. 1 v. Steamer Anna No. 2, 7 La. Ann. 149.

⁷⁰ Cent. Bridge Corp. v. Lowell, 15 Gray (Mass.) 106.

⁷¹ Stone v. Charlestown, 114 Mass. 214.

⁷² Slade v. Lexington, 141 Ky. 214, 132 S. W. 404.

⁷³ Board of Education of Borough of Flemington v. State Board of Education, 81 N. J. L. 211, 81 Atl. 163.

the railroad companies to reconstruct the viaduct was held not to violate a contract, such ordinance being authorized by the city charter, and being a valid exercise of the police power of the city.⁷⁴ And where, after an agreement entered into between a railroad company and a village, whereby the railroad company agreed to maintain a bridge over its tracks at a street intersection, a statute was enacted relieving the company from the maintenance of such bridge, the statute was held not unconstitutional as impairing the obligation of a contract, since the contract was for the benefit of the people.⁷⁵ And a covenant in a conveyance of land by a city for wharfage purposes was held to be subject to the legislative power of the state to change the water-front of the city, even though the grantees' rights may thereby be impaired or rendered useless.⁷⁶ So, a city ordinance repealing a prior ordinance permitting a cemetery association to use certain land acquired by it within the city limits for burial purposes was held not to impair the obligation of a contract, where the land had not been used or prepared for use as a cemetery.⁷⁷ And a city ordinance granting a right to use certain of the city's lands for the construction of belt railroad tracks, and providing for the construction and use thereof by certain railroads, was held not to impair the obligation of the city's contracts with other railroad companies which had previously constructed a portion of the belt line in order to reach terminal docks.⁷⁸ But the enactment of an ordinance, after the city had contracted with an electric light company to furnish the city with light, imposing a license tax on electric light poles and wires was held invalid in so far as it applied to poles and wires used exclusively for city lighting under such contract.⁷⁹ And, although a city sold land to be used

⁷⁴ *Chicago &c. R. Co. v. State*, 47 Nebr. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. 557; *Chicago, B. & Q. R. Co. v. State*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. 513.

⁷⁵ *Port Jervis v. Erie R. Co.*, 59 Misc. (N. Y.) 623, 111 N. Y. S. 851.

⁷⁶ *Whitney v. New York*, 6 Abb. N. Cas. (N. Y.) 329.

⁷⁷ *People v. Pratt*, 60 Hun (N. Y.) 582, 14 N. Y. S. 804, affg. 14 N. Y. S. 551.

⁷⁸ *Behrman v. Louisiana R. & Nav. Co.*, 127 La. 775, 54 So. 25.

⁷⁹ *New Castle v. Electric Co.*, 16 Pa. County Court 663, 26 Pittsburg Leg. J. (N. S.) 197.

as a powder magazine, the city may, under its police power, require the removal of such magazine.⁸⁰

These same rules apply to counties and other political subdivisions of the state. Thus, a statute conferring a charter on a bridge company to erect a bridge near a ferry which had been licensed by the county court was held not to violate a contract right.⁸¹ So, where the county supervisors contracted for the publication of the county delinquent tax list, but before the list was published a statute authorizing the publication was repealed, it was held that the repealing statute did not impair the obligation of a contract, since the contract was held to have been made subject to the right of the legislature to control the matter of publication of the tax list.⁸² And a contract made under authority of a statute with an individual by a board of county commissioners, employing him to assist county officers in the discovery of property not listed for taxation, upon compensation of a certain percentage of the taxes recovered, was held not irrevocable under the constitutional provision prohibiting impairment of contracts.⁸³ As a general rule, a license granted by a city does not constitute an irrevocable contract. Thus, an annual license required by statute for the carrying on of a particular business was held not to constitute a contract for the whole period, within the contract clause of the constitution.⁸⁴

§ 2725. Subsequent and prior contracts.—The provision of the constitution against impairing obligations of contracts does not apply to a statute in respect to contracts made after its passage. It is only those contracts in existence when the statute is enacted that are protected from its effect.⁸⁵ No act of the legislature can alter the nature and legal effect of an existing contract to the preju-

⁸⁰ *Davenport v. Richmond*, 81 Va. 636, 59 Am. Rep. 694.

⁸¹ *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655.

⁸² *Pott v. Sheboygan County*, 25 Wis. 506.

⁸³ *State v. McCafferty* (Okla.), 105 Pac. 992.

⁸⁴ *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878. See also, *Mc-*

Mechan v. Baltimore, 2 Har. & J. (Md.) 41; *Branson v. Philadelphia*, 47 Pa. St. 329.

⁸⁵ *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31; *People's Savings Bank v. Tripp*, 13 R. I. 621; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. 134.

dice of either party.⁸⁶ The rule is that a statute affecting rights and liabilities should not be so construed as to act upon those already existing, and it is the result of the decisions that, although the words of the statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise unless the intention to embrace all is clearly expressed.⁸⁷ To be invalid as impairing the obligation of contracts, a statute must be one enacted after the execution of the contract, the obligation of which is claimed to be impaired.⁸⁸ Thus, a statute making stockholders of a foreign corporation, doing business within the state, personally liable, does not impair the obligation of the contract entered into by the stockholders of a foreign corporation afterwards incorporated for the purpose of doing business in that state.⁸⁹ A law passed after a contract is executed purporting to affect it has been held invalid as impairing the obligation of such contract.⁹⁰ Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, and in all respects as if the statute were still in force.⁹¹ A railroad charter giving the company the power to construct a railroad according to its discretion does not prevent the railroad commission, in the exercise of the police power of the state, from requiring the railroad company to remove its tracks to such distance from the station as to insure the safety and convenience of the public.⁹²

⁸⁶ *King v. Dedham Bank*, 15 Mass. 447, 8 Am. Dec. 112.

⁸⁷ *State v. Smith*, 38 Conn. 397; *Torrey v. Corliss*, 33 Maine 333; *Colony v. Dublin*, 32 N. H. 432; *Merwin v. Ballard*, 66 N. Car. 398; *Briggs v. Hubbard*, 19 Vt. 86.

⁸⁸ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. 52.

⁸⁹ *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. 52.

⁹⁰ *State v. Bradshaw*, 39 Fla. 137, 22 So. 296; *McMurray v. Sidwell*, 155 Ind. 560, 58 N. E. 722, 80 Am.

St. 255; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *State v. Kearney*, 49 Nebr. 325, 68 N. W. 533; *Hughes v. Cuming*, 165 N. Y. 91, 58 N. E. 794; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212.

⁹¹ *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263; *State v. New Orleans*, 32 La. Ann. 709, affd. 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. 211; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654, 20 L. ed. 689.

⁹² *Bacon v. Boston & M. R. Co.*, 83 Vt. 421, 76 Atl. 128.

§ 2726. Statutes validating or invalidating contracts.—

Where a statute is broad enough to include existing contracts, as well as contracts that may thereafter arise, it may have the effect of validating invalid contracts in existence at the time of its enactment.⁹³ Thus, where a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of parties, and promote justice, then, both as a matter of right and of public policy, the law should generally be sustained. So, the right to avoid a contract under which the party avoiding it has received a valuable consideration is not a contract right; and therefore a subsequent statute which destroys this right to avoid the contract is not unconstitutional as impairing the obligation of contracts.⁹⁴ Such a statute rather enables the parties to enforce the contract that they intended to make.⁹⁵ Thus, where a certain marriage had been celebrated by a person in the ministry who was not empowered to perform that ceremony by the state law, and the legislature passed an act declaring such marriage valid, the court sustained the act, although it affected incidental rights depending upon the marriage relation.⁹⁶ Where the consideration of a contract declared void by statutes is morally good, it has been held that a repeal of the statute will validate the contract,⁹⁷ and if the parties have made an invalid contract, though upon a valuable consideration, a subsequent statute may make such contract valid.⁹⁸ Thus, a statute making a contract tainted with usury valid upon certain terms has been held valid.⁹⁹

⁹³ *Mechanics' &c. Sav. Bank & Bldg. Assn. v. Allen*, 28 Conn. 97; *Lewis v. McElvain*, 16 Ohio 347; *Cuyahoga Falls Real Est. Assn. Trustees v. McCaughy*, 2 Ohio St. 152.

⁹⁴ *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714; *Wistar v. Foster*, 46 Minn. 484, 49 N. W. 247, 24 Am. St. 241; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446; *Swope v. Jordan*, 107 Tenn. 166, 64 S. W. 52; *Romine v. State*, 7 Wash. 215, 34 Pac. 924.

⁹⁵ *Gross v. United States Mortgage Co.*, 108 U. S. 477, 27 L. ed. 795, 2

Sup. Ct. 940; *Butler v. United States Sav. & Loan Co.*, 97 Tenn. 679, 37 S. W. 385.

⁹⁶ *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

⁹⁷ *Washburn v. Franklin*, 35 Barb. (N. Y.) 599, 13 Abb. Pr. 140, 24 How. Pr. 515; *Little Rock v. National Bank*, 98 U. S. 308, 25 L. ed. 108.

⁹⁸ *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236.

⁹⁹ *Montgomery Mut. Building & Loan Assn. v. Robinson*, 69 Ala. 413; *Peterson v. Berry*, 125 Fed. 902, 60 C. C. A. 610; *Iowa Savings & Loan*

Where a warrant issued to a judge for salary contained the clause, "subject to any claim of the county," which warrant was indorsed in collecting it, and the statute under which it was issued was subsequently declared unconstitutional, but the statute was thereafter validated by a constitutional amendment, it was held that such statute was not violative of the constitution as impairing the obligation of a contract.¹ A statute exempting the bondsmen of a tax collector from liability for failure to collect taxes not specified in the order appointing the collector was held not to impair the obligations of a contract.² A statute releasing the county treasurer and his bondsmen from liability for money lost was held unconstitutional as impairing the obligations of the contract.³ It is a general rule that contracts valid when made can not be invalidated by subsequent legislation.⁴ A special statute releasing a debtor from imprisonment and discharging bonds for imprisonment liberties, which was passed after breach of the bonds and assignment of the bonds to creditors, was held unconstitutional as impairing the obligation of contracts.⁵ A statute which renders enforceable a contract previously made by unregistered foreign corporations which, under the prior statute, was unenforceable, was held not unconstitutional as impairing the obligation of a contract.⁶ It is held that congress, in the exercise of its power over interstate commerce, has authority to enact a statute rendering unenforceable a prior contract, valid when made, by which a railroad company agreed to issue an annual pass for life in consideration of a release of a claim for damages, since the constitutional inhibition against impairment of contract is not binding on the federal government.⁷ A

Assn. v. Heidt, 107 Iowa 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. 197; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. 408; *Smoot v. Building Assn.*, 95 Va. 686, 29 S. E. 746, 41 L. R. A. 589.

³ *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479.

² *Commonwealth v. Moody*, 150 Ky. 571, 150 S. W. 680.

⁵ *Miller v. Henry* (Ore.), 124 Pac. 197.

⁴ *Home Tel. Co. v. Sarvcoie Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124n.

⁶ *Starr v. Robinson*, 1 D. Chip. (Vt.) 257, 6 Am. Dec. 732.

⁷ *Pittsburg Const. Co. v. West Side Belt R. Co.*, 232 Pa. 578, 81 Atl. 884.

¹ *Louisville & N. R. Co. v. Mottley*,

statute merely curing informalities in a prior act creating and providing for the organization of a parish, so that it is regarded as having been constitutional from the beginning, was held not to impair the obligation of a contract.⁸ A statute making valid a stipulation in a contract between a railroad company and an employé requiring notice of the claim by the employé for damages for personal injuries was held not to apply to contracts made before the act took effect, and hence is not invalid as impairing the obligation of contracts.⁹ A statute attempting to annul a tax sale made during the Civil War was held to violate the clause of the federal constitution forbidding the state to impair the obligations of a contract.¹⁰ A street railroad company was held to have the right to charge the rate permitted by a city ordinance, although the city had no power to adopt the ordinance, when ratified by legislative enactment, and such right can not be impaired by subsequent legislation.¹¹ The clause of the constitution forbidding impairment of contracts was not violated by a statute validating a parol sale of standing timber which was, under an existing statute, merely voidable.¹² A statute validating corporations which had previously attempted to be formed, and acts done by such corporations, was held not to impair the obligation of contracts.¹³ A statute ratifying an ultra vires act of school commissioners in making a loan was held not to impair the obligation of a contract, but merely to afford a remedy for its enforcement.¹⁴

§ 2727. Police power.—The exact nature of the police power of the legislature is somewhat in doubt, and many courts have expressed their inability to give an exact defi-

219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. 265, revg. 133 Ky. 652, 118 S. W. 982.

⁸ Fontenot v. Young, 128 La. 20, 54 So. 408.

⁹ Missouri, K. & T. R. Co. v. Hudgins (Tex. Civ. App.), 127 S. W. 1183.

¹⁰ Wright v. Giles (Tex.), 129 S. W. 1163.

¹¹ Minneapolis v. Minneapolis St. R. Co., 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118.

¹² Hurley v. Hurley, 110 Va. 31, 65 S. E. 472.

¹³ Provident Bank & Trust Co. v. Saxon, 123 La. 243, 48 So. 922.

¹⁴ Courtner v. Etheredge, 149 Ala. 78, 43 So. 368.

nition of it. But for all practical purposes, it may be said to be the power of the legislature to make such regulations relating to the person and property rights as look to the public health, the public safety and the public morals.¹⁵ This power is very broad and comprehensive, and the constitutional inhibitions do not limit, and were not designed to limit, the subjects upon which the power may be exercised.¹⁶ Where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the state legislature chooses to exercise it.¹⁷ As the police power of the state extends to the protection of the lives, health and property of the citizens, the maintenance of good order and the preservation of the public morals, the legislature can not, by any contract, divest itself of the power to provide for these objects.¹⁸ There is, however, some limitation to the police power. The courts are bound to enforce the constitution as against the legislature; and if the legislature, assuming to act under the police power of the state, should pass an act depriving a person of the right to make contracts where the public good clearly does not require such interference, the act would be unconstitutional and void.¹⁹

The police power of a state must be exercised in subordination to the constitution.²⁰ And it is for the courts to deter-

¹⁵ *Grand Trunk Western R. Co. v. South Bend*, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. 818.

¹⁶ *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Minneapolis & C. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. 273.

¹⁷ *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *State v. Hoskins*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. 460, affd., 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468.

¹⁸ *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gas*

Light Co. v. Louisiana Light & C. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Thorpe v. Rutland & Co.*, 27 Vt. 140, 62 Am. Dec. 625.

¹⁹ *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605n; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Scougal*, 3 S. Dak. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. 756; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383.

²⁰ *State v. Kansas City & C. R. Co.*, 32 Fed. 722; *In re Jacobs*, 98 N. Y. 98, 2 N. Y. Cr. 539, 50 Am. Rep. 636; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. 1126.

mine whether the act of the legislature which interferes with the rights of personal liberty of the citizen, ostensibly in the exercise of the police power, is a proper and reasonable exercise of the power.²¹ Although the police power of the government can not be contracted away, yet where rights, privileges and immunities are granted and accepted, and money has been expended on the faith of the grant, a binding contract is created which must be observed.²² A statute relating to the control and management of corporations doing business within the state, and the issuance of license therefor, is a mere exercise of the police power of the state, and does not constitute a contract with such corporation which can not be amended or repealed without violating the constitutional provision against impairment of contracts.²³ Although a corporate charter is a contract within the protection of the contract laws of the federal constitution, the state has the reserved right under its police power to subject corporations to the general laws subsequently passed by the legislature for the promotion of the general welfare.²⁴ A contractual obligation in a corporate charter can not prevent the state from exercising its police powers.²⁵ A charter of a medical society was held to be in the nature of a contract, and not to be subject to amendment or repeal, except in the exercise of the police power of the state in the regulation of the conduct of the citizens generally.²⁶ The obligation of the contract between private individuals is not impaired by a statute passed in the legitimate exercise of the police powers of the state relating to the drainage of lands.²⁷ The

²¹ *Austin v. Murray*, 16 Pick. (Mass.) 121; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847.

²² *Colorado & S. R. Co. v. Ft. Collins* (Colo.), 121 Pac. 747; *German Ins. Co. v. Commonwealth*, 141 Ky. 606, 133 S. W. 793; *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, revg. 98 App. Div. (N. Y.) 521, 91 N. Y. S. 87.

²³ *State v. Vandiver*, 222 Mo. 206, 121 S. W. 45.

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²⁴ *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 243, revg. 152 Ill. App. 398.

²⁵ *Commonwealth v. Boston & N. St. R. Co.* (Mass.), 98 N. E. 1075.

²⁶ *Ewald v. Medical Society*, 70 Misc. (N. Y.) 615, 130 N. Y. S. 1024, revg. 144 App. Div. (N. Y.) 82, 128 N. Y. S. 886.

²⁷ *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127, affd. 123 Fed. 707.

exercise of the police power of a state in the regulation of the affairs of municipal corporations can not be objected to on the ground that it impairs the obligations of contracts.²⁸ A statute prohibiting the sale of game was held not to impair the obligation of contract, but a proper exercise of the police power of the state.³⁰ A statute limiting the amount which an insurance company may expend in prosecuting new business was held not to be invalid as impairing the obligation of a contract of the insurance company with a general agent of the company who was employed to procure applications and appoint agents at a higher rate than the maximum fixed by the statute, since it was an exercise of the police power.³¹ A city ordinance making it a misdemeanor to excavate in streets and sidewalks without obtaining a permit of the city clerk to do so was held not to violate franchise rights of a telephone company to erect and maintain poles in the streets, but was a valid police regulation.³² A statute forbidding diversion of any stream of water beyond the state limits and into another state was held not to impair the obligation of a prior contract to divert the waters of a certain river into another state for use therein, since such statute is a legitimate exercise of the police power of the state.³³

§ 2728. Invalid contracts not protected.—An invalid contract is not protected by that clause of the constitution providing that no state shall pass any law impairing the obligation of contracts.³⁴ This is the case with a contract which is illegal in its inception,³⁵ as where it is usurious,³⁶ or

²⁸ *Marion v. Forrest*, 168 Ind. 94, 78 N. E. 187.

³⁰ *State v. Heger*, 194 Mo. 707, 93 S. W. 252.

³¹ *Boswell v. Security Mut. Life Ins. Co.*, 119 App. Div. (N. Y.) 723, 104 N. Y. S. 130.

³² *Carthage v. Garner*, 209 Mo. 688, 108 S. W. 521.

³³ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529,

52 L. ed. 828, affg. *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489.

³⁴ *Folsom v. Ninety-Sixth Tp.*, 59 Fed. 67.

³⁵ *Durkee v. People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. 340; *Logan v. Postal Tel. & Cable Co.*, 157 Fed. 570.

³⁶ *Hardin v. Trimmier*, 27 S. Car. 110, 3 S. E. 46.

is without consideration,³⁷ or is too indefinite in its terms,³⁸ or ultra vires,³⁹ or in case of an assignment made to evade exemption laws forbidden by statute.⁴⁰ Also where the conditions precedent in a contract have not been complied with, as where certain franchises were to vest when electric light works were put into successful operation, and this was never done,⁴¹ or where the necessary consent of the city authorities was never obtained,⁴² the franchise is not protected against the impairment of subsequent legislation. So, an invalid statute, or ordinance, can not confer rights within the protection of the clause of the constitution forbidding impairment of contracts.⁴³ The contract clause of the federal constitution forbidding the impairment of contracts does not protect a contract which is invalid as being contrary to the laws of the state and against public policy.⁴⁴ A contract made without authority of law, and hence invalid, is not protected either by the federal or the state constitutions.⁴⁵

§ 2729. Executory and executed contracts.—The prohibition of the constitution against laws impairing the obligation of contracts applies to all contracts, executed and

³⁷ Lord v. Litchfield, 36 Conn. 116, 4 Am. Rep. 41; Hardy v. Waltham, 7 Pick. (Mass.) 108; State v. Gilmore, 141 Mo. 506, 42 S. W. 817; People v. Commissioners, 47 N. Y. 501; Synod of Dakota v. State, 2 S. Dak. 366, 50 N. W. 632, 4 L. R. A. 418; Louisiana v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. 211.

³⁸ Tacoma Land Co. v. Young, 18 Wash. 495, 52 Pac. 244.

³⁹ Westminster Water Co. v. Westminster, 98 Md. 551, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. 424; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77.

⁴⁰ Bishop v. Middleton, 43 Nebr. 10, 61 N. W. 129, 26 L. R. A. 445.

⁴¹ Capital City, L. & F. Co. v. Tallahassee, 42 Fla. 462, 28 So. 810, affd. 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. 866.

⁴² Underground R. Co. v. New York, 116 Fed. 952, affd. 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494.

⁴³ Covington v. Commonwealth, 107 Ky. 680, 19 Ky. L. 105, 39 S. W. 836, affd. 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383; State v. Stearns, 72 Minn. 200, 75 N. W. 210, revd. 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. 73; Griffith v. Connecticut, 218 U. S. 572, 31 Sup. Ct. 134, 54 L. ed. 1155, affg. 83 Conn. 1, 74 Atl. 1068.

⁴⁴ Noble v. Davison (Ind.), 96 N. E. 325.

⁴⁵ Hord v. State, 167 Ind. 622, 79 N. E. 916.

executory, whoever may be parties to them.⁴⁶ This clause of the constitution is more generally invoked to protect executory contracts,⁴⁷ but it applies equally to executed contracts.⁴⁸ The legislature can not arrest performance by impairing the obligation to perform, nor can it wait until after performance, and then by legislation undo and rescind the contract and restore parties to the rights transferred by the acts of performance. Neither party can undo what has been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so.⁴⁹ Where a state has granted lands for public use, it is held to be an executed contract, and therefore a statute which takes away rights conferred under such contract has been held to be invalid as impairing the obligation of contracts.⁵⁰ Executed conveyances are thus protected even if without consideration.⁵¹ It has also been held that where lands are bought at a tax sale, the conveyance therefor is an executed contract, and a statute which takes away the rights thereof is invalid as impairing the obligation of contracts.⁵² While executed conveyances are thus protected, the legislature may change the laws of descent so as to restrict the power to devise realty.⁵³ It has also often been held that the exercise of the right of eminent domain is not unconstitutional as impairing the obligation of con-

⁴⁶ *Seattle, R. & S. R. Co. v. Seattle*, 190 Fed. 75; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

⁴⁷ *Stephens v. Southern Pacific R. Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. 17; *McMurray v. Sidwell*, 155 Ind. 560, 58 N. E. 722, 80 Am. St. 255.

⁴⁸ *Houston & T. C. R. v. Tex. & P. R.*, 70 Tex. 649, 8 S. W. 498; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. 585.

⁴⁹ *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. 545.

⁵⁰ *Minnesota v. Duluth & I. R. Co.*, 97 Fed. 353; *Chicago v. Ward*,

169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. 185.

⁵¹ *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 20 Atl. 820.

⁵² *St. Louis, &c. R. Co. v. Alexander*, 49 Ark. 190, 4 S. W. 753; *Hull v. State*, 29 Fla. 79, 11 So. 97, 16 L. R. A. 308, 30 Am. St. 95; *State v. Bradshaw*, 39 Fla. 137, 22 So. 296; *Morgan v. Miami County*, 27 Kans. 89; *Merrill v. Dearing*, 32 Minn. 479, 21 N. W. 721; *Roberts v. Bank*, 8 N. Dak. 504, 79 N. W. 1049; *State v. Fylpaa*, 3 S. Dak. 586, 54 N. W. 599; *Tracy v. Reed*, 13 Sawy. (U. S.) 622, 38 Fed. 69, 2 L. R. A. 773; *Robinson v. Howe*, 13 Wis. 341.

⁵³ *Patton v. Patton*, 39 Ohio St. 590.

tracts.⁵⁴ A statute in the nature of an executory contract, supported by a sufficient consideration, creates an obligation which a subsequent legislature can not impair.⁵⁵

§ 2730. Partial impairment of contracts.—It is not required that the impairment should extend to the entire contract. The constitutional prohibition applies to cases where the impairment affects only a portion of the contract, and the rule is that a statute of this character is void to the extent that it impairs a portion of an existing contract.⁵⁶ The principle is illustrated by the case of statutes which change the rate of interest on notes and other obligations,⁵⁷ or which abolish days of grace on paper to which this privilege had attached at the time of its execution,⁵⁸ or which impose conditions or additional duties not in the existing contract.⁵⁹ Where an obligation does not bear interest at the time it accrues, a statute thereafter passed can not impose a liability for interest on such obligation.⁶⁰ And generally the remedies for the enforcement of bonds and the collection of taxes to meet such obligations can not be altered or diminished so as to impair the substantial rights or interests of the holders of such obligations.⁶¹

⁵⁴ *Baltimore &c. Turnpike Road v. Baltimore, C. &c. R. Co.*, 81 Md. 247, 31 Atl. 854; *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; 2 Elliott R. R. (2d ed.), § 925; post, § 2736.

⁵⁵ *Trustees of Bishop's Fund v. Rider*, 13 Conn. 87.

⁵⁶ *State v. McPeak*, 31 Nebr. 139, 47 N. W. 691; *McGahey v. Virginia*, 135 U. S. 662, 685, 34 L. ed. 304, 10 Sup. Ct. 972.

⁵⁷ *Butler v. Rockwell*, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611; *Seymour v. Continental Ins. Company*, 44 Conn. 300, 26 Am. Rep. 469; *Seton v. Hoyt*, 34 Ore. 266, 55 Pac. 967, 43 L. R. A. 634, 75 Am. St. 641; *Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886; *Kent's Admr. v. Kent's Admr.*, 28 Gratt. (Va.) 840; *Union Savings*

Bank v. Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; *State v. Bowen*, 11 Wash. 432, 39 Pac. 648; *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169; *Murdock v. Franklin Ins. Company*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

⁵⁸ *Wood v. Rosendale*, 10 Ohio C. D. 66, 18 Ohio C. C. 247.

⁵⁹ *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638; *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379; *Latham v. Whitehurst*, 69 N. Car. 33; *King's Admr. v. Cassidy's Admr.*, 36 Tex. 531.

⁶⁰ *Molineux v. State*, 109 Cal. 378, 42 Pac. 34, 50 Am. St. 49.

⁶¹ *Swain v. Fritchman*, 21 Idaho 783, 125 Pac. 319. See also, *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *People v. Chicago &c. R. Co. (Ill.)*, 100 N. E. 35.

§ 2731. **Change or withdrawal of remedy.**—Since a remedy in existence when the contract is made becomes a part of the contract, a subsequent statute which so affects the remedy as to impair the value of the contract is unconstitutional.⁶² But, although the remedies which are in existence when the contract was made constitute a part of the contract, a change or repeal of a remedy which does not substantially diminish the value of the contract or seriously obstruct its enforcement is not unconstitutional as impairing the obligation of contracts.⁶³ It may be laid down as a general rule that a contract is impaired within the meaning of the Federal Constitution by a statute which materially affects the remedy for the enforcement of a contract, or which prevents its enforcement, unless an equally adequate and convenient alternative is substituted therefor.⁶⁴

⁶² *State v. Helms*, 136 Ind. 122, 35 N. E. 893; *Walterscheid v. Bowditch*, 77 Kans. 665, 96 Pac. 56; *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. 438; *Lyon & Matthews Co. v. Modern Order of Praetorians* (Tex. Civ. App.), 142 S. W. 29. However, it has been held that the remedy for enforcement of a contract does not become a part of the contract, but remains within the discretion of the legislature. *Kendall v. Fader*, 99 Ill. App. 104, affd. 199 Ill. 294, 65 N. E. 318. And there is in general no vested right in a particular form of remedy.

⁶³ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; *Greef v. Equitable Life Assur. Soc. of United States*, 40 App. Div. (N. Y.) 180, 57 N. Y. S. 871; *Swan v. Mutual Reserve Fund Life Assn.*, 155 N. Y. 9, 49 N. E. 258; *Weist v. Wuller*, 210 Pa. 143, 59 Atl. 820; *Island Sav. Bank v. Galvin*, 20 R. I. 347, 39 Atl. 196; *Kirkman v. Bird*, 22 Utah 100, 61 Pac. 338, 58 L. R. A. 669, 83 Am. St. 774; *Smith v. Northern Neck Mut. Fire Assn.*, 112 Va. 192, 70 S. E. 482; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569.

⁶⁴ *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Ensley v. Simpson* (Ala.), 52 So. 61; *Smith v. Van Gilder*, 26 Ark. 527; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228; *Webb v. Moore*, 25 Ind. 4; *Bryson v. McCreary*, 102 Ind. 1, 1 N. E. 55; *Edwards v. Johnson*, 105 Ind. 594, 5 N. E. 716; *Goodbub v. Hornung's Estate*, 127 Ind. 181, 26 N. E. 770; *State v. Helms*, 136 Ind. 122, 35 N. E. 893; *Holloway v. Sherman*, 12 Iowa 282, 79 Am. Dec. 537; *Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 113 Md. 77, 77 Atl. 255; *State Sav. Bank v. Matthews*, 123 Mich. 56, 81 N. W. 918; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell's Admrs.*, 2 Doug. (Mich.) 197, 45 Am. Dec. 246; *Tarpley v. Hamer*, 9 S. & M. (Miss.) 310; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Porter v. Mariner*, 50 Mo. 364; *State v. Hager*, 91 Mo. 452, 3 S. W. 844; *Simpson v. City Savings Bank*, 56 N. H. 466, 22 Am. Rep. 504. "It has been settled that the remedies for the enforcement of obligations assumed by municipal corporations, which existed when the contract was made, can not be impaired by the legislature, or, if they are

A statute which materially lessens the means of enforcing a contract which was in existence when the statute was enacted is unconstitutional as impairing the obligation of contracts.⁶⁵ And the parties to a contract can not, by stipulations as to other remedies, tie the hands of the state in regard thereto, since such procedure would be against public policy.⁶⁶ So, a remedy which affects the interests of parties to a contract, and is made a subject of the contract for the purpose of enforcing it, can not be impaired by a subsequent statute.⁶⁷ But, where a statute authorizing any interested party to sue on a probate bond is repealed by a statute permitting the probate judge to authorize or instruct the administrator to sue on such bond, the later statute relates only to the remedy and is not unconstitutional.⁶⁸

A statute changing the notice by publication of the sale of property for street improvement assessments from three weeks to two weeks was held a mere change of remedy and not to impair the obligation of contracts.⁶⁹ And a statute which changes the notice required on foreclosure sale was held not to impair the obligation of a mortgage contract executed prior to the enactment of the statute.⁷⁰ Where, under an existing statute, a creditor of a corporation had the right to sue a stockholder at law for his own exclusive benefit, a subsequent statute making the sole remedy of the creditor a suit in equity by creditor's bill,

changed, a substantial equivalent must be provided." *Baldwin v. Newark*, 38 N. J. L. 158; *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *Newark Savings Inst. v. Forman*, 33 N. J. Eq. 436; *Danks v. Quackenbush*, 3 Denio (N. Y.) 594, 1 N. Y. 129, 4 How. Pr. (N. Y.) 291; *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46, 93 Am. Dec. 778; *Evans v. Montgomery*, 4 W. & S. (Pa.) 218; *Austin v. W. C. White & Co. (Tex.)*, *Dallam Dig.* 434; *Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. 820; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606;

Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. ed. 145; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Sprecker v. Wakeley*, 11 Wis. 432; *Smith v. Packard*, 12 Wis. 371.

⁶⁵ *Cleveland v. United States*, 166 Fed. 677, 93 C. C. A. 274.

⁶⁶ *Monteleone v. Seaboard Fire & Ins. Co.*, 126 La. 807, 52 So. 1032.

⁶⁷ *Weist v. Wuller*, 210 Pa. 143, 59 Atl. 820.

⁶⁸ *Hayes v. Briggs*, 106 Maine 423, 76 Atl. 905.

⁶⁹ *Lantz v. Fishburn*, 17 Cal. App. 583, 120 Pac. 1068.

⁷⁰ *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

the effect of which was to abate all actions at law by creditors against stockholders, was held not to so affect the remedy as to impair the creditor's contract right.⁷¹ And the obligation of a contract was held not impaired by a statute enlarging the remedies of creditors either against the corporation or its stockholders.⁷² So, a statute changing the remedy against stockholders and making it more effectual, and dispensing with the requirement of personal service of process on stockholders as a prerequisite to assessment, was held not to impair the obligation of contracts.⁷³ But, it has been held that a subsequent statute which abrogates a stockholder's liability, or so affects the remedy as to substantially lessen the value of the contract, is in violation of the Federal Constitution forbidding impairment of contracts.⁷⁴ So, where a creditor had the right, on return of execution *nulla bona* against a corporation, to have the execution issued against a stockholder of the corporation, which rendered him liable to the extent of his stock, a subsequent statute providing for the appointment of a receiver, who should sue the stockholders for the benefit of all the creditors, was held to impair the obligation of contracts as to creditors who, prior to the enactment of the later statute, had obtained a judgment and were attempting to satisfy it under the prior law.⁷⁵ But such a statute was held not unconstitutional, where it did not supersede the prior remedy against individual stockholders.⁷⁶ Under the New Jersey Constitution, providing that a remedy of enforcing a contract which existed when the contract was made can not be withdrawn, a statute withdrawing a creditor's right of action against individual stockholders and officers of a corporation was held to impair contract rights, and to be unconstitutional, although

⁷¹ Republic Iron & Steel Co. v. Carlton, 189 Fed. 126.

⁷² Converse v. Aetna Nat. Bank, 79 Conn. 163, 64 Atl. 341.

⁷³ Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. 755.

⁷⁴ Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405,

3 L. R. A. (N. S.) 954; Myer v. Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; Walterscheid v. Bowdish, 77 Kans. 665, 96 Pac. 56.

⁷⁵ Pusey & Jones Co. v. Love, 6 Pennew. (Del.) 80, 66 Atl. 1013.

⁷⁶ Webster v. Bowers, 104 Fed. 627.

it substituted an equitable remedy of account against all the stockholders, since the two modes of action were essentially different.⁷⁷

A statute providing that the only remedy of a landowner affected by an assessment for public improvements shall be by appeal from the determination of the city council to the circuit court was held not to impair the obligations of contract, since it is purely remedial.⁷⁸ So, where creditors have the right to individual actions against stockholders of the corporation, a statute substituting a right of action by a receiver after judgment against the corporation was held not to impair the obligations of contracts.⁷⁹ And a statute providing that when any income from trust funds is due a judgment debtor to the amount of twelve dollars or more per week, a creditor may have an order of execution issued against the income, which on presentation to the debtor becomes a lien and remains a continuing lien to the amount specified, which shall not exceed ten per cent. thereof, until the execution is satisfied, was held not to impair a contract right, although construed as applicable to existing trusts as well as to trusts thereafter created.⁸⁰ A public service corporation law which creates a new remedy by mandamus to compel performance of a street railway franchise was held not to impair the obligation of the railroad company's franchise which provided only for foreclosure for such failure.⁸¹ So, a statute which merely gives a new remedy against the state does not impair the obligations of a contract.⁸²

A statute providing for attachment by trustee process was held not to impair the obligation of contracts as to goods

⁷⁷ *Western Nat. Bank v. Reckless*, 96 Fed. 70. See also, *Knickerbocker Trust Co. v. Cremen*, 140 Fed. 973; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764.

⁷⁸ *Newton v. Superior*, 146 Wis. 308, 130 N. W. 242, 131 N. W. 986.

⁷⁹ *Henley v. Myers*, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. 148, affg. 76 Kans. 823, 93 Pac. 168, 17 L. R. A. 779.

⁸⁰ *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, affg. 138 App. Div. (N. Y.) 833, 123 N. Y. S. 614.

⁸¹ *Public Service Commission of First Dist. v. New York R. Co.*, 136 N. Y. S. 720.

⁸² *Boggs v. Ganeard*, 148 Cal. 711, 84 Pac. 195.

shipped under a contract executed after the statute took effect.⁸³ And a statute requiring notice of attachment, or of dissolution of attachment under the bankruptcy act, or removing a ground of attachment pending the issuance and levy of attachment, has been held not to impair the obligation of contracts.⁸⁴ So, a statute which requires the filing of notice of an attachment lien was held not to impair the obligation of a contract which was entered into prior to the passage of the act, and was sought to be enforced by attachment after the passage of the act.⁸⁵ But a statute which changes the time of the filing of a bill of exceptions was held unconstitutional as impairing the right of the prevailing party under the judgment appealed from to have the bill of exceptions filed within the time originally allowed.⁸⁶

§ 2732. Change or withdrawal of remedy—Illustrative cases.—A statute withdrawing the remedy of imprisonment of debtors for default of payment has been held not unconstitutional as impairing the obligation of contracts.⁸⁷ And a statute which authorizes recovery of damages resulting from the original grading of a street, so as to take away the right of action for such damages pending when the repealing law was adopted, was held not to contravene the contract clause of the Federal Constitution.⁸⁸ And the obligation of a contract was held not impaired by a statute reducing the time required for publication of notice of foreclosure sale.⁸⁹ Nor is the obligation of contracts impaired

⁸³ *Rosenbush v. Bernheimer*, 211 Mass. 146, 97 N. E. 984.

⁸⁴ *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053; *Wood v. Carr*, 115 Ky. 303, 24 Ky. L. 2144, 73 S. W. 762; *Boltz v. Boain*, 28 Ky. L. 842, 90 S. W. 593.

⁸⁵ *Boltz v. Boain*, 28 Ky. L. 842, 90 S. W. 593.

⁸⁶ *Johnson v. Gehbauer*, 159 Ind. 271, 64 N. E. 855.

⁸⁷ *Carr v. State*, 106 Ala. 35, 17 So. 350, 34 L. R. A. 634, 54 Am. St. 17; *Maxey v. Loyal*, 38 Ga. 531; *Bronson v. Newberry*, 2 Doug.

(Mich.) 38; *Ware v. Miller*, 9 S. Car. 13; *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *Mason v. Haile*, 12 Wheat. (U. S.) 370, 6 L. ed. 660; *Beers v. Houghton*, 9 Pet. (U. S.) 329, 9 L. ed. 145; *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602; *Sommers v. Johnson*, 4 Vt. 278, 24 Am. Dec. 604.

⁸⁸ *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

⁸⁹ *Orvik v. Casselman*, 15 N. Dak. 34, 105 N. W. 1105.

by a statute prohibiting recovery for intoxicating liquors purchased in another state to be illegally sold in the state of Maine, as applied to contracts made after the statute took effect.⁹⁰ Laws changing remedies or withdrawing one of two or more remedies have been held constitutional, although the remaining or new remedy is less convenient than the one abolished.⁹¹ And it has been held that exemption laws do not impair the obligation of contracts,⁹² but the right to increase the amount of exemption does not exist as to prior debts.⁹³ It is held that the homestead law can not be applied as against prior debtors of the homesteader.⁹⁴

⁹⁰ *Corbin v. Houlehan*, 100 Maine 246, 61 Atl. 131, 70 L. R. A. 568.

⁹¹ *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Smith v. Van Gilder*, 26 Ark. 527; *Holloway v. Sherman*, 12 Iowa 282, 79 Am. Dec. 537; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell's Admrs.*, 2 Doug. (Mich.) 197, 45 Am. Dec. 246; *Tarpley v. Hamer*, 9 Sm. & M. (Miss.) 310; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Porter v. Mariner*, 50 Mo. 364; *Simpson v. City Savings Bank*, 56 N. H. 466, 22 Am. Rep. 491; *Newark Savings Inst. v. Forman*, 33 N. J. Eq. 436; *Baldwin v. Newark*, 38 N. J. L. 158; *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *Danks v. Quackenbush*, 3 Denio (N. Y.) 594, 1 N. Y. 129, 4 How. Pr. 291; *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103; *Evans v. Montgomery*, 4 Watts & S. (Pa.) 218; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46, 93 Am. Dec., 778; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606; *Beers v. Houghton*, 9 Pet. (U. S.) 329, 9 L. ed. 145; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Sprecker v. Wakeley*, 11 Wis. 432; *Smith v. Packard*, 12 Wis. 371.

⁹² *Farley v. Dowe*, 45 Ala. 324; *Maull v. Vaughn*, 45 Ala. 134; *Sneider v. Heidelberger*, 45 Ala. 126; *Maxey v. Loyal*, 38 Ga. 531; *Hardeman v. Downer*, 39 Ga. 425; *Cusic v. Douglas*, 3 Kans. 123, 87 Am. Dec. 458n; *Rockwell v. Hubbell's Admrs.*, 2 Doug. (Mich.) 197, 45 Am. Dec. 246; *Breitung v. Lind-*

auer, 37 Mich. 217; *Coleman v. Ballandi*, 22 Minn. 144; *Quackenbush v. Danks*, 1 Denio (N. Y.) 128, affd. 1 N. Y. 129, 3 Denio (N. Y.) 594, 4 How. Pr. (N. Y.) 291; *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103; *Hill v. Kessler*, 63 N. Car. 437; *Martin v. Hughes*, 67 N. Car. 293; *Sweeney v. Hunter*, 145 Pa. St. 363, 22 Atl. 653, 14 L. R. A. 594; *In re Kennedy*, 2 S. Car. 216; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. ed. 143; *Sprecker v. Wakeley*, 11 Wis. 432. See also, § 2753, this chapter.

⁹³ *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Cochran v. Miller*, 74 Ala. 50; *Cohn v. Hoffman*, 45 Ark. 376; *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Duncan v. Barnett*, 11 S. Car. 333, 32 Am. Rep. 476; *Harris v. Austell*, 2 Baxt. (Tenn.) 148; *Wright v. Straub*, 64 Tex. 64; *In re Estate of Heilbron*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602. See also, *Morton v. Valentine*, 15 La. Ann. 150; *Canadian & American Mortgage & Trust Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. 946. See *Watson v. New York Central R. Co.*, 47 N. Y. 157; *Dye v. Cook*, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. 882; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, 79 N. Car. 664.

⁹⁴ *McAfee v. Covington*, 71 Ga. 272, 51 Am. Rep. 263; *Foster v. Byrne*, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22; *Lessley v. Phipps*, 49 Miss. 790; *Squire v. Mudgett*, 61 N. H. 149; *Parker v. Savage*, 6 Lea

The state may, however, modify the remedies of the parties to contracts without impairing the obligation of contracts.⁹⁵ A statute which abolishes a common-law remedy is not invalid if another adequate remedy remains,⁹⁶ and the repeal of a statutory right to sue the members of a school board as a corporate body was held not unconstitutional.⁹⁷ So, a statute forbidding the use of expert testimony to establish the genuineness of detached coupons was held not to impair a constitutional right.⁹⁸

But a statute which deprives a party of all remedies as to existing contracts when the statute was enacted is void.⁹⁹ A change of remedy affecting rights of mort-

(Tenn.) 406; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, 79 N. Car. 664; *Homestead Cases*, 22 Grat. (Va.) 266, 12 Am. Rep. 507; *Peninsular Lead & Color Works v. Union Oil & Paint Co.*, 100 Wis. 488, 76 N. W. 359, 42 L. R. A. 331, 69 Am. St. 934.

⁹⁵ *Woodbury v. Grimes*, 1 Colo. 100; *Ward v. Farwell*, 97 Ill. 593; *Williams v. Haines*, 27 Iowa 251, 1 Am. Rep. 268; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See further, *Parsons v. Carey*, 28 Iowa 431; *Cook v. Gregg*, 46 N. Y. 439; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Worsham v. Stevens*, 66 Tex. 89, 17 S. W. 404; *Curtis v. Whitney*, 13 Wall. (U. S.) 68, 20 L. ed. 513. *Contra*, *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280; *Ellis v. Jones*, 51 Mo. 180; *Whitehead v. Latham*, 83 N. Car. 232; *Moore v. Holland*, 16 S. Car. 15; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *Richmond v. Richmond & C. R. Co.*, 21 Grat. (Va.) 604. See *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Gurnee v. Speer*, 68 Ga. 711; *Weidenger v. Spruance*, 101 Ill. 278; *Vance v. Vance*, 32 La. Ann. 186, affd. 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. 854; *Augusta Bank v. Augusta*, 49 Maine 507; *Coffin v. Rich*, 45 Maine 507, 71 Am. Dec. 559; *Norris v. Wrenschall*, 34 Md. 492; *Thistle v. Frostbury Coal Co.*, 10 Md. 129; *Bay City & E. S. R. Co. v. Austin*, 21

Mich. 390; *Breitung v. Lindauer*, 37 Mich. 217; *Providence Sav. Institution v. Jackson Place Skating & C. Rink*, 52 Mo. 552; *St. Louis R. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *Baldwin v. Newark*, 38 N. J. 158; *Corning v. McCullough*, 1 N. Y. 47, 3 Denio (N. Y.) 589, 4 How. Pr. (N. Y.) 182, 49 Am. Dec. 287; *Story v. Furman*, 25 N. Y. 214; *Brown v. Hitchcock*, 36 Ohio St. 667; *Mabry v. Baxter*, 11 Heisk. (Tenn.) 682; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 27 L. ed. 977, 3 Sup. Ct. 304; *Hawthorne v. Calef*, 2 Wall. (U. S.) 10, 17 L. ed. 776; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327, Fed. Cas. No. 14367; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. 703.

⁹⁶ *Van Rensselaer v. Snyder*, 9 Barb. (N. Y.) 302, affd. 13 N. Y. 299; *Guild v. Rogers*, 8 Barb. (N. Y.) 502; *Conkey v. Hart*, 14 N. Y. 22.

⁹⁷ *Wheeler v. Board of Control*, 137 Mich. 291, 100 N. W. 394.

⁹⁸ *Commonwealth v. Booker*, 82 Va. 964, 7 S. E. 381. See also, *Cooper v. Commonwealth*, 85 Va. 528, 8 S. E. 247, revd. 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. 972.

⁹⁹ *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Walker v. Whitehead*, 43 Ga. 538, revd. 16 Wall. (U. S.) 314, 21 L. ed. 357; *Garrett v. Cordell*, 43 Ga. 366; *Welborn v. Akin*, 44 Ga. 420; *West v. Sansom*, 44

gagees on default of the mortgagor was held unconstitutional as impairing the mortgage contract.¹ But the enlargement of the remedy for enforcing a mechanic's lien after sale under mortgage foreclosure was held not to impair contracts, either as to the mortgagee or the purchaser under the foreclosure proceedings.² However, a statute forbidding property to be sold under execution for less than two-thirds of its appraised value was held to impair the contract, where the prior statute permitted the property to be sold to the highest bidder.³ Likewise, a statute providing for stay of sale for one year on foreclosure of mortgage, and providing for appraisal, and that the land should not bring less than eighty per cent. of the appraised value, was held to impair the mortgage contract.⁴ And a statute shortening the time of redemption has been held void,⁵ and the same is true of a statute authorizing a stay of execution for an unreasonable time as to existing contracts.⁶ But a statute which in effect only amounts to

Ga. 295; *Griffin v. Wilcox*, 21 Ind. 370; *Call v. Hagger*, 8 Mass. 423; *McFarland v. Butler*, 8 Gil. (Minn.) 91; *Jackson v. Butler*, 8 Minn. 117; *Horne v. State*, 84 N. Car. 362; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46, 93 Am. Dec. 778; *Thompson v. Commonwealth*, 81 Pa. St. 314; *State v. Bank of South Carolina*, 1 S. Car. 63; *State v. Bank of Tennessee*, 3 Baxt. (Tenn.) 395; *Osborn v. Nicholson*, 13 Wall. (U. S.) 654, 20 L. ed. 689; *United States v. Conway, Hempst.* (U. S.) 313, Fed. Cas. No. 14849; *Johnson v. Bond, Hempst.* (U. S.) 533, Fed. Cas. No. 7374; *South & North Alabama R. Co. v. State*, 101 U. S. 832, 25 L. ed. 973; *Memphis & C. R. Co. v. State*, 101 U. S. 337, 25 L. ed. 960; *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684, 16 Sup. Ct. 500; *Walker v. Whitehead*, 16 Wall. (U. S.) 314, 21 L. ed. 357; *Hess v. Johnson*, 3 W. Va. 645. See also, *Auld v. Butcher*, 2 Kans. 135; *Stephens v. St. Louis Nat. Bank*, 43 Mo. 385; *State v. Gatzweiler*, 49 Mo. 17, 18 Am. Rep. 119; *Burrough v. Vanderbergh*, 69 Nebr. 43, 95 N. W. 57.

¹ *Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. 748.

² *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. 703.

³ *Rawley v. Hooker*, 21 Ind. 144; *Willard v. Longstreet*, 2 Doug. (Mich.) 172; *Handy v. Chatfield*, 23 Wend. (N. Y.) 35; *Conkey v. Hart*, 14 N. Y. 22; *Robeson v. Brown*, 63 N. Car. 554; *Hilliard v. Moore*, 65 N. Car. 540; *Case v. Dunmore*, 23 Pa. St. 93; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738; *Billmeyer v. Evans*, 40 Pa. St. 324; *Lewis v. Lewis*, 47 Pa. St. 127; *Harmon v. Wallace*, 2 S. Car. 208; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397; *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. 179.

⁴ *Swinburne v. Mills*, 17 Wash. 611, 50 Pac. 489, 61 Am. St. 932.

⁵ *Cargill v. Power*, 1 Mich. 369; *Hillebert v. Porter*, 28 Minn. 496, 11 N. W. 84; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Robinson v. Howe*, 13 Wis. 341.

⁶ *Scoby v. Gibson*, 1 Am. L. Reg. (N. S.) 221; *Ex parte Pollard*, 40

a change in the mode of procedure of creditors of school districts, on change of boundaries or consolidation of districts, does not have the effect, as to school districts not consolidated and having an outstanding indebtedness, to impair the obligation of contracts, where there is no change in the measure of the obligation or the right of enforcement.⁷ But a statute which extends the time for redemption of land sold under execution has been held void.⁸

A statute relating to the procedure in case of loss of a certificate of deposit and making no provision for the protection of the rights of other persons, except as to notice by publication, was held to impair the obligation of contracts, as affecting the rights of bona fide holders of certificates.⁹ Where, at the time a judgment creditor made his contract with a city, assessments were required to be made by an officer of the city, though subsequently a statute was enacted providing that the assessment of the county assessor should be copied for municipal purposes, it was held that the creditor was entitled to have a reassessment of property undervalued by the assessor.¹⁰ And a statute withdrawing the power of municipal taxation for the pay-

Ala. 77; *Hudspeth v. Davis*, 41 Ala. 389; *Burt v. Williams*, 24 Ark. 91; *Garlington v. Priest*, 13 Fla. 559; *Aycock v. Martin*, 37 Ga. 124, 92 Am. Dec. 56; *Dormire v. Cogly*, 8 Blackf. (Ind.) 177; *Strong v. Daniel*, 5 Ind. 348; *Grayson v. Lilly*, 7 T. B. Mon. (Ky.) 6; *Cargill v. Power*, 1 Mich. 369; *Coffman v. Bank of Kentucky*, 40 Miss. 29, 90 Am. Dec. 311; *Baily v. Gentry*, 1 Mo. 164, 13 Am. Dec. 484; *Brown v. Ward*, 1 Mo. 209; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Stevens v. Andrews*, 31 Mo. 205; *Jones v. Crittenden*, 4 N. Car. 55, 1 Car. L. R. 385, 6 Am. Dec. 531; *Barnes v. Barnes*, 8 Jones (N. Car.) 366; *Jacobs v. Smallwood*, 63 N. Car. 112, Fed. Cas. No. 7163; *Chadwick v. Moore*, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267; *State v. Carew*, 13 Rich L. (S. Car.) 498, 91 Am. Dec. 245; *Townsend v. Townsend*, Peck (Tenn.) 1, 14 Am. Dec. 722; *Webster v. Rose*, 6 Heisk. (Tenn.)

93, 19 Am. Rep. 583; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397; *Gantly v. Ewing*, 3 How. (U. S.) 707, 11 L. ed. 794; *Howard v. Bugbee*, 24 How. (U. S.) 461, 16 L. ed. 753.

⁷ *State v. Grefe*, 139 Iowa 18, 117 N. W. 13.

⁸ *Davis v. Rupe*, 114 Ind. 588, 17 N. E. 163; *January v. January*, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211; *Stone v. Basset*, 4 Gil. (Minn.) 215; *Heyward v. Judd*, 4 Minn. 483; *Freeborn v. Pettibone*, 5 Gil. (Minn.) 219; *Goenen v. Schroeder*, 8 Minn. 387; *Dikeman v. Dikeman*, 11 Paige (N. Y.) 484; *Greenfield v. Dorris*, 1 Sneed (Tenn.) 548; *Robinson v. Howe*, 13 Wis. 341.

⁹ *In re Ellard*, 62 Misc. (N. Y.) 374, 114 N. Y. S. 827.

¹⁰ *Cleveland v. United States*, 166 Fed. 677.

ment of its bonds was also held void.¹¹ So, a statute forbidding the maintenance of any action for the refunding of money paid for assessment sale certificates under a city charter within two years from the day when notice of expiration of the redemption period should have been legally given was held unconstitutional as applied to certificates purchased prior to the passage of such statute.¹² Where, subsequent to the execution of a mortgage containing a power of sale by advertisement, a statute was enacted prohibiting foreclosure by advertisement, the statute was held not to impair the obligation of contracts, since the remedy was merely a cumulative one.¹³ But a statute repealing the provisions of a former act, which gives a creditor of a corporation an individual right of action against a stockholder on suspension of the business of the corporation, and substituting therefor a suit in equity by a receiver, and providing for the distribution of the proceeds pro rata among the creditors, was held unconstitutional as to rights which had accrued prior to the passage of the act.¹⁴ So, a statute which takes away the pre-existing remedy of a creditor of a corporation to enforce a civil statutory liability at law against stockholders of a bank association for corporate debts, to the extent of the par value of the stock held by such members, and substituting therefor a remedy by bill in equity in behalf of all the creditors of the association against all the stockholders in the state, was held unconstitutional as impairing the obligation of contracts.¹⁵

¹¹ *O'Connor v. Memphis*, 6 Lea (Tenn.) 730; *Beckwith v. Racine*, 7 Biss. (U. S.) 142, Fed. Cas. No. 1213, affd. 100 U. S. 514, 25 L. ed. 699; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. 648; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed.

620, 6 Sup. Ct. 398; *Smith v. Appleton*, 19 Wis. 468.

¹² *Gray v. St. Paul*, 105 Minn. 19, 116 N. W. 1111.

¹³ *Scott v. District Court of 5th Judicial Dist.*, 15 N. Dak. 259, 107 N. W. 61.

¹⁴ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954.

¹⁵ *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171.

§ 2733. **Impairment of corporate charters.**—It is well settled that when the sovereign power or any body, acting under authority derived from it, grants to a body of individuals a franchise for a corporation, or any privilege in the nature of property, and such grant is accepted, and no power of repeal or amendment is reserved, then such grant or privilege is within the constitutional protection and can not be repealed or amended against the consent of the corporators.¹⁶ The principle, however, does not apply in

¹⁶ *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268; *Arkansas State Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255n, 140 Am. St. 103; *Derby Tpk. Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700; *Enfield Toll Bridge Co. v. Hartford & C. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716n; *Philadelphia W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Farmers' Loan & C. Co. v. Stone*, 20 Fed. 270; *Larabee v. Dolley*, 175 Fed. 365; *Central R. & Banking Co. v. State*, 54 Ga. 401, revd. 92 U. S. 665, 23 L. ed. 757; *Young v. Harrison*, 6 Ga. 130; *Union Mutual & C. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Lewis v. Brackneridge*, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228; *Maysville Tpk. Road Co. v. How*, 14 B. Mon. (Ky.) 426; *Louisville v. Vreeland*, 140 Ky. 400, 131 S. W. 195; *German Ins. Co. v. Commonwealth*, 141 Ky. 606, 133 S. W. 793; *Boisdere v. Citizens' Bank*, 9 La. 506, 29 Am. Dec. 453; *Montpelier Academy v. George*, 14 La. 395, 33 Am. Dec. 585; *Bowdoinham v. Richmond*, 6 Greenl. (Maine) 112, 19 Am. Dec. 197; *New Gloucester School Fund v. Bradbury*, 11 Maine 118, 26 Am. Dec. 515; *Baltimore & O. R. Co. v. Waters*, 105 Md. 396, 66 Atl. 685, 12 L. R. A. (N. S.) 326n; *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *Commercial Bank v. State*, 6 Smedes & M. (Miss.) 599; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517; *State v. Missouri Pac. R. Co. (Mo.)*, 147 S. W. 118; *Somerville v. St. Louis Min. &*

Mill. Co. (Mont.), 127 Pac. 464; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Zabriskie v. Hackensack & C. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *Pharaoh v. Benson*, 69 Misc. (N. Y.) 241, 126 N. Y. S. 1035; *Burke v. Rector & C. of Trinity Church*, 132 App. Div. (N. Y.) 930, 63 Misc. (N. Y.) 43, 117 N. Y. S. 1130; *Ewald v. Medical Society of New York County*, 70 Misc. (N. Y.) 615, 130 N. Y. S. 1024; *Burke v. Rector & C. of Trinity Church*, 132 App. Div. (N. Y.) 930, 63 Misc. (N. Y.) 43, 117 N. Y. S. 1130; *North Carolina University v. Foy*, 1 Murph. (N. Car.) 58, 3 Am. Dec. 672; *Attorney-General v. Bank*, 57 N. Car. 287; *Bank of State of N. Car. v. Bank of Cape Fear*, 13 Ired. L. (N. Car.) 75; *Brown v. Hummel*, 6 Pa. St. 86, 47 Am. Dec. 431; *Commonwealth v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450n; *Second & Third St. Pass. R. Co. v. Green & Coates St. Pass. R. Co.*, 3 Phila. (Pa.) 430; *Gray v. Monongahela Nav. Co.*, 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500; *Manheim Borough v. Manheim Water Co.*, 229 Pa. 177, 78 Atl. 93; *State v. Heyward*, 3 Rich. L. (S. Car.) 389; *Tate v. Bell*, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221; *Officer v. Young*, 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 266 Sup. Ct. 427; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369, 14 L. ed. 977; *Dodge v. Woolsey*, 18 How. (U.

strictness to the charters or franchises of corporations organized for the performance of strictly public or political duties, such as cities, towns and counties, the charters of such corporations and some others being subject to alteration and repeal at the will of the sovereign except as restrained by state constitutions.¹⁷ The state may reserve to

S.) 331, 15 L. ed. 401; *Mechanics' &c. Bank v. Debolt*, 18 How. (U. S.) 380, 15 L. ed. 458; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. 110; *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; *State v. Railroad Commission of Wisconsin*, 140 Wis. 145, 121 N. W. 919; *State v. Bancroft*, 148 Wis. 124, 134 N. W. 330. Where a city granted a franchise to a water company for a period of twenty years with an option on the part of the city to purchase the plant at the expiration of the twenty years, or to grant a renewal for another twenty years, a subsequent amendment of the city charter providing for the purchase of the water plant if the company would accept the bonds of the city in payment therefor, but if not so purchased, authorizing the city to construct its own water plant, was held to impair the obligation of the contract, and was therefore void. *Denver v. New York Trust Co.*, 187 Fed. 890, 110 C. C. A. 24. The charter of a water company was held not impaired by construing it in the light of the laws and decisions existing when the charter was granted. *Consumers' Co. v. Hatch*, 224 U. S. 148, 56 L. ed. 703, 32 Sup. Ct. 465. Where under the laws of Illinois, 1855, a railroad company was not liable for injuries to stock caused by the failure of the landowner to fence the track, a subsequent statute requiring the railroad companies to fence their tracks was held not to apply to a prior contract between a railroad company under the law of 1855 and a landowner, requiring the latter to fence the tract. *Lynch v. Baltimore & O. S. W. R. Co.*, 240 Ill. 567, 88 N. E. 1034. The obligation of a provision of a special charter of the corporation that

the capital stock may be increased to an amount not exceeding a certain limit amounts to an impairment of a contract existing between the stockholders themselves and between the stockholders and the corporation, and is invalid. *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624, 70 Atl. 295. A contract right acquired by purchase under foreclosure proceedings, and which existed prior to the adoption of the Constitution, giving the state the right to alter or repeal corporate charters, can not be impaired under the authority to alter or repeal corporate charters, although the corporation which purchased such rights was organized after the adoption of the Constitution. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660.

¹⁷*Mobile School Commissioners v. Putnam*, 44 Ala. 506; *State v. Curran*, 12 Ark. 321, revd. 15 How. (U. S.) 304, 14 L. ed. 705; *Dart v. Houston*, 22 Ga. 506; *Smith v. People*, 140 Ill. 355, 29 N. E. 676; *Chalstran v. Board of Education*, 244 Ill. 470, 91 N. E. 712; *State v. Stover*, 47 Kans. 119, 27 Pac. 850; *Central University of Kentucky v. Walter's Exrs.*, 122 Ky. 65, 28 Ky. L. 1041, 90 S. W. 1066; *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642; *Montpelier Academy v. George*, 14 La. 395, 33 Am. Dec. 585; *Essex Public Road Board v. Skinkle*, 49 N. J. L. 641, 10 Atl. 379, affd. 140 U. S. 334, 35 L. ed. 446, 11 Sup. Ct. 790; *People v. Board of Assessors of Town of Oswego*, 134 N. Y. S. 177; *People v. Palatine*, 53 Barb. (N. Y.) 70; *People v. Fishkill &c. Plank Road Co.*, 27 Barb. (N. Y.) 445; *Tippencanoe v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Newton v. Commissioners*,

itself the power of amendment or repeal, and where this reserved power is reasonably exercised and is not confiscatory there can not be said to be an impairment of the obligation of a contract.¹⁸

100 U. S. 548, 25 L. ed. 710; *New Orleans &c. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Maryland v. Baltimore & O. R. Co.*, 3 How. (U. S.) 534, 11 L. ed. 714; *Head v. University of Missouri*, 19 Wall. (U. S.) 526, 22 L. ed. 160; *Sargent v. Clark*, 83 Vt. 523, 77 Atl. 337; *State v. Irvine*, 14 Wyo. 318, 84 Pac. 90, affd. 206 U. S. 278, 51 L. ed. 1063, 27 Sup. Ct. 613.

¹⁸ *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268; *Arkansas Stave Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255n, 140 Am. St. 103; *In re College Hill Land Assn. of San Diego*, 157 Cal. 596, 108 Pac. 681 (reserved power part of contract); *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341; *Seattle, R. & S. R. Co. v. Seattle*, 190 Fed. 75; *Larabee v. Dolley*, 175 Fed. 365 (vested rights may not be disturbed); *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. 229; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 30 Ky. L. 18, 97 S. W. 778; *Commonwealth v. Boston & N. St. R. Co.*, 212 Mass. 82, 98 N. E. 1075 (half rates for school children); *Deloria v. Atkins*, 158 Mich. 232, 122 N. W. 559; *People v. Calder*, 153 Mich. 724, 117 N. W. 314, 126 Am. St. 550; *State v. Louisville & N. R. Co.*, 97 Miss. 35, 51 So. 918 (dissolution); *State v. Missouri Pac. R. Co. (Mo.)*, 147 S. W. 118; *Lewis v. Northern Pac. R. Co.*, 36 Mont. 207, 92 Pac. 469; *Somerville v. St. Louis Min. & Mill. Co. (Mont.)*, 127 Pac. 464; *People v. Public Service Commission*, 138 N. Y. S. 434; *Bush v. New York Life Ins. Co.*, 135 App. Div. (N. Y.) 447, 119 N. Y. S. 796; *Ewald v. Medical Soc.*, 144 App. Div. (N. Y.) 82, 128 N. Y. S. 886; *People v. Public Service Commission*, 128 N. Y. S. 384 (railroad rates); *Bond v. Atlantic Terra Cotta Co.*, 137 App. Div. (N. Y.) 671, 122 N. Y. S. 425 (may not deprive stockholders of vested

rights); *People v. Public Service Commission*, 143 App. Div. (N. Y.) 769, 128 N. Y. S. 384 (railroad fares); *New York Cent. & H. R. Co. v. Williams*, 136 App. Div. (N. Y.) 904, 120 N. Y. S. 1137 (weekly payment of wages); *Pratt Institute v. New York*, 99 App. Div. (N. Y.) 525, 91 N. Y. S. 136, affd. 183 N. Y. 151, 75 N. E. 1119 (repeal of special exemptions); *State v. Cantwell*, 142 N. Car. 604, 55 S. E. 820, 8 L. R. A. (N. S.) 498n (exemption of firemen from jury duty); *Ware Shoals Mfg. Co. v. Jones*, 78 S. Car. 211, 58 S. E. 811 (license taxes); *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. 419; *Covington v. Commonwealth*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383, affg. 107 Ky. 680, 19 Ky. L. 105, 39 S. W. 836; *Smith v. Lake Shore &c. R. Co.*, 114 Mich. 460, 72 N. W. 328, revd. 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. 565; *Polk v. Mutual Reserve Fund Life Assn.*, 207 U. S. 310, 52 L. ed. 222, 28 Sup. Ct. 65; *Missouri Pac. R. Co. v. State of Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. 330; *Citizens' Nat. Bank v. Commonwealth*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. 532 (taxation); *Calder v. Attorney-General*, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. 122 (bonded indebtedness); *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 32 L. R. A. (N. S.) 1062, affg. 22 Okla. 48, 97 Pac. 590; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. 261 (children's half fare rates on street railroads); *Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. 74, affg. 75 Conn. 442, 53 Atl. 960 (paving between tracks); *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. 189; *State v. Bancroft (Wis.)*, 134 N. W. 330. A statute enacted subsequently to the grant of a charter to a water company, providing a different

The legislature may withdraw a grant where there has been no act of performance by the corporation under the grant.¹⁹ But the reserved right of alteration and repeal does not authorize the legislature to impair or destroy contracts of third persons with the corporation.²⁰ Neither

mode of acquiring the water-works by the city than that provided in the charter, was held not to apply to such water company, and hence not unconstitutional as impairing obligations of a contract. *Manheim Borough v. Manheim Water Co.*, 229 Pa. 177, 78 Atl. 93. Under the reserved power of the state to change the power granted to corporations, a subsequent statute giving to corporations the right to consolidate upon a vote of two-thirds of the stockholders of each company in favor of the consolidation was held not to impair the obligations of contracts created prior to the enactment of the statute. *Winfree v. Riverside Cotton Mills Co. (Va.)*, 75 S. E. 309. The right reserved to the state in the franchise granted to a street railroad company of future control of the "construction and maintenance and operation" of the company's lines was held to refer only to the manner of carrying on the business of the road, the laying of tracks and the use of the streets and the safety of the public passengers, and does not confer the power to reduce fares below the rate prescribed in the franchise. *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118. Under the reserved power of the state to amend general corporation laws, an amendatory act authorizing domestic companies to hold stock in other mining companies is not such an impairment of the contract between the corporation and its stockholders as to require acceptance of it by the stockholders as an amendment of the charter. *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 721, 94 C. C. A. 13. Under the reserved power of the state to amend laws under which corporations are organized, a statute authorizing corporations to make

their stock assessable was held not to impair the obligation of contracts. *Somerville v. St. Louis Min. & Mill. Co. (Mont.)*, 127 Pac. 464. A constitutional provision reserving the power to alter or amend corporate charters, "provided, however, that no injustice shall be done to the stockholders," does not authorize the legislature to empower a city to construct its own water-works during the existence of an exclusive water-works franchise adopted under legislative sanction. *Vicksburg v. Vicksburg Water-works Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660. Under the reserved power of the state to alter the charters of corporations, the legislature may authorize the issuance of preferred stock by consent of the holders of two-thirds of the capital stock, although at the time the corporation was organized the statute required the unanimous consent of the holders of the capital stock. *Hinckley v. Schwarzschild & Sulzberger Co.*, 107 App. Div. (N. Y.) 470, 95 N. Y. S. 357.

¹⁹ *People v. Ellison*, 115 App. Div. (N. Y.) 254, 101 N. Y. S. 55.

²⁰ *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736; *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073. But see *Boswell v. Security Mut. Life Ins. Co.*, 119 App. Div. (N. Y.) 723, 104 N. Y. S. 130. The repeal of a corporate charter does not constitute an infringement of the rights of creditors of the corporation, where such power is conferred by the legislature, although such repeal may abate actions of creditors against the corporations, since the creditors have the right to participate in the distribution of the assets. *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

can the corporation be deprived of property already acquired nor of the proceeds of lawful contracts previously made nor can rights vested in the corporation under the grant be impaired or destroyed.²¹ Nor can the power be exercised where its effect would be to take property without due process of law.²² The right to amend does not extend to the making of a new contract for the stockholders.²³ The main principle is without application where there is no contract involved. Thus, a statute fixing the rate of bonus payable by a corporation on its organization or on the increase of its capital stock does not constitute a contract between the state and the corporation, which the legislature can not destroy by enlarging the bonus for the increase of the capital stock of a corporation previously incorporated.²⁴ Notwithstanding the contract character of a charter under the constitution, it is believed that a state has the reserved right under its police power to subject corporations to general laws subsequently passed by the legislature for the promotion of the general welfare.²⁵ The legislature may, for example,

²¹ *New York Cent. & H. R. Co. v. Williams*, 199 N. Y. 108, 92 N. E. 404, affg. 136 App. Div. (N. Y.) 904, 120 N. Y. S. 1137.

²² *Detroit v. Detroit &c. R. Co.*, 43 Mich. 140, 5 N. W. 275.

²³ *Manheim Borough v. Manheim Water Co.*, 229 Pa. 177, 78 Atl. 93.

²⁴ *Commonwealth v. Independence Trust Co.*, 233 Pa. 92, 81 Atl. 928. A contract between two railroad companies requiring one to construct and maintain a crossing was held not impaired by a subsequent order of the railroad commission requiring the installation of an interlocking plant at the crossing and apportioning between such companies the costs thereof. *Grand Trunk Western R. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 55 L. ed. 786, 31 Sup. Ct. 537.

²⁵ *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268; *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 243, 138 Am. St. 229; *New York & N. E. R. Co. v. Bristol*,

151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437; *Butchers' Union Slaughter House &c. Co. v. Crescent City Live Stock &c. Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. 652; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Chicago, B. & Q. R. Co. v. State*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. 513. A statute imposing a penalty on the doing of corporate business within the state while the corporation is a member of a trust or combination to control prices was held not to impair contract rights of domestic corporations, where the constitution of the state reserved the power to amend or repeal corporate charters. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. 370. A provision in a charter of a railroad company exempting it from liability for the death of any of its employes, although caused by its negligence, was held not protected by the contract clause of the Federal Constitution, since as to such matters the

legally enact weekly wage payment to employes of corporations.²⁶

Upon the consent of all the stockholders of a corporation, the provisions of a charter may be altered as to the relations of the stockholders among themselves.²⁷ Where a subsequent charter granting additional powers is accepted by a corporation, such additional powers are not required to be interpreted in accordance with the original grant.²⁸ It has been held that there was no impairment by a statute which prohibited the increase of the capital stock of corporations without the consent of a railroad and warehouse commission.²⁹ A statute requiring corporations to keep correct books of account in the state and to permit their inspection by stockholders has been held not to impair the obligation of a contract when applied to a company previously incorporated under a special act which contained no provision that it should be subject to subsequent laws.^{29a} A statute prohibiting common carriers from knowingly carrying any person free of charge and from issuing free passes was held not to impair the obligation of a contract between a railroad company and an express company whereby the railroad company was to furnish cars for transportation of express matter and to carry express messengers and the express company's officials "free of charge," the act being prospective only and calling for mutual services.³⁰

legislature has only the power to regulate and not to contract. *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. 534; *Union Sawmill Co. v. Felsen-thal*, 85 Ark. 346, 108 S. W. 217 (redemption of scrip).

²⁶ *New York Cent. & H. R. Co. v. Williams*, 64 Misc. (N. Y.) 15, 118 N. Y. S. 785.

²⁷ *Murray v. Beattie Mfg. Co.*, 79 N. J. Eq. 322, 82 Atl. 1038. Under the reserved power of the state to change the power granted to corporations, a subsequent statute giving to corporations the right to consolidate upon a vote of two-thirds of the stockholders of each

company in favor of the consolidation was held not to impair the obligations of contracts created prior to the enactment of the statute. *Winfree v. Riverside Cotton Mills Co. (Va.)*, 75 S. E. 309.

²⁸ *Phoenix v. Columbia*, 179 N. Y. 592, 72 N. E. 1149.

²⁹ *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250n.

^{29a} *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. 229.

³⁰ *Texas & N. O. R. Co. v. Wells-Fargo Express Co. (Tex.)*, 110 S. W. 38, affg. 108 S. W. 172.

§ 2734. Impairment of franchises of public utility companies.—An unconditional grant of a franchise to a public utility corporation, where there is no reservation of the right of regulation to the granting power, may amount to a contract which can not be impaired by subsequent legislation.³¹ But a grant to such corporation is generally held subject to municipal and legislative regulation in the absence of an express exemption.³² Among franchises falling within this rule may be mentioned the grants of rights of way to railroads,³³ and rights of way in streets to street

³¹ A water company's franchise giving the company the right to maintain its mains and pipes in the streets of the city for a definite term for the purpose of supplying water to the inhabitants of the city, is a contract which is protected by the United States Constitution from impairment. *Farmers' Loan & Trust Co. v. Meridian Waterworks Co.*, 139 Fed. 661; *Cleveland Electric Co. v. Cleveland*, 135 Fed. 368, *affd.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. 513; *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162, 73 N. E. 87 (rates for gas); *Terre Haute &c. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401, *revd.* 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. 767; *Burlington v. Burlington Street R. Co.*, 49 Iowa 144, 31 Am. Rep. 145; *Gulf & S. I. R. Co. v. Adams*, 90 Miss. 559, 45 So. 91 (maximum railroad rates); *Independence v. Independence Waterworks Co.*, 153 Mo. App. 693, 135 S. W. 956; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162n, 140 App. Div. (N. Y.) 921, 125 N. Y. S. 1125. Where a street railroad franchise requires the company to pay an annual license fee on the basis of the greatest number of cars in daily use at the busiest season of the year, and not on each car, a subsequent ordinance imposing a penalty for failure to display in each car a certificate of payment of the license fee was held to impair the obligation of the contract. *New York v. New York R. Co.*, 117 N. Y. S. 921; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291;

Cincinnati & Springfield R. Co. v. Carthage, 36 Ohio St. 631; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. ed. 594; *Louisville v. Cumberland Tel. & T. Co.*, 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. 572 (telephone company); *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023; *Commonwealth v. Boston*, 97 Mass. 555; *State v. Chicago & N. W. R. Co.*, 128 Wis. 449, 108 N. W. 594.

³² *Bloomington &c. Heating Co. v. Bloomington*, 123 Ill. App. 639; *City of Kenosha v. Kenosha Home Tel. Co.*, 149 Wis. 338, 135 N. W. 848.

³³ *Arcata v. Arcata &c. R. Co.*, 92 Cal. 639, 28 Pac. 676; *Iron Mountain R. Co. of Memphis v. Memphis*, 96 Fed. 113, 37 C. C. A. 410. Where a railroad charter authorized it to condemn land for a right of way under a statute then in force which did not require notice to the landowner, the charter contract was not violated by subsequent statute amending prior statute and requiring notice to the landowner, since it related merely to the remedy for condemning land. *Chicago, B. & O. R. Co. v. Abbott*, 215 Ill. 416, 74 N. E. 412; *Snell v. Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Commonwealth v. Mobile &c. R. Co.*, 23 Ky. L. 784, 64 S. W. 451, 54 L. R. A. 916. A statute requiring a railroad company to bear a part of the cost of constructing a highway

railway companies,⁸⁴ the grant of rights to lay gas⁸⁵ and water pipes,⁸⁶ and the right to occupy streets for the op-

bridge so as to make an overhead crossing instead of a grade crossing was held valid as beneficial to the railroad company, although the grade crossing was not technically abolished. In re Bristol County, 193 Mass. 257, 79 N. E. 339; Houston & T. C. R. Co. v. Texas & P. R. Co., 70 Tex. 649, 8 S. W. 498; New York L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 854, 14 Sup. Ct. 952.

⁸⁴Portland R. &c. Power Co. v. Portland, 201 Fed. 119; Southern Pac. Co. v. Portland, 177 Fed. 958; Citizens' St. R. Co. v. Memphis, 53 Fed. 715; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667; Africa v. Knoxville, 70 Fed. 729; Parmelee v. Chicago, 60 Ill. 267; Williams v. Citizens' R. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. 201; Western Paving &c. Co. v. Citizens' Street R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462; City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. 157; Shreveport Traction Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. 345; Hovelman v. Kansas City Horse R. Co., 79 Mo. 632; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. 653; Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418; State v. Madison St. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771.

⁸⁵Toledo v. Northwestern Ohio Nat. Gas. Co., 5 Ohio C. C. 557; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. 575; Missouri v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. 505; Louisville Gas Co. v. Citizens' Gas-Light Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; New Orleans Gas Light Co. v. Louisiana Light &c. Mfg. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252. Contract rights under an exclusive

franchise of a gas company are not infringed by a statute relating to a municipal drainage system necessitating a change of location by the gas company of its pipes and mains in the street at the expense of such company, since the gas company had no vested right in the location of its pipes and mains, but were subject to the police power of the city. New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 25 S. Ct. 471, 49 L. ed. 831.

⁸⁶The statute passed after the organization of the water-works company under the general incorporation laws of the state with power to transport and sell water as a "lawful business," making it unlawful to transport the water of any river of the state through pipes into another state for use there, does not impair the obligation of the contract within the meaning of the Federal Constitution. McCarter v. Hudson County Water Co., 70 N. J. Eq. 525, 61 Atl. 710, affd. 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. 754. A provision in the charter of Greater New York, providing that no pavement shall be destroyed without a permit from the president of the borough, was held not unconstitutional as violating the vested right of the water company previously incorporated under the general law of the state, which authorized the company to lay its pipes in streets and public places. Jamaica Water Supply Co. v. New York, 57 Misc. (N. Y.) 475, 109 N. Y. S. 948; Warsaw Waterworks Co. v. Warsaw, 161 N. Y. 176, 55 N. E. 486; Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736; St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818.

eration of telegraph, telephone or electric light franchises.³⁷ Where a public utility company is given an exclusive franchise it has been held that there is an impairment of such franchise by the construction of a competing utility by the city.³⁸ But it is held not a violation of the contract clause of the constitution to require a street railroad company to construct a new line of road,³⁹ or to change its lines at its own expense to conform to the improvements to be made in a street,⁴⁰ or to pay a proportional part of the expense of maintaining viaducts which they have helped construct.⁴¹

³⁷ Where, prior to the adoption of the constitution of 1891, the city granted a telephone company the right to erect and maintain its poles in the streets of a city, and the telephone company proceeded to build and operate its lines and exchange at considerable expense, such grant is in the nature of a contract, and is not affected by the constitution subsequently adopted, especially in view of a section providing that it shall have no effect on franchises theretofore granted, when work has, in good faith, been begun thereunder. *Owensboro v. Cumberland Telephone &c. Co.*, 174 Fed. 739, 99 C. C. A. 1. An ordinance granting a telephone franchise was held to be impaired by a resolution of the city council ordering removal of the poles and wires of the telephone company from the streets. *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008; *New Decatur v. American Telephone &c. Co. (Ala.)*, 58 So. 613; *Michigan Telephone Co. v. Charlotte*, 93 Fed. 11; *New Orleans v. Great Southern Tel. &c. Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. 502; *Michigan Telegraph Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. 520, 47 L. R. A. 87; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. The rights of an electric company were not impaired by statute, where the only effect is to require electric companies to place conductors in conduits constructed in accord-

ance with a general plan prepared in accordance with such statute, instead of allowing electric companies to construct their own subways. *People v. Ellison*, 188 N. Y. 523, 81 N. E. 447; *Jemison v. Bell Tel. Co.*, 109 App. Div. (N. Y.) 911, 95 N. Y. S. 728, affd. id., 186 N. Y. 493, 79 N. E. 728; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; *People v. Squire*, 145 U. S. 175, 36 L. ed. 666; *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. 868; *Commercial Electric Light &c. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592; *Clarksburg Electric Light &c. Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

³⁸ *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611; *Monett Electric Light &c. Co. v. Monett*, 186 Fed. 360; *Bellevue Water Co. v. Bellevue*, 3 (Hasb.) Idaho 739, 35 Pac. 693; *White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567. But see, *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224; *Walla Walla v. Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341.

³⁹ *Minneapolis St. R. Co. v. Minneapolis*, 189 Fed. 445; *State v. St. Paul City R. Co.*, 117 Minn. 316, 135 N. W. 976. But see, *People v. Detroit United Ry.*, 156 Mich. 659, 121 N. W. 321.

⁴⁰ *People v. Geneva &c. Trac. Co.*, 112 App. Div. (N. Y.) 581, 98 N. Y. S. 719.

⁴¹ *Northern Pac. R. Co. v. Minne-*

Generally, where legislative control of franchises is reserved, there is not an impairment of the contract by a statute which requires a street railway company to pave between its tracks.⁴² Where the power to require elevation of bridges is reserved, the right to exact performance of this condition may not be defeated by the amount of the expense involved in doing the work.⁴³ The right of a city to require street railroads to give universal transfers must be based upon a contract with such companies, or the city can not, as a general rule, compel the issuance of such transfers.⁴⁴ As a general rule, legislative acts regulating the internal management of a corporation, in so far as they concern the public and the policy of the state, are within the reserved powers of the state to alter or repeal corporate charters.^{44a} Public service corporations may not, by private grants, disable themselves from performing duties imposed by law.⁴⁵ The constitutional prohibition may be invoked by foreign corporations,⁴⁶ for the right of the state to withdraw its permission to a foreign corporation to do business within the state is always subject to the limitation that if the corporation has been granted a franchise amounting to a contract, it is protected by the constitution from impairment.⁴⁷

sota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341.

⁴² *Marshalltown Light & C. R. Co. v. Marshalltown*, 127 Iowa 637, 103 N. W. 1005.

⁴³ *Kaw Valley Drainage District v. Kansas City Terminal R. Co.*, 87 Kan. 272, 123 Pac. 991.

⁴⁴ *Shreveport v. Shreveport Trac. Co.*, 127 La. 560, 53 So. 863; *State v. Tacoma Ry. & C. Co.*, 61 Wash. 507, 112 Pac. 506.

^{44a} *Hinckley v. Schwarzschild & Sulzberger Co.*, 95 N. Y. 357, 107 App. Div. (N. Y.) 470.

⁴⁵ *Southwestern & C. Tel. Co. v. Dallas* (Tex. Civ. App.), 131 S. W. 80.

⁴⁶ *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152 (removal of suits to Federal courts). A stat-

ute prohibiting a foreign corporation from removing any suit from the state court to the federal court on the penalty of forfeiting its rights to do business in the state was held unconstitutional as impairing the obligation of a contract, as to a foreign railroad company which had acquired its road lines under the laws of Oklahoma territory, and under the laws of Congress relating to the Indian Territory, under which it obtained a vested contract right. *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480.

⁴⁷ *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152; *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 783.

§ 2735. Protection of exclusive grants to water companies.—A charter of a water-works company which grants an exclusive right to furnish a community with water for a specified time and which is valid at the time of the grant is a contract which may not be impaired by subsequent statutory or constitutional enactments.⁴⁸ The exclusive privilege may, of course, be repealed where that right is reserved at the time of the grant of the charter.⁴⁹ But the obligation of a contract imposed by the grant of a city of the exclusive right to supply the city with water from a certain source is not impaired by the later grant to others of a similar right to take water from other sources.⁵⁰ The constitutional provision that “no state shall pass any law impairing the obligation of contracts” is without application to laws enacted prior to the making of the contract with a water company, the obligation of which is claimed to be impaired.⁵¹ As a general rule, the company having the exclusive right has an adequate remedy at law against infringement of the right by private individuals, and hence is not entitled to injunction to restrain such infringement.⁵² Where the company has no exclusive right it can not interfere with traffic in water by others.⁵³

§ 2736. Impairment by making franchise subject to right of eminent domain.—The exercise of the power of eminent domain by or under the authority of the state is not open to the objection that it impairs the obligation of a

⁴⁸ *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep., 283; *In re Long Island Water Supply Co.*, 30 Abb. N. Cas. (N. Y.) 36, 24 N. Y. S. 807, revd. 73 Hun. (N. Y.) 499, 56 N. Y. St. 232, 26 N. Y. S. 198; *New Orleans Waterworks Co. v. St. Tammany Water-Works Co.*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405, affg. 14 Fed. 194, 4 Woods (U. S.) 134; *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. ed. 525. But see, *Attorney-General of Prince of Wales v. Bristol Waterworks Co.*, 10 Exch. 884; *Freeport Water-Works Co. v. Prager*, 3 Pa. Co. Ct. 371.

⁴⁹ *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 46 L. ed. 1132, 22 Sup. Ct. 820.

⁵⁰ *Stein v. Bienville Water Supply Co.*, 34 Fed. 145, affd. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. 892.

⁵¹ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916.

⁵² *Whitchurch v. Hide*, 2 Atk. 391; *Stein v. Bienville Water Supply Co.*, 32 Fed. 876.

⁵³ *Freeport Water Works Co. v. Prager*, 3 Pa. Co. Ct. 371.

contract. All contracts are entered into subject to this right. As a matter of fact, the exercise of the right of eminent domain recognizes the obligation of the contract to its fullest extent, since it provides for compensation on the theory of the force and validity of the contract. This does not, however, authorize the state to resume a franchise granted by it and carry on the functions of the corporation; for example, the state could not take a bank charter under the right of eminent domain, and continue the bank for public purposes. This would hardly be termed an appropriation of private property to public purposes. It is apparent that there would be no change in the use except the application of the profits of the institution, and this would not bring the act within the power. The power must not only be exercised bona fide by a state, but the property, and not its product, must be applied to public use.⁵⁴ Justice Harlan suggests the use of the power of eminent domain to terminate obnoxious franchises. He says: "If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of giving exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the state are unaffected by that

⁵⁴ *Amador Queen Min. Co. v. De-witt*, 73 Cal. 482, 15 Pac. 74; *Salem & Hamburg Tpk. Co. v. Lym*, 18 Conn. 451; *State v. Suffield &c. Bridge Co.*, 81 Conn. 56, 70 Atl. 55; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1; *Boston Water-Power Co. v. Boston*, 9 Metc. (Mass.) 199; *Central Bridge Corp. v. Lowell*, 4 Gray (Mass.) 474; *Eastern R. Co. v. Boston &c. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *In re Minneapolis & St. Louis R. Co.*, 36 Minn. 481, 32 N. W. 556; *Barber v. Andover*, 8 N. H. 398; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Clarke v. Blackmar*, 47 N. Y. 150; *In re Pittsburgh Junction R. Co.'s Ap-*

peal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128; *In re Providence & W. R. Co.*, 17 R. I. 324, 21 Atl. 965; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.) 176, 60 Am. Dec. 143; *New Orleans Gaslight Co. v. Louisiana Light &c. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Richmond F. & P. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71, 14 L. ed. 55; *Greenwood v. Union Freight Co.*, 105 U. S. 13, 26 L. ed. 961; *West River Bridge v. Dix*, 6 How. (U. S.) 507, 12 L. ed. 535; *Armington v. Barnet*, 15 Vt. 745, 40 Am. Dec. 705; *James River & Kanawha Co. v. Thompson & Teays*, 3 Gratt. (Va.) 270.

change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. * * * In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed."⁵⁵

§ 2737. Impairment of franchises by rate regulation.—

Where the rates to be charged by a public service corporation are fixed by the charter or franchise, and there is no violation of law in this respect, there is an impairment of the contract by legislation which lowers these rates.⁵⁶ Where, however, the right to regulate charges is reserved to the state or municipality by the charter or the laws, the rate may be controlled within reasonable limits. This does not authorize a reduction to the point of confiscation, but the rate must be such as to allow a reasonable profit on the corporate investment.⁵⁷ The reserved power may

⁵⁵ *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

⁵⁶ *Bessemer v. Bessemer Waterworks*, 152 Ala. 391, 44 So. 663; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736; *Pocatello v. Murray*, 173 Fed. 382. A gas company organized by consolidation of other gas companies under statute, and permitted to issue capital stock equal to the value of the property, franchises and rights of the consolidated companies, can not charge such rate for its gas as to pay in perpetuity a return on the original capitalization without regard to the depreciation in the value of the property. *In re Rebecchi*, 51 Misc. (N. Y.) 327, 100 N. Y. S. 335. A city ordinance providing for the forfeiture of street railroad franchise if the railroad shall, for a period of one month, neglect or refuse to comply with the provisions of the ordinance as to the charges

for passengers who can be seated and those who are compelled to stand, was held to impair the franchise. *Portland R., Light & Power Co. v. Portland*, 201 Fed. 119. Compare also, *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756; 2 *Elliott Rds. & Sts.* (2d ed.), § 959.

⁵⁷ *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178, 137 S. W. 1093; *Home Telephone & Telegraph Co. v. Los Angeles*, 155 Fed. 554; *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812; *People v. Public Service Commission*, 140 App. Div. (N. Y.) 839, 125 N. Y. S. 1000; *Richman v. Consolidated Gas Co.*, 114 App. Div. (N. Y.) 216, 100 N. Y. 81. Where an ordinance granting a telephone franchise made it subject to the present and future charters and ordinances of the city, an ordinance lowering telephone rates was held not invalid as impairing the obligation of contracts between the company and its patrons for higher rates. South-

be exercised through public service commissioners.⁵⁸ As a general rule, a city has not the right to contract away its governmental power by agreements relating to charges.⁵⁹ Neither is it allowed a city to grant a franchise that will deprive the state of its reserved power as to rate regulations. So, where a city makes a contract with an interurban company under authority of a statute fixing the rate of fare between certain cities as a consideration for the use of its streets, it has been held that such contract does not prevent the state from interfering by subsequent legislation under the power reserved in the constitution when the public welfare demands it.⁶⁰ The right to regulate the charges of

western Tel. & T. Co. v. Dallas (Tex. Civ. App.), 131 S. W. 80. A statute empowering the legislature to prescribe railroad rates subject to certain limitations was held not to create a contract right between the state and the railroad company subsequently organized, so as to deprive the state of the right to change such law. *Houston & T. C. R. Co. v. Storey*, 149 Fed. 499. A street railroad contract exemption from legislative regulation of rates, under a charter granted prior to the adoption of Texas Constitution, 1876, giving the legislature control of all the privileges and franchises granted by it or created under its authority was lost by foreclosure sale of its property and the acquisition of another franchise by municipal ordinance under a new corporation incorporated since the adoption of the Texas Constitution, 1876, notwithstanding the ordinance granting the franchise provided that the rights and privileges previously granted to the old corporation were conferred upon the new. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. 261. The contract clause of the state and Federal Constitution forbidding impairment of contracts was held not violated by an order of the railroad commission, permitting a telephone company to increase its rates, although its franchise fixed the rates to be charged.

Dawson v. Dawson Tel. Co. (Ga.), 72 S. E. 508.

⁵⁸ *Portland R., Light & Power Co. v. Railroad Commission*, 56 Ore. 468, 105 Pac. 709, 109 Pac. 273; *People v. Public Service Commission*, 138 N. Y. S. 434.

⁵⁹ *South Covington & C. R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28. Where a city charter reserving the right in the city council to regulate in the interests of the public, the exercise of franchises granted, provides that such "power can not be divested or granted," a further provision that a franchise granted shall fix a maximum rate which may be charged during the life of such franchise, was held not to authorize the city to contract away its right to regulate fares. *Portland R., Light & Power Co. v. Portland*, 201 Fed. 119. See also, *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, affd. 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469.

⁶⁰ *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. 1056. Since a municipal corporation is merely an agent of the state it can not make a contract with a telephone company which is not subject to the public utilities law. *Kenosha v. Kenosha Home Tel. Co.*, 149 Wis. 338, 135 N. W. 848. A city ordinance granting a telephone franchise and fixing rates is not binding on the state, within the meaning of the contract clause

public service corporations is a governmental power continuing in its nature and can only be suspended for a definite time, not unreasonably long, by words of positive grant by the legislature of the state or by its delegated authority.⁶¹ It has been held that a street railroad company had the right to charge the rate permitted by a city ordinance, although the city had no power to adopt the ordinance in a case where the matter was ratified by legislative enactment, and that such right could not be impaired by subsequent legislation.⁶²

§ 2738. Impairment of franchise by rate regulation—Water rates.—A valid contract between a city and a water company which fixes the rates to be charged to consumers or gives the company the right to fix the rates may not be impaired during its life by an ordinance reducing the rates, where neither the charter of the company nor the laws reserve the right of the city to regulate the charges.⁶³ This is the rule where the contract fixes a minimum rate. Where this is done the city is without power to fix a rate below the minimum rate specified in the contract.⁶⁴ Where, however, the constitution of the state makes the charters of corporations subject to alteration by the granting power, then the fact that the rates are fixed in the charter or contract will not prevent a change of the rates.⁶⁵ Where

of the Federal Constitution, but is in the nature of a license subject to the sovereign power of the state, under the right reserved to the state to fix rates for public service corporations. *State v. Superior Court for King County*, 67 Wash. 37, 120 Pac. 861. See also, *Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

⁶¹ *Portland R., Light & Power Co. v. Portland*, 201 Fed. 119.

⁶² *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118.

⁶³ *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, affd. 177 U. S. 558, 44 Fed. 886, 20 Sup. Ct. 736;

Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6, 60 Pac. 208, 50 L. R. A. 224; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

⁶⁴ *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, affd. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736.

⁶⁵ *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531.

this power is reserved it exists from the moment of the creation of the charter of the corporation, and the state may absolutely extinguish the corporation by the exercise of its reserved power whenever it deems it expedient to do so.⁶⁶ Where the constitution of the state merely confers on the water company the right to establish "reasonable rates," the state has an undoubted right to reduce rates which are clearly unreasonable. No one has a vested right "to charge an unreasonable or an unconscionable rate while exercising a franchise to serve a public use. To deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate or unconscionable rate deprives him of no right, natural or acquired, and can not be the impairment of a contract within the purview and meaning of section 10, article 1, of the Federal Constitution, nor is it depriving him of property without due process of law, in violation of the fourteenth amendment."⁶⁷ The obligation of contracts between a water company and consumers by which the latter are to pay for the water in accordance with the rates "now or hereafter in force" has been held not impaired by a municipal ordinance reducing the rates, which was enacted in the exercise of the power of the city to regulate water rates.⁶⁸ Where the city has the power to regulate water rates from time to time under the laws of the state as the public good may require, it is not deprived of this right by the fact of having entered into a contract with a water company for a fixed period, where the change in the rates is made before the expiration of the time fixed by the contract.⁶⁹

⁶⁶ *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48. A city ordinance fixing the water rates for a definite period was held not impaired by a subsequent statute appointing commissioners to determine the rate to be charged for water. *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812.

⁶⁷ *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812.

⁶⁸ *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531.

⁶⁹ *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. 304. See also, *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888, *affd.* 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531.

§ 2739. **Impairment of rights of stockholders under reserved power of amendment.**—The legislature can not by an amendatory act under its reserved powers destroy the rights of stockholders. The reason of this is that the constitutional provisions against impairing the obligation of contracts stand between the state and the stockholders. The state is not authorized to alter or amend a charter in such a way as would impair the contractual relations or rights of the stockholders among themselves or between the corporation and its stockholders.⁷⁰ Illustrative of this principle it has been held that where free colored persons had become stockholders under an original charter the legislature could not make an amendment and confine the right of holding stock to free white persons.⁷¹ It was pointed out in such a case that a stockholder has such an interest in the peculiar franchises of his corporation as can not be impaired by the legislature without his consent, either express or implied.⁷² But where this right of amendment has been reserved it has been held that it may be exercised so as to change the voting power of the stockholders as between the state and the private members of a corporation in which the state is a stockholder.⁷³ So, under the reserved power to amend, it has been held that the state may amend a charter so as to authorize cumulative voting.⁷⁴ In cases where the entire body of stockholders give their consent, the legislature may, without question, alter the provisions of the charter as to the relations of the stockholders among themselves.⁷⁵ The right given a majority of the stockholders of a corporation to amend its

⁷⁰ *Snook v. Georgia Imp. Co.*, 83 Ga. 61, 9 S. E. 1104; *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554.

⁷¹ *Boisdere v. Citizens' Bank*, 9 La. 506, 29 Am. Dec. 453.

⁷² *Gifford v. New Jersey R. & C. Co.*, 10 N. J. Eq. 171.

⁷³ *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778.

⁷⁴ *Attorney-General v. Looker*, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947, affd. 179 U. S. 46, 45 L. ed. 79, 21

Sup. Ct. 21; *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201; *Looker v. Maynard*, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. 21; *Cross v. West Virginia & C. R. Co.*, 35 W. Va. 174, 12 S. E. 1071. But see, *Orr v. Bracken County*, 81 Ky. 593, 5 Ky. L. 632; *Hays v. Commonwealth*, 82 Pa. St. 518.

⁷⁵ *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268; *Murray v. Beattie Mfg. Co.*, 79 N. J. Eq. 322, 82 Atl. 1038.

articles of incorporation does not generally authorize an amendment which affects the contractual relation of the stockholders among themselves.⁷⁶ As a general rule, there is no impairment of the obligation of contracts in statutes which require greater formality thereafter in the transfer of stock than was required at the time the stock was purchased.⁷⁷

§ 2740. Impairment by imposition of personal liability on stockholders for corporate debts.—It is generally agreed that there is no impairment of the obligations of contracts in statutes imposing personal liability on stockholders for corporate debts. It has been several times held that statutes imposing a personal liability upon stockholders are valid where they made stockholders of existing corporations, as well as of corporations thereafter organized, subject to such liability.⁷⁸ Accordingly, it has been held that a statute changing the remedy against stockholders making it more effectual and dispensing with the requirements of personal service of process on the stockholders as a prerequisite to assessment did not impair the obligation of contracts.⁷⁹ So, a statute requiring the president and sec-

⁷⁶ *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554. The right of the majority of the stockholders of the corporation to rule in matters pertaining to the corporate business within the authority of its charter is implied from the contract of the stockholders with the corporation and with each other, and the contract rights of the minority were not impaired by the exercise by the majority of such right. *Perkins v. Coffin*, 84 Conn. 275, 79 Atl. 1070.

⁷⁷ *Henley v. Myers*, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. 148.

⁷⁸ *Perkins v. Coffin*, 84 Conn. 275, 79 Atl. 1070; *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642; *Williams v. Nall*, 108 Ky. 21, 55 S. W. 706, 21 Ky. L. 1526; *Oldtown & Lincoln R. Co. v. Veazie*, 39 Maine 571; *Commonwealth v. Essex County*, 13 Gray (Mass.) 239; *Lord v. Equitable Life Assur. Soc.*, 109 App. Div. (N. Y.) 252, 96 N. Y. S. 10; *Hag-*

mayer v. Farley, 23 App. Div. (N. Y.) 426, 48 N. Y. S. 336; *Barnes v. Arnold*, 45 App. Div. (N. Y.) 314, 61 N. Y. S. 85; *Hagmayer v. Alten*, 36 Misc. (N. Y.) 59, 72 N. Y. S. 623; *Everhart v. West Chester & Co.*, 28 Pa. St. 339; *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238; *Bailey v. Power Street Methodist Episcopal Church*, 6 R. I. 491; *Hill v. Merchants' & Co. Ins. Co.*, 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. 589; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. 755. But see, *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126. In Maryland, it is held that stockholders' liability to creditors is based upon contract with the legislature, which the state can not impair by subsequent legislation. *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126.

⁷⁹ *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. 755.

retary of a corporation to file with the secretary of state a statement of the transfers of stock on the books of the corporation, in order to relieve the stockholders from personal liability, was held not to impair the contract of the stockholders arising from the ownership of the stock.⁸⁰ It has been held by the Supreme Court of the United States that the obligation of the contract of a stockholder in a foreign corporation was not impaired by a statute enacted prior to the formation of such corporation imposing the same liability upon foreign corporations doing business within the state as upon stockholders of domestic corporations.⁸¹ The enforcement of a statutory liability on the purchaser of stock is likewise held not to impair the obligation of his contract.⁸² But it has been held that the statutory right of action by creditors against individual stockholders of a corporation, which has become a condition of the contract with the creditors of the corporation, can not be taken away by a subsequent statute, although another remedy is sought to be substituted.⁸³ A statute providing for the enforcement of a stockholder's liability by a receiver does not impair the obligation of the contract of a stockholder where his liability is not increased.⁸⁴ The impairment of contracts clause has been held not violated by a statute imposing an annual license fee on the stock of foreign corporations.⁸⁵

§ 2741. Impairment of contracts by statutes authorizing

⁸⁰ *Henley v. Myers*, 76 Kan. 723, 93 Pac. 168, 173.

⁸¹ *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. 52.

⁸² *White v. Jones*, 45 App. Div. (N. Y.) 241, 61 N. Y. S. 21.

⁸³ *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, citing *Matthews v. Albert*, 24 Md. 527; *Webster v. Bowers*, 104 Fed. 627; *Western Nat. Bank v. Reckless*, 96 Fed. 70; *Dexter v. Edmonds*, 89 Fed. 467; *Woodworth v. Bowles*, 61 Kans. 569, 60 Pac. 331; *Norris v. Wenschall*, 34 Md. 492; *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. 456; *Hawthorne v. Calef*, 2 Wall.

(U. S.) 10, 17 L. ed. 776; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. 263; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. 788; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. 224; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. 739; *Whitman v. Exford Nat. Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. 477.

⁸⁴ *Henley v. Myers*, 76 Kans. 723, 93 Pac. 168, 173.

⁸⁵ *American Smelting Co. v. People*, 34 Colo. 240, 82 Pac. 531, revd. 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. 198.

the condemnation of corporate stock.—It now seems definitely settled, after some doubt, that there is no impairment of the obligation of contracts by statutes which allow the condemnation of shares of stock of minority stockholders in corporations affected with a public interest who refuse to consent to schemes of improvement for the benefit of the public that have received legislative sanction.⁸⁶ Said the Supreme Court of Connecticut: "The claim that the statute impairs the obligation of a contract is equally groundless. When the defendant acquired his shares he became a member of a corporation charged with a public trust. It has acquired a railroad for public use. It has given a lease of it to the plaintiff, subject to the same trust, for public use. It is the right of the state to do whatever is necessary to secure its being put to the best use in fulfillment of the trust."⁸⁷ And this principle has been carried to the extent of reserving the right to the state in charters granted at a time when no reservation of such control existed.⁸⁸

§ 2742. Impairment of contracts by laws affecting foreign corporations.—The constitutional prohibition of laws impairing the obligation of contracts is often invoked in the case of laws which regulate the right of foreign corporations to do business in a domestic state. Where the law under which a foreign corporation enters a state provides that it shall have the right to do business in the state on the same terms as domestic corporations, this contract is impaired by a subsequent statute which imposes an annual tax or license fee on the corporation in double the amount imposed upon domestic corporations.⁸⁹ But a for-

⁸⁶ *New York, N. H. & C. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 510; *Spencer v. Seaboard Airline R. Co.*, 137 N. Car. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604; *Offield v. New York, N. H. & H. R. Co.*, 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. 72.
⁸⁷ *New York, N. H. & H. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 510. See also, *Gates v. Boston & N. Y.*

Air-Line R. Co., 53 Conn. 333, 5 Atl. 695.

⁸⁸ *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604.

⁸⁹ *American Smelting & Co. v. People*, 34 Colo. 240, 82 Pac. 531, revd. 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. 198. But see, *British American Mortgage Co. v. Jones*, 76 S. Car. 218, 56 S. E. 983.

foreign corporation doing business in a domestic state under license or acquiescence, or merely through comity without a valuable consideration, can not be said to have such a contract with the state as will preclude it from preventing such a corporation from doing business within the state.⁹⁰ Yet in a case where a foreign corporation had purchased and leased property on the faith of an existing statute authorizing such purchase and lease, it was held that the state could not prevent such foreign corporation from doing business in the state since that would amount to the impairment of a contract.⁹¹ Foreign corporations doing business in a state are subject to any changes in the law affecting such business which apply to domestic corporations doing a like business, where that right is reserved in the laws of the state.⁹² The constitutional provision against the impairment of contracts by a state is held not violated by a statute which prohibits foreign corporations from suing in the state courts without first obtaining a certificate from the secretary of state.⁹³ But this provision has been held without application to actions to vacate judgments based on business transacted in the state prior to the enactment of such a statute.⁹⁴

⁹⁰ *State v. Louisville &c. R. Co.*, 97 Miss. 35, 51 So. 918, 53 So. 454. A statute in effect annulling the right of a foreign corporation to transact business with the state, and constituting certain persons a body corporate with exclusive authority to grant charters to subordinate councils of a benefit order does not impair the obligation of contracts, within the meaning of the Federal Constitution. *National Council v. State Council*, 104 Va. 197, 51 S. E. 166. An amendment to a statute imposing additional duties on foreign corporations then doing business in the state under the statute prior to such amendment was held not to impair the obligation of contracts of such corporation, where there is no discrimination against foreign corporations which have placed themselves on an equal footing with domestic corporations. *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 99 Pac. 1049, 21 L. R. A. (N. S.) 703n.

⁹¹ *Seaboard Air Line R. Co. v. Railroad Commission*, 155 Fed. 792.

⁹² *Ivy v. Western Union Tel. Co.*, 165 Fed. 371. Where a foreign corporation has complied with the laws of the state permitting it to do business in the state on the same terms as domestic corporations, the contract between the state and such foreign corporation is not impaired by a subsequent act providing that a foreign corporation shall not carry on business within the state which can not be transacted by a domestic corporation, and that foreign corporations doing business within the state shall be deemed to have consented to the laws of the state. *Hannis Distilling Co. v. Baltimore*, 114 Md. 678, 90 Atl. 319.

⁹³ *Wilson-Moline Buggy Co. v. Hawkins*, 80 Kans. 117, 101 Pac. 1009.

⁹⁴ *Industrial Building &c. Association v. Myers-Abel (Cal.)*, 95 Pac. 115.

§ 2743. Impairment by change in statutes of limitations.

—The authorities are generally agreed that there is no impairment of the obligations of contracts by the enactment of statutes limiting the time for the commencement of suits on pre-existing contracts, provided a reasonable time is given for the commencement of such suits after the enactment of the statute. Such statutes are regarded as affecting the remedy only, and they do not impair the obligations of contracts unless they entirely take away the remedy or so encumber it with conditions as to render it impracticable.⁹⁵ This means that the legislature has the power to shorten the period of limitation where it leaves a reasonable time within which to invoke a remedy for a breach of contract or to prolong the period where the right to plead it has not accrued.⁹⁶ But a statute which unrea-

⁹⁵ *Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408; *Billings v. Hall*, 7 Cal. 1; *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330; *Arbuckle v. Kelley*, 144 Fed. 276; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586, 3 Am. St. 655; *Blackford v. Peltier*, 1 Blackf. (Ind.) 36; *Wooster v. Bateman*, 126 Iowa 552, 102 N. W. 521; *Elliott v. Lochrane*, 1 Kans. 126; *Louisville & N. R. Co. v. Williams*, 103 Ky. 375, 20 Ky. L. 77, 45 S. W. 229; *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282; *Kingley v. Cousins*, 47 Maine 91; *State v. Jones*, 21 Md. 432; *Loring v. Alline*, 9 Cush. (Mass.) 68; *Lewis v. Crowell*, 205 Mass. 497, 91 N. E. 910; *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826; *Watson v. Doherty*, 56 Miss. 628; *Kreyling v. O'Reilly*, 97 Mo. App. 384, 71 S. W. 372; *Cranor v. School Dist.*, 81 Mo. App., 152, *affd.* 151 Mo. 119, 52 S. W. 232; *Guterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Gilman v. Cutts*, 23 N. H. 376; *Rexford v. Knight*, 11 N. Y. 308; *People v. Turner*, 145 N. Y. 451, 40 N. E. 400, *affd.* 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. 38; *Waltermire v. Westover*, 14 N. Y. 16; *Graves v. Howard* (N. Car.), 75 S. E. 998; *Bartol v.*

Eckert, 50 Ohio St. 31, 33 N. E. 294; *Clay v. Iseminger*, 190 Pa. St. 580, 42 Atl. 1039, *affd.* 185 U. S. 55, 46 L. ed. 804, 22 Sup. Ct. 573; *Kenyon v. Stewart*, 44 Pa. St. 179; *Wardlaw v. Buzzard*, 15 Rich. L. (S. Car.) 158, 94 Am. Dec. 148; *Henry v. Henry*, 31 S. Car. 1, 9 S. E. 726; *Bender v. Crawford*, 33 Tex. 745, 7 Am. Rep. 270; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297; *De Cordova v. Galveston*, 4 Tex. 470; *Bear Lake & Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. 7; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. 76; *Mitchell v. Clark*, 110 U. S. 633, 312 L. ed. 279, 4 Sup. Ct. 170; *Barker v. Jackson*, 1 Paine (U. S.) 559, Fed. Cas. No. 989; *Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. 692; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. 38; *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 27 L. ed. 977, 3 Sup. Ct. 304; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. 854; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Sohn v. Waterson*, 17 Wall. (U. S.) 596, 21 L. ed. 737; *Ross v. Duval*, 13 Pet. (U. S.) 45, 10 L. ed. 51; *Lawton v. Waite*, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.

⁹⁶ *Wooster v. Bateman*, 126 Iowa 552, 102 N. W. 521; *Smith v. Northern Neck Mutual Fire Association*, 112 Va. 192, 70 S. E. 482.

sonably restricts the time for commencing an action will amount to an impairment of the obligation of a contract.⁹⁷ No fixed rule can be stated as to what constitutes a reasonable time within the meaning of the principle. However, in determining whether the time is reasonable, it is proper to consider the time intervening between the passage of the statute making the change and the date when it takes effect.⁹⁸ Where a cause of action is completely barred by the statute of limitations it can not ordinarily be impaired by a later statute which extends the time for bringing the action.⁹⁹ A state has the right to prescribe a limitation of two years for actions on judgments obtained in other states prior to the passage of the act.¹ A change in the statute of limitations which allowed fifteen months within which to bring an action which would otherwise be barred by an amendment to the statute of limitations has been held to be reasonable and not void as impairing the obligation of contracts.² So, the enlargement of the statute of limitations from nine months to three years in which to bring an action to quiet title or to set aside a tax deed as to lands purporting to be conveyed by a tax deed, void on its face, was held not to impair the obligation of a contract as to one in whose favor limitations had not completely run.³

§ 2744. Statutes affecting sales and conveyances.—The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to

⁹⁷ *Lamb v. Powder River Live Stock Co.*, 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558; *Cranor v. School Dist. No. Two*, 151 Mo. 119, 52 S. W. 232; *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686; *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

⁹⁸ *Wooster v. Bateman*, 126 Iowa 552, 102 N. W. 521.

⁹⁹ *Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Board of Edu-*

cation v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. 348; *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384; *Ireland v. Mackintosh*, 22 Utah 296, 61 Pac. 901; *Wires v. Farr*, 25 Vt. 41; *Brown v. Parker*, 28 Wis. 21.

¹ *Bank of Alabama v. Dalton*, 9 How. (U. S.) 522, 13 L. ed. 242.

² *Wooster v. Bateman*, 126 Iowa 552, 102 N. W. 521.

³ *Cole v. Van Ostrand*, 131 Wis. 454, 110 N. W. 884.

in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other.⁴ If the effect of any subsequent law is to diminish the duties or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which, in its operation amounts to a denial of the rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. Thus, it has been held that under an executory contract for the sale of land, the vendee has a vested right to the conveyance of such title as the vendor had at the time of the contract, regardless of any subsequent legislation affecting such title, since any subsequent statute diminishing the title of the vendor impaired the obligation of the contract and is void as to it.⁵ A statute enacted in 1893, relating to lands used for school sites, and providing that a reversionary interest shall not deprive a school district of a school-house or improvements thereon, was held not to apply to a school site acquired by deed executed in 1883, providing for reversion of the land in case it should cease to be used for school purposes, and that the reversioner had the right to take possession of the land and the buildings thereon which had not been removed from the land before it was abandoned as a school site.⁶ The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions on lawful occupations. Thus, a statute making it a misdemeanor for any persons in cities of certain classes to offer real estate for sale without the written authority of the owner, or his attorney, or of a person who has made a written contract for the purchase of the property with the owner, has been held void as impairing the obligation of contracts.⁷ It has also been

⁴ Wiseman v. Beckwith, 9 Ind. 185; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397.

⁵ Wiseman v. Beckwith, 90 Ind. 185.

⁶ Evans v. Cropp, 141 Ky. 514, 133 S. W. 221.

⁷ Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, revg. 110 App. Div. (N. Y.) 890, 96 N. Y. S. 1125.

held that an act which provides for submitting the question of liquor license to a popular vote, and which forbids the sale of intoxicating liquors within a district voting against license, is not, in the absence of proof that the liquor sold contrary to its provisions was the property of the defendant at the time of its passage, unconstitutional as impairing the obligation of contracts.⁸

§ 2745. Impairment by change in lien laws.—Where one has a clear right to a statutory lien he may not be deprived of this right by a later repealing statute, for this would amount to the impairment of the obligations of a contract.⁹ There would seem, however, to be no obstacle to the enactment of an abrogating statute where the right to the lien is not complete at the time of the enactment of the later statute.¹⁰ And the rule would seem not to prevent a change in the method of enforcing a lien.¹¹ The time for perfecting the lien may be changed after the right to the lien has accrued, provided the party entitled to the lien is given a reasonable time to perfect the same.¹² It has been held that a mechanic's lien as to a building erected may be given priority over existing incumbrances on the land which, through the operation of law, would attach to the buildings upon their completion.¹³ "As against a prior mortgage or incumbrance of the land, the equity and policy of the statute which secures the mechanic's and materialman's lien rest upon the principle that no injustice is done in preventing the holder of the older lien from appro-

⁸ *Savage v. Commonwealth*, 84 Va. 619, 5 S. E. 565.

⁹ *Sprangler v. Green*, 21 Colo. 505, 42 Pac. 674, 52 Am. St. 259; *Goodbub v. Hornung's Estate*, 127 Ind. 181, 26 N. E. 770; *Weaver v. Sells*, 10 Kans. 609; *Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. 549; *Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262; *Warren v. Woodard*, 70 N. Car. 382.

¹⁰ *Wilson v. Simon*, 91 Md. 1, 45 Atl. 1022, 80 Am. St. 427.

¹¹ *Phelps-Bigelow Windmill Co. v. North American Trust Co.*, 62 Kans. 529, 64 Pac. 63; *Groesbeck v. Barger*, 1 Kans. App. 61, 41 Pac. 204; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. 703.

¹² *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648.

¹³ *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305.

priating the labor and material of others, by which his security is enhanced, without compensation."¹⁴

§ 2746. **Change in regard to priority of liens.**—When a lien has attached to property, such as a mechanic's lien,¹⁵ or a lien obtained by a laborer,¹⁶ or a judgment lien,¹⁷ or a mortgage lien,¹⁸ it can not be divested by a subsequent statute, nor can its priority be affected. This rule also applies to the lien of a corporation on the shares of its stockholders if it is due from them.¹⁹ Thus, a curative statute can not change the pre-existing order of priority of liens, nor can a conveyance made before the statute is passed be made subordinate to a lien acquired after the statute is passed.²⁰ A statute subsequent to a mortgage attempting to subordinate the mortgage lien to other claims is void for the reason that it impairs the obligation of the mortgage contract.²¹ A state legislature has the constitutional power, however, to declare that the taxes shall be a lien on land prior to all other liens. So it has the power to declare that special assessments shall be a lien prior to all other liens of a private nature, even though they may have attached before the assessment was made.²² But in

¹⁴ *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305.

¹⁵ *Florence Gas, Electric Light & Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *McFadden v. Blocker*, 2 Ind. Ter. 260, 48 S. W. 1043, 58 L. R. A. 878.

¹⁶ *Garneau v. Mill Co.*, 8 Wash. 467, 36 Pac. 463, 24 L. R. A. 359.

¹⁷ *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089; *Gilman v. Tucker*, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. 464; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. 715.

¹⁸ *Shibley v. Ft. Smith*, 96 Ark. 410, 132 S. W. 444; *Central Trust Co. v. Charlotte & C. R. Co.*, 65 Fed. 257, affd. 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823; *Shrigley v. Black*, 66 Kans. 213, 71 Pac. 301; *Blouin v. Ledet*, 109 La. 709, 33 So. 741; *Vicksburg & C. R. Co. v. Sledge*, 41 La.

Ann. 896, 6 So. 725; *Chipman v. Peabody*, 88 Maine 282, 34 Atl. 77; *Yeatman v. King*, 2 N. Dak. 421, 51 N. W. 721, 33 Am. St. 797; *Giles v. Stanton*, 86 Tex. 620, 26 S. W. 615; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. 1042; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 32 L. ed. 905, 10 Sup. Ct. 546.

¹⁹ *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

²⁰ *Crowther v. Fidelity Ins. & Co.*, 85 Fed. 41, 29 C. C. A. 1.

²¹ *Crowther v. Fidelity Ins. & Co.*, 85 Fed. 41, 29 C. C. A. 1; *Yeatman v. King*, 2 N. Dak. 421, 51 N. W. 721, 33 Am. St. 797.

²² *Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119; *State v. Kilburn*, 81 Conn. 9, 69 Atl. 1028, 129 Am. St. 205; *Lybass v. Ft. Myers*, 56 Fla. 817, 47 So. 346; *State v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144; *Dressman v. Farmers' & Trad-*

the absence of statutory authority on the subject, the lien of a special assessment will be subordinate to a lien of a private nature prior in time.²³ A new constitution providing that any property in the parish which may be acquired by a railroad company thereafter constructed shall be exempt from the tax of five mills in aid of a prospective railroad, which obligation the city had assumed, was held not to affect the obligation of the city for such tax.²⁴ A statute providing for the construction of drains and that assessments therefor against lands shall constitute a first lien was held not to impair the obligation of a prior mortgage on the land so affected, since the land is subject to the taxing power of the state, as against prior mortgages.²⁵ A statute making an agister's lien created subsequently to a mortgage lien superior to the latter was held void as impairing the obligation of contract.²⁶ But a statute creating a thresher's lien and making it superior to other liens, except a lien for seed from which the crop was raised, was held not to impair the obligation of contracts.²⁷

§ 2747. Statutes affecting judgments.—A judgment is not a contract in the constitutional sense.²⁸ A judgment or decree by consent comes nearer to a contract than any other, but even such is only the result of an antecedent contract, liability or penalty. A judgment rendered to enforce the obligation of a contract creates the authority under which that obligation is enforced.²⁹ The term “con-

ers' Nat. Bank, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; *Ranney v. Burthe*, 15 La. Ann. 343; *Auditor General v. Bishop*, 161 Mich. 117, 125 N. W. 715; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Clifton v. Cincinnati*, 5 Ohio Dec. (reprint) 570, 6 Am. L. Rec. 687, 3 Wkly. L. Bul. 272; *Bellevue Borough v. Umstead*, 38 Pa. Super. Ct. 116; *Kirby v. Waterman*, 17 S. Dak. 314, 96 N. W. 129; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844.
²³ *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

²⁴ *Arkansas S. R. Co. v. Louisiana & A. R. Co.*, 218 U. S. 431, 54 L. ed.

1097, 31 Sup. Ct. 56, affg. *Louisiana & A. R. Co. v. Shaw*, 121 La. 997, 46 So. 994.

²⁵ *Baldwin v. Moroney*, 173 Ind. 574, 91 N. E. 3, 30 L. R. A. (N. S.) 761n.

²⁶ *National Bank of Commerce v. Jones*, 18 Okla. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310n.

²⁷ *Phelan v. Terry*, 101 Minn. 454, 112 N. W. 872.

²⁸ *Mottu v. Davis*, 151 N. Car. 237, 65 S. E. 969; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. 211; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. 763.

²⁹ *Sprott v. Reid*, 3 Greene (Iowa) 489, 56 Am. Dec. 549.

tract" is used in the constitution in its ordinary sense. When a transaction is not based upon any assent of the parties it can not be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition. But if the judgment is based upon a contract, it must be protected from a statute which impairs the effect of it, because it is but a means of enforcing such contract, and its obligation can not be destroyed or impaired without destroying or impairing the contract.⁸⁰ The authorities recognize the implied obligation of every judgment debtor to pay the judgment, and for the purpose of actions upon them judgments are treated as contracts.⁸¹ A judgment is an obligation of record, and interest thereon is given as damages for delay in performing the obligation.⁸² In some states it has been held that the debt and liability for interest thereon, as provided by statute at the date of the judgment, are obligations binding upon the debtor until the judgment is enforced or satisfied, and that it is not in the power of the legislature to alter the rate of interest to which a creditor is entitled upon his pre-existing judgment.⁸³ It has also been held that the lien of a judgment on real estate is purely statutory, and it is within the power of the legislature to abolish this lien at any time before rights have become vested or estates acquired under it and to confine the remedies of the creditor to property held by the judgment debtor at the time of issuing execution.⁸⁴ Statutes providing that debts of certain classes or due from certain persons can not be recovered upon before a certain time have been held valid.⁸⁵ But statutes providing for delay in issuing execution, the judgment being al-

⁸⁰ Ratcliffe v. Anderson, 31 Grat. (Va.) 105, 31 Am. Rep. 716.

⁸¹ Johnson v. Butler, 2 Iowa 535; Gutta-Percha &c. Rubber Mfg. Co. v. Mayor &c. of Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. 412.

⁸² O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64, affd. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. 54.

⁸³ Butler v. Rockwell, 17 Colo. 290,

29 Pac. 458, 17 L. R. A. 611; Cox v. Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454.

⁸⁴ Watson v. New York Cent. R. Co., 47 N. Y. 157; Davidson v. Richardson (Ore.), 89 Pac. 742; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

⁸⁵ Barkley v. Glover, 3 Metc. (Ky.) 44.

lowed to be rendered, have been held invalid.³⁶ It has been held by the Supreme Court of Kansas that a judgment for damages for trespass upon land, where the tort-feasor's estate has been benefited by the tort, to the extent of the judgment, is upon a cause so far contractual in its nature as to bring the judgment within the protection of the contract clause of the federal constitution forbidding impairment of contracts.³⁷ It has been held that the fact that a judgment lien on land was based upon a confession of a judgment in consideration of a loan does not render it a creation of contract rather than of statute, so as to prevent the legislature from enacting laws affecting the rights of a party under it.³⁸ A statute providing that a judgment shall cease to be a lien against the person or estate of a debtor after the expiration of six years from the rendition of the judgment, and that no suit shall be maintained by which the lien of the judgment shall be extended, is not, as to a judgment in an action for a tort, rendered prior to the passage of such act, unconstitutional as impairing the obligation of the contract.³⁹ But where at the time a contract was made the law permitted the revival of a judgment or the institution of suit thereon, a subsequent statute which continues the lien of a judgment for six years and prohibits an action or proceeding to revive the lien thereafter can not be applied to judgments rendered on contracts made prior to the enactment of the latter statute without impairing the obligation of contract.⁴⁰ A statute which unreasonably restricts the time for commencing the action for the enforcement of a judgment rendered in another state on an existing contract is void as impairing the obligation of the contract, since the obligation of the contract is not terminated by rendition of judgment.⁴¹

³⁶ Strong v. Daniel, 5 Ind. 348; Webster v. Rose, 6 Heisk. (Tenn.) 93, 19 Am. Rep. 583; contra, Holloway v. Sherman, 12 Iowa 282, 79 Am. Dec. 537.

³⁷ Douglass v. Loftus, 85 Kans. 720, 119 Pac. 74.

³⁸ Davidson v. Richardson (Ore.), 89 Pac. 742.

³⁹ Gaffney v. Jones, 39 Wash. 587, 81 Pac. 1058.

⁴⁰ Howard v. Ross, 38 Wash. 627, 80 Pac. 819; Fischer v. Kittinger, 39 Wash. 174, 81 Pac. 551.

⁴¹ Lamb v. Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

§ 2748. Impairment by change in measure of damages.

—The measure of damages for the breach of a contract is generally regarded as a part of the contract in the sense that a departure therefrom impairs the obligation of the contract.⁴² But the legislature has the right to provide a remedy, or impose a penalty, for the nonperformance of a duty by a corporation where no remedy is provided by the charter.⁴³

§ 2749. Impairment of marriage contracts.—Marriage is not a civil contract in the sense of the constitutional prohibition, and hence the right of the legislature to enact laws on the subject of divorce is not restrained by this provision. Acts on the subject of divorce enable the courts not to impair a marriage contract, but to liberate one of the parties to a marriage because the contract has been broken by the other. It was not the intent of the framers of the constitution to restrain the states in the regulation of civil institutions adopted for internal government.⁴⁴ Said Chief Justice Marshall: "The provision in the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of

⁴² *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. 179; *Wilmington &c. R. Co. v. King*, 91 U. S. 3, 23 L. ed. 186. See also, *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389.

⁴³ *Sparger v. Cumpton*, 54 Ga. 355; *Cutts v. Hardee*, 38 Ga. 350; *Standifer v. Wilson*, 93 Tex. 232, 54 S. W. 898. See also, *Davis v. Vernon Shell Road Co.*, 103 Ga. 491, 29 S. E. 475; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681.

⁴⁴ *Green v. State*, 58 Ala. 190, 29 Am. Dec. 739; *Starr v. Pease*, 8 Conn. 541; *Georgia v. Tutty*, 41 Fed. 753, 7 L. R. A. 50; *Noel v. Ewing*, 9 Ind. 37; *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.)

90, 38 Am. Dec. 179; *Cabell v. Cabell's Admr.*, 1 Metc. (Ky.) 319; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Adams v. Palmer*, 51 Maine 480; *Wales v. Wales*, 119 Mass. 89; *Carson v. Carson*, 40 Miss. 349; *Holmes v. Holes*, 4 Barb. (N. Y.) 295; *Rugh v. Ottenheimer*, 6 Ore. 231, 25 Am. Rep. 513; *Cronise v. Cronise*, 54 Pa. St. 255; *Grant v. Grant*, 12 S. Car. 29, 32 Am. Rep. 506; *Starr v. Hamilton*, 1 Deady (U. S.) 268, Fed. Cas. No. 13314; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Ex parte Kinney*, 3 Hughes (U. S.) 9, Fed. Cas. No. 7825; *Hunt v. Hunt*, 131 U. S. CLXV Appendix, 24 L. ed. 1109; *Maynard v. Valentine*, 2 Wash. T. 3, 3 Pac. 195.

the legislature to legislate on the subject of divorce.”⁴⁵ In line with this view it has been held that a legislature has the power to authorize divorces for causes happening before the passage of the act and which at the time of the occurrence were lawful and innocent and furnished no ground for granting a divorce.⁴⁶ The fact that a married woman gave a bond for the purchase-price of property for her separate estate before the courts had jurisdiction to enforce the payment of such a bond from her separate estate has been held not to prevent the enforcement of the bond against her estate under a later statute conferring such jurisdiction.⁴⁷

§ 2750. Impairment of contracts with reference to public offices.—It is well settled that, in the absence of constitutional protection from interference, a public office is neither a grant nor a contract or obligation which can not be changed nor impaired by the legislature.⁴⁸ The legislature

⁴⁵ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

⁴⁶ Carson v. Carson, 40 Miss. 349.

⁴⁷ Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710. A statute enlarging the dower right was held void as against the pre-existing creditors of the husband. Davidson v. Richardson, 50 Ore. 323, 91 Pac. 1080, 126 Am. St. 738.

⁴⁸ Benford v. Gibson, 15 Ala. 521; Perkins v. Corbin, 45 Ala. 103, 6 Am. Rep. 698; Beebe v. Robinson, 52 Ala. 66; Ex parte Wiley, 54 Ala. 226; Ex parte Tully, 4 Ark. 220, 38 Am. Dec. 33; State v. Scott, 9 Ark. 270; Humphry v. Sadler, 40 Ark. 100; Robinson v. White, 26 Ark. 139; Vincenheller v. Reagan, 69 Ark. 460; People v. Haskell, 5 Cal. 357; People v. Squires, 14 Cal. 12; People v. Kelsey, 34 Cal. 470; Mills v. Sargent, 36 Cal. 379; In re Bulger, 45 Cal. 553; People v. Auditor of Public Accounts, 1 Scam. (Ill.) 537; Donahue v. Will County, 100 Ill. 94; Turpen v. Tipton County Comrs., 7 Ind. 172; Jeffries v. Rowe, 63 Ind. 592; Ellis v. State, 4 Ind. 1; Coffin v. State, 7 Ind. 157; Perry County v. Lindemann, 165 Ind. 186, 73 N. E.

912; Lyons v. Perry County, 165 Ind. 197, 73 N. E. 916; Bryan v. Cattell, 15 Iowa 538; Reed v. Francis, 22 Kans. 510; Harvey v. Rush County, 32 Kans. 159, 4 Pac. 153; Williams v. Newport, 75 Ky. 438; Standeford v. Wingate, 2 Duv. (Ky.) 440; Sigur v. Crenshaw, 8 La. Ann. 401; State v. Clinton, 26 La. Ann. 406; Farwell v. Rockland, 62 Maine 296; Prince v. Skillin, 71 Maine 361, 36 Am. Rep. 325; Rounds v. Smart, 71 Maine 380; Opinion of the Justices, 117 Mass. 603; Chase v. Lowell, 7 Gray (Mass.) 33; People v. Detroit, 38 Mich. 636; Rice v. Ionia Probate Judge, 141 Mich. 692, 105 N. W. 17; Kendall v. Canton, 53 Miss. 526; Hyde v. State, 52 Miss. 665; Fant v. Gibbs, 54 Miss. 396; State v. Bernoudy, 40 Mo. 192; State v. Davis, 44 Mo. 129; In re Burris, 66 Mo. 442; State v. Ford, 41 Mo. App. 122; State v. Hermann, 11 Mo. App. 43; Wilcox v. Rodman, 46 Mo. 322; Head v. University of Missouri, 47 Mo. 220; Denver v. Hobart, 10 Nev. 28; State v. Tilford, 1 Nev. 240; Hoboken v. Gear, 27 N. J. L. 265; Kenny v. Hudspeth, 59 N. J. L. 320, 36 Atl. 662; Eastman v. McCarten, 70 N. H.

may change the term of the office or entirely abolish it.⁴⁹ "Public offices * * * are not incorporeal hereditaments; nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken, and may at any time be resigned. They are created for the benefit of the public, and not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder."⁵⁰ The legislature may modify or reduce the compensation of the officer,⁵¹ or it may add to or deprive him of functions formerly exercised.⁵² The legislature if it sees fit

23, 45 Atl. 1081; Warner v. People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740; People v. Batchelor, 28 Barb. (N. Y.) 310, affd. 22 N. Y. 128; People v. Green, 58 N. Y. 295; People v. Whitlock, 92 N. Y. 191; Coulter v. Murray, 4 Daly (N. Y.) 506; Conner v. New York, 4 N. Y. Super. Ct. 355, affd. 5 N. Y. 285; Cotten v. Ellis, 52 N. Car. 545; Mial v. Ellington, 134 N. Car. 131, 46 S. E. 961, 65 L. R. A. 697; State v. Harris, 1 N. Dak. 190, 45 N. W. 1101; Koontz v. Franklin County, 76 Pa. St. 154; Commonwealth v. Moir, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801; Alexander v. McKenzie, 2 S. Car. 81; Haynes v. State, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187; Jones v. Hobbs, 4 Baxt. (Tenn.) 113; Bonner v. Belsterling (Tex.), 137 S. W. 1154; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Ex parte Hennen, 38 U. S. 230, 10 L. ed. 138; Newton v. Commissioners, 100 U. S. 548, 25 L. ed. 710; Butler v. Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472; Cushman v. Hale, 68 Vt. 444; 35 Atl. 382; Holladay v. Auditor, 77 Va. 425; State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87; State v. Von Baumbach, 12 Wis. 310.

⁴⁹ Robinson v. White, 26 Ark. 139; People v. Banvard, 27 Cal. 470; In re Bulger, 45 Cal. 553; State v. Baldwin, 45 Conn. 134; Augusta v. Sweeney, 44 Ga. 463, 9 Am. Rep. 172; Hall v. Burks, 96 Ga. 622, 24 S. E. 349; People v. Auditor of Public Accounts, 2 Ill. 537; Blakemore

v. Dolan, 50 Ind. 194; Frisbie v. Fogg, 78 Ind. 269; Bryan v. Cattell, 15 Iowa 538; State v. Majors, 16 Kans. 440; Standeford v. Wingate, 2 Duv. (Ky.) 440; Williams v. Newport, 75 Ky. 438; State v. Jumel, 30 La. Ann. 861; Taft v. Adams, 3 Gray (Mass.) 126; Bailey v. State, 56 Miss. 637; State v. Dolan, 93 Mo. 467, 6 S. W. 366; Territory v. Van Gaskin, 5 Mont. 352, 6 Pac. 30; Commonwealth v. McCombs, 56 Pa. St. 436; Alexander v. McKenzie, 2 S. Car. 81; Head v. University of Missouri, 19 Wall. (U. S.) 526, 22 L. ed. 160; State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87; Hall v. State, 39 Wis. 79, revd. 103 U. S. 5, 26 L. ed. 302.

⁵⁰ Conner v. New York, 5 N. Y. 285, affg. 4 N. Y. Super. Ct. 355. ⁵¹ Benford v. Gibson, 15 Ala. 521; Gilbert v. The Board of Commissioners, 8 Blackf. (Ind.) 81; Walker v. Dunham, 17 Ind. 483; Black v. Merrill, 51 Ind. 32; Commonwealth v. Bailey, 81 Ky. 395, 4 Ky. L. 384; State v. Police Jury, 35 La. Ann. 544; Wyandotte v. Drennan, 46 Mich. 478, 9 N. W. 500; State v. Smedes, 26 Miss. 47; Denver v. Hobart, 10 Nev. 28; Love v. Jersey City, 40 N. J. L. 456; Conner v. New York, 5 N. Y. 285, affg. 4 N. Y. Super. Ct. 355; People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377; State v. Gales, 77 N. Car. 283; Commonwealth v. Bacon, 6 Serg. & R. (Pa.) 322; Commonwealth v. McCombs, 56 Pa. St. 436; Haynes v. State, 22 Tenn. 480, 39 Am. Dec. 187.

⁵² Hunter State Bank v. Mills, 90

may require bonds where none were required before, or it may require the giving of additional bonds for the faithful performance of the duties of an office.⁵³ Where, however, the services have been rendered under a law which fixed the compensation therefor there is an implied contract to pay for them at the rate fixed by law and this contract may not be impaired by the legislature.⁵⁴ A statute which merely changes the conditions for the payment of salaries in full, and which does not diminish or increase the same, or take away salaries already earned, does not impair the obligation of a contract within the meaning of the Constitution of the United States.⁵⁵ It follows from the foregoing that there is no impairment of contract under a legislative system of recall of public officers where there is no other constitutional prohibition of this method of vacating offices.⁵⁶ Neither is there an impairment of a contract by a statute which legalizes an irregular election.⁵⁷

§ 2751. Impairment by change in appraisement laws.—

Where there is no statute on the subject, a statute which requires property sold on execution to bring a certain percentage of its appraised value impairs judgment contracts rendered prior to the enactment of the statute. In other words, these statutes can have no retroactive effect.⁵⁸ But it has been held that the legislature may repeal an exist-

Ark. 10, 117 S. W. 760, 134 Am. St. 20; *People v. Squires*, 14 Cal. 12; *State v. Dews, R. M. Charl.* (Ga.) 397; *Walker v. Dunham*, 17 Ind. 483; *Denver v. Hobart*, 10 Nev. 28; *People v. Warner*, 7 Hill (N. Y.) 81; *Hoke v. Henderson*, 15 N. Car. 1, 25 Am. Dec. 677.

⁵³ *Ex parte Buckley's Case*, 53 Ala. 42; *Hyde v. State*, 52 Miss. 665.

⁵⁴ *Fulk v. Monroe County*, 46 Ind. 150; *Bradford v. Jones*, 1 Md. 351; *State v. Auditor of Public Accounts*, 33 Mo. 287; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329.

⁵⁵ *Perry County v. Lindemann*, 165 Ind. 186, 73 N. E. 912; *Lyons v.*

Perry County, 165 Ind. 197, 73 N. E. 916.

⁵⁶ *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154.

⁵⁷ *Eastman v. McCarten*, 70 N. H. 23, 45 Atl. 1081.

⁵⁸ *Robards v. Brown*, 40 Ark. 423; *Rawley v. Hooker*, 21 Ind. 144; *Rossier v. Hale*, 10 Iowa 470, 77 Am. Dec. 127; *Olmstead v. Kellogg*, 47 Iowa 460; *Willard v. Longstreet*, 2 Doug. (Mich.) 172; *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397; *Gantly's Lessee v. Ewing*, 3 How. (U. S.) 707, 11 L. ed. 794; *Moore v. Fowler, Hemp.* (U. S.) 536, Fed. Cas. No. 9761. But see, *Jones v. Davis*, 6 Nebr. 33; *Dorrington v. Meyers*, 11 Nebr. 388, 9 N. W. 555.

ing appraisement law without impairing the obligation of the contract as to the debtor.⁵⁹

§ 2752. Impairment by changes in redemption laws.—It is well established that the enactment of statutes authorizing redemption where that right did not previously exist, or extending the period where the right is given under existing statutes, or withdrawing the right entirely, impairs the obligation of contracts executed before the enactment of the statutes.⁶⁰ So, an act subjecting the title of the purchaser at a foreclosure sale to conditions of redemption not existing before the sale has been held an impairment of the obligation of contracts.⁶¹ So, it has been held that a statute which allowed one year to redeem from a mortgage foreclosure sale by providing that if, at the expiration of one year, from the date of the sale, the mortgagor should pay all taxes and interest due and interest for a year in advance, the time of redemption should be extended one year, impairs the obligation of contracts as to mortgages executed before the enactment of the statute.⁶² But it can be said that no contract right of an independent purchaser at a foreclosure sale, who has no other connection with the mortgage contract than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by changes in the law, subsequently to the execution of the mortgage but prior to the sale, with reference to the time

⁵⁹ *Phelps-Bigelow Windmill Co. v. North American Co.*, 62 Kans. 529, 64 Pac. 63.

⁶⁰ *Scobey v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490; *Iglehart v. Wolfin*, 20 Ind. 32; *Malony v. Fortune*, 14 Iowa 417; *Holland v. Dickerson*, 41 Iowa 367; *Paris v. Nordburg*, 6 Kans. App. 260, 51 Pac. 799; *Collins v. Collins*, 79 Ky. 88; *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148; *State v. Gilliam*, 18 Mont. 94, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556; *Coddington v. Bispham's Exrs.*, 36 N. J. Eq. 574; *Turk v. Mayberry*, 32 Okla. 66, 121 Pac. 665; *State v. Sears*, 29 Ore. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. 808; *Hollister v. Donahoe*, 11 S.

Dak. 497, 78 N. W. 959; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. 1042; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397; *Howard v. Bugbee*, 24 How. (U. S.) 461, 16 L. ed. 753; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. 706; *Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. 748. See also, *State Savings Bank v. Mathews*, 123 Mich. 56, 81 N. W. 918; *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

⁶¹ *Coddington v. Bispham's Exrs.*, 36 N. J. Eq. 574.

⁶² *Hollister v. Donahoe*, 11 S. Dak. 497, 78 N. W. 959.

of redemption and the rate of interest payable in order to redeem.⁶³ These principles, however, are not universally accepted. In some jurisdictions cases are encountered which hold that there is no impairment as to existing contracts by the enactment of such statutes.⁶⁴

§ 2753. Impairment by change of exemption or homestead laws.—The authorities are not in agreement on the question whether contracts are impaired by changes in exemption and homestead laws, and the lack of harmony can not be reconciled. Many of the courts adopt the view of the Supreme Court of the United States that laws extending exemptions from attachment or execution are, so far as they relate to previously contracted debts, unconstitutional as impairing the obligation of contracts by the destruction of the remedy in a material respect. In this view the legal remedies for the enforcement of a contract which belonged to it at the time and place where it was made are a part of its obligation.⁶⁵ The conclusion is the same in the case of statutes which establish or enlarge homestead exemptions, and they are held invalid by numerous courts as to debts contracted before their enactment.⁶⁶ Other

⁶³ *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. 706.

⁶⁴ *Iverson v. Shorter*, 9 Ala. 713; *Moore v. Martin*, 38 Cal. 428; *Templeton v. Horne*, 82 Ill. 491; *Edwards v. Johnson*, 105 Ind. 594, 5 N. E. 716; *Stone v. Bassett*, 4 Minn. 298; *Heyward v. Judd*, 4 Minn. 483; *Butler v. Palmer*, 1 Hill (N. Y.) 324; *State v. Sears*, 29 Ore. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. 808; *In re Gault's Appeal*, 33 Pa. St. 94; *Northwestern Mutual Life Ins. Co. v. Neeves*, 46 Wis. 147, 49 N. W. 832.

⁶⁵ *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *Forsyth v. Marbury*, R. M. Charl. (Ga.) 324; *Willard v. Sturm*, 96 Iowa 555, 65 N. W. 847; *New Orleans Canal & Banking Co. v. New Orleans*, 30 La. Ann. 1371; *Lessley v. Phipps*, 49 Miss. 790; *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Rice v. Smith*, 72 Miss. 42, 16 So. 417; *Dorrington v. Meyers*, 11 Nebr. 388, 9 N. W.

555; *Danks v. Quackenbush*, 1 N. Y. 129, 3 Denio (N. Y.) 594, 4 How. Pr. (N. Y.) 291; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46, 93 Am. Dec. 778; *State v. Bank of State*, 1 S. Car. 63; *Hannum v. McInturf*, 65 Tenn. 225; *Skinner v. Holt*, 9 S. Dak. 427, 69 N. W. 595, 62 Am. St. 878; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *The Homestead Cases*, 22 Grat. (Va.) 266, 12 Am. Rep. 507; *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

⁶⁶ *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Lindsay v. Norrill*, 36 Ark. 545; *Jones v. Brandon*, 48 Ga. 593; *Bridgman v. Wilcut*, 4 G. Greene (Iowa) 563; *Cole v. La Chambre*, 31 La. Ann. 41; *Blouin v. Ledet*, 109 La. 709, 33 So. 741; *Duna v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348; *Lessley v. Phipps*, 49 Miss. 790; *Berry v. Ewing*, 91 Mo.

courts take the view that these statutes apply to the remedy merely and not to the contractual relations of the parties, and hold that they do not impair the obligation of contracts within the meaning of the constitutional prohibition. In these jurisdictions a statute granting an exemption from execution does not constitute a contract between the debtor and the state.⁶⁷ Under this latter view "creditors as well as debtors are presumed to know that the legislature has an inherent power to enlarge, limit, alter or repeal remedial statutes, provided that contracts are not directly impaired, and a remedy be left, though less convenient and less prompt and speedy than the one so changed or repealed. Also, to enact such laws as, 'according to its own views of policy and humanity, it may deem necessary to protect the citizens of the state from unjust, merciless and oppressive litigation and other evils detrimental to the common weal, and protect them in those pursuits of industry, and secure to them those privileges and rights, which experience has already shown, or in the

395, 3 S. W. 877; *Earle v. Hardie*, 80 N. Car. 177; *Gheen v. Summey*, 80 N. Car. 187; *Shelor v. Mason*, 2 S. Car. 233; *Cochran v. Darcy*, 5 S. Car. 125; *Ex parte Hewett*, 5 S. Car. 409; *Douglass v. Craig*, 13 S. Car. 371; *Bull v. Rowe*, 13 S. Car. 355; *Norton v. Bradham*, 21 S. Car. 375; *Hannum v. McInturf*, 58 Tenn. 48; *McLane v. Paschal*, 62 Tex. 102; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *Canadian &c. Trust Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. 946.

⁶⁷*Richardson v. Kaufman*, 143 Ala. 243, 39 So. 368; *Sneider v. Heidelberg*, 45 Ala. 126; *In re Mercer*, 4 Har. (Del.) 248; *Harris v. Glenn*, 56 Ga. 94; *Lockhart v. Tinley*, 15 Ga. 496; *Hardeman v. Downer*, 39 Ga. 425; *Lockhart v. Tinley*, 15 Ga. 496; *Mooney v. Moriarty*, 36 Ill. App. 175; *Taylor v. Stockwell*, 66 Ind. 505; *Cusic v. Douglas*, 3 Kans. 123, 87 Am. Dec. 458; *Root v. McGrew*, 3 Kans. 215; *Reardon v. Searcy's Heirs*, 2 Bibb (Ky.) 202; *Bigelow v. Pritchard*, 21 Pick. (Mass.) 169; *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139; *Rockwell v. Hubbell's*

Admrs., 2 Doug. (Mich.) 197, 45 Am. Dec. 246; *Grimes v. Bryne*, 2 Minn. 89; *Massey v. Womble*, 69 Miss. 347, 11 So. 188; *Stephenson v. Osborne*, 41 Miss. 119, 90 Am. Dec. 358; *Kittell v. Domeyer*, 175 N. Y. 205, 67 N. E. 433; *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, affg. 138 App. Div. (N. Y.) 833, 123 N. Y. S. 614; *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822, 25 L. R. A. (N. S.) 189n; *Lindholm v. Waite*, 134 App. Div. (N. Y.) 993, 119 N. Y. S. 1132; *Myers v. Moran*, 113 App. Div. (N. Y.) 427, 99 N. Y. S. 269; *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103; *Leak v. Gay*, 107 N. Car. 468, 12 S. E. 312; *Allen v. Shields*, 72 N. Car. 504; *Hill v. Kessler*, 63 N. Car. 437; *In re Neff's Appeal*, 21 Pa. St. 243; *Dye v. Cooke*, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. 882; *Parker v. Savage*, 74 Tenn. 406; *Lyon v. Modern Order* (Tex. Civ. App.), 142 S. W. 29; *Folsom v. Asper*, 25 Utah 299, 71 Pac. 315; *Kirkman v. Bird*, 22 Utah 100, 61 Pac. 338, 58 L. R. A. 669, 83 Am. St. 774; *Bull v. Conroe*, 13 Wis. 233.

future may be shown, to be necessary to the prosperity and strength of the state, although such necessary laws may in some way or other affect contracts previously entered into.' Among such necessary laws are police regulations, exemptions from forced sales on execution of necessary implements of agriculture, the tools of mechanics, necessary household furniture for the use of the family and their wearing apparel, exemption of a portion of the wages of laborers, etc."⁶⁸ Under any view it can not be claimed by a creditor that there was an impairment of the obligation of his contract by a law changing the exemptions where the change was favorable to the creditor.⁶⁹ So, it has been held that the debtor has no vested right in his exemptions. Thus, a statute which subjects a homestead to a lien for materials furnished in its construction is not unconstitutional as impairing the obligation of a contract.⁷⁰

§ 2754. Impairment by change of law as to notice.—A law requiring notice with reference to existing contracts having no condition of notice is generally held not to render the statute void as an impairment of contracts. It is to be borne in mind that every statute which affects the value of a contract can not in every case be considered an impairment of the contract. "It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation."⁷¹ Accordingly, a statute which reduced the time required for publication of notice on foreclosure sale by advertisement has been held not to impair the obligation of contracts, even as to previously existing powers of sale.⁷² A statute providing that no no-

⁶⁸ *Kirkman v. Bird*, 22 Utah 100, 61 Pac. 338, 58 L. R. A. 669, 83 Am. St. 774.

⁶⁹ *Brearely School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, affg. 138 App. Div. (N. Y.) 833, 123 N. Y. S. 614.

⁷⁰ *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Leak v. Gay*, 107 N. Car. 468, 483, 12 S. E. 312.

⁷¹ *Curtis v. Whitney*, 13 Wall. (U. S.) 68, 20 L. ed. 513. See, *Coulter v. Stafford*, 56 Fed. 564, 6 C. C. A. 18; *Herrick v. Niesz*, 16 Wash. St. 74, 47 Pac. 414.

⁷² *Orvik v. Casselman*, 15 N. Dak. 34, 105 N. W. 1105. A statute which changes the notice required on foreclosure sale was held not to impair the obligation of a mortgage con-

tice of the expiration of the time of the redemption from tax sale shall issue after six years from the date of the sale, and that certificates upon which no notices are issued, shall be void, has been held not to impair the obligations of contracts between the holders of the certificates and the state.⁷³ A statute relating to the voluntary dissolution of corporations has been held not unconstitutional as impairing the obligation of a contract, because the only notice of hearing of the application for the dissolution was by publication, since the debts of a corporation are not vacated by dissolution of the corporation.⁷⁴ Neither can it be said that a statute dispensing with notice where one was formerly required amounts to the impairment of the obligation of a contract.⁷⁵

§ 2755. Impairment of contracts by tax laws generally.

—There is no contract right existing between the state and its citizens that will prevent the state from changing its rate of levy within the law,⁷⁶ or the amounts that it will

tract executed prior to the adoption of the statute. *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

⁷³*Byers v. Minnesota Commercial Loan Co.*, 118 Minn. 266, 136 N. W. 880.

⁷⁴*Crossman v. Vivienda Water Co.*, 150 Cal. 575, 89 Pac. 335.

⁷⁵*McKennon v. State*, 42 Tex. Cr. 371, 60 S. W. 41, 96 Am. St. 802.

⁷⁶*Desha County v. State*, 73 Ark. 387, 84 S. W. 625; *Haskel v. Burlington*, 30 Iowa 232; *Debolt v. Ohio Life Ins. & Co.*, 1 Ohio St. 563, affd. 16 How. (U. S.) 416, 14 L. ed. 997; *Bank of Toledo v. Bond*, 1 Ohio St. 622; *Champaign County Bank v. Smith*, 7 Ohio St. 42. A statute fixing the rate of bonus payable by a corporation on its organization or on the increase of its capital stock does not constitute a contract between the state and the corporation, which the legislature can not destroy by enlarging the bonus for the increase of the capital stock of a corporation previously incorporated. *Commonwealth v. Independence Trust Co.*, 233 Pa. 92, 81 Atl. 928. A statute taxing national bank

deposits bearing a certain rate of interest was held not unconstitutional as impairing the bank's obligation to its depositors, since all property is held subject to the state's right to impose new taxes or to increase the rate of taxation. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944. A statute requiring street railroads to pave between their tracks or pay for such paving is an exercise of the taxing power of the state, and is not invalid on the ground that a previous statute granting immunity from contribution to the expense of new pavement constituted a contract between a railroad company and the state. *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, affd. 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469. A city has no power to limit or convey away its taxing powers conferred by the legislature. *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, affd. 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469. A contract does not exist between a city and the taxpayers thereof that the taxpayers shall be taxed only for

exact as fees for privileges for licenses. An ordinance imposing a license tax does not create any contract right and it may be repealed or modified, provided no constitutional rights are invaded.⁷⁷ Where the corporate charter contains a provision fixing a certain sum to be paid as taxes, but does not provide that such provision shall be in lieu of all other taxes, the charter provision is not a contract that a greater tax shall not be levied, and is not impaired by the levy of a greater tax.⁷⁸ A statute authoriz-

the corporation as it then exists, so that a contract is not impaired by a statute under which the municipality was enlarged by the annexation of an adjoining municipality. *Hunter v. Pittsburg*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. ed. 151.

⁷⁷ *Bishoff v. State*, 43 Fla. 67, 30 So. 808; *Baker v. Lexington*, 21 Ky. L. 809, 53 S. W. 16; *Adams v. Yazoo & R. Co.*, 77 Miss. 194, 28 So. 200, 28 So. 956, 60 L. R. A. 33, affd. 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. 240; *State v. Gazlay*, 5 Ohio 15; *Western Union Tel. Co. v. Harris*, (Tenn. Ch.), 52 S. W. 748. A privilege tax statute relating to taxation of railroads was held to impair the obligation of a contract, where the tax exceeded the usual tax required of other railroads doing the same business. *Gulf & S. I. R. Co. v. Adams*, 90 Miss. 559, 45 So. 91. *Los Angeles Gas & Elec. Corp. v. Los Angeles* (Cal.), 126 Pac. 594. A city ordinance granting the street railroad companies the right to use the streets under agreement to pay certain sums for such right for a given period does not create an inviolable contract so as to prevent the city from exacting a license tax, where such right is not expressly relinquished by the city. *St. Louis v. United R. Co.*, 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. 630. Under a state constitution requiring that the state shall provide by general law for amending existing corporate charters and for the organization of subsequent corporations, the legislature has unlimited power to alter corporate charters, so that a subsequent statute imposing a license tax on a corporation organized under the gen-

eral law subsequent to the adoption of the constitution was valid. *Ware Shoals Mfg. Co. v. Jones*, 78 S. Car. 211, 58 S. E. 811. Where a foreign corporation pays a franchise tax under the existing law and obtains a permit to do business within the state, the imposition of a further franchise tax by the state was held not to impair the obligation of a contract, in view of the constitution of the state providing that the power of the state to tax corporations shall not be suspended by contract. *Gaar, Scott & Co. v. Shannon*, 52 Tex. Civ. App. 634, 115 S. W. 361. A contract with a street railroad company and a city as embraced in a city ordinance providing that if a percentage of the gross receipts of a railroad company shall be paid into the city treasury, it shall be in lieu of all other special tax or taxes, was held not impaired by a subsequent statute imposing a franchise tax on the company. *Macon R. & Light Co. v. Macon*, 136 Ga. 797, 72 S. E. 159. A statute taking away the right to levy a privilege tax does not impair the obligation of a contract, since such right is not conferred by contract. *Crow v. Cartledge* (Miss.), 54 So. 947.

⁷⁸ *Gaar, Scott & Co. v. Shannon*, 52 Tex. Civ. App. 634, 115 S. W. 361. A general statute increasing the gross earnings tax on railroad companies from three to four per cent. was held not to impair a contract right of a railroad company which had theretofore paid only three per cent. tax, whether authorized by its charter or by subsequent legislation, in view of the state constitution providing that laws imposing a gross earnings tax

ing the assessment of abutting property for payment of the paving of the street theretofore made has been held to involve the principle of taxation, and not to impair the obligation of contracts.⁷⁹ A law granting a bounty does not create a contract in the sense that the law may not be repealed after parties have expended money on equipment necessary to earn the bounty.⁸⁰ The constitutional provision does not prevent the enactment of statutes changing the rate of interest on delinquent taxes.⁸¹ So, a statute giving a portion of fines collected to prosecuting officers is not a contract or a quasi contract which precludes the legislature from withdrawing the privilege at its pleasure.⁸² A statute making drainage assessments a lien on the land assessed does not violate the obligation of contracts, for these assessments are a species of taxation.⁸³ Where the power of the state to tax state stocks or bonds has never been expressly surrendered, this power exists in full force and its exercise involves no violation of a contract.⁸⁴ But it is the doctrine of the Supreme Court of the United States that a city ordinance directing that a tax assessed on its stock shall be retained by its treasurer out of the interest

in lieu of all other taxation might be changed or amended. *State v. Chicago Great Western R. Co.*, 106 Minn. 290, 119 N. W. 211. A general statute increasing the gross earnings tax on railroad companies from three to four per cent. was held not to impair a contract right of a railroad company which had theretofore paid only three per cent. tax, whether authorized by its charter or by subsequent legislation, in view of the state constitution providing that laws imposing a gross earnings tax in lieu of all other taxation might be changed or amended. *State v. Great Northern R. Co.*, 106 Minn. 303, 119 N. W. 202.

⁷⁹*Durkee v. Barre*, 81 Vt. 530, 71 Atl. 819.

⁸⁰*East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. (U. S.) 373, 20 L. ed. 611.

⁸¹*Webster v. Auditor-General*, 121 Mich. 668, 80 N. W. 705.

⁸²*Cushman v. Hale*, 68 Vt. 444, 35 Atl. 382.

⁸³*Wabash East. R. Co. v. Drainage District Comrs.*, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285n.

⁸⁴*Champaign County Bank v. Smith*, 7 Ohio St. 42. A former owner of land which has been forfeited for nonentry on the tax books, who paid into court the amount fixed for redemption, a decree being entered that he had the right to redeem, which decree was reversed on appeal on the ground that the amount paid was insufficient, had no contract with the state which was impaired by a subsequent statute relating to sales of land for the benefit of a school fund. *State v. King*, 64 W. Va. 545, 610, 63 S. E. 468, 495. In the absence of express or implied provisions to the contrary, a city may tax its bonds in the hands of others, without impairing the contract obligations. *Bank of Russellville v. Russellville*, 133 Ky. 637, 118 S. W. 921, 134 Am. St. 479.

due on it to its holders is void as impairing the obligation of the contract.⁸⁵ So, a special statute incorporating a railroad company and providing that the company shall pay an annual tax of one per cent. on its capital stock, which shall be in lieu of all other taxes, except for penalties imposed, under which large expenditures are made by the company, constitutes a contract between the railroad company and the state, and can not be impaired by the state.⁸⁶ But a statute subjecting the right of a widow in community property to an inheritance tax was held by the same court not to violate the clause of the federal constitution forbidding the impairment of contracts, even if such a right as it existed at the time of the marriage was contractual.⁸⁷ Under the constitutional provision requiring counties to provide for the collection of annual taxes sufficient to pay the principal and interest of their indebtedness, and that all laws providing for the payment of the principal and interest of any debt shall be irrepealable until such debt is paid, a statute providing that the county rate shall not exceed eight mills on the dollar for all purposes was held to impair the obligation of sinking fund contracts.⁸⁸ A statute relating to the levy of taxes, which makes it possible for the county to evade the liquidation of and the payment of interest on its bonded indebtedness is unconstitutional as impairing the obligation of contracts.⁸⁹ The apportionment of taxes collected between the city and a county is held not to impair the obligation of contracts.⁹⁰

⁸⁵ *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760. See also, *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271. The provision of a statute requiring a railroad company to pay to the state annually a tax of one per cent. on its capital stock, which shall be in lieu of all other taxes, constitutes a contract between the state and the railroad company, which was not affected by subsequent change of the name of the company, and a subsequent statute purporting to change the mode of taxation of the company was held invalid. *Detroit, G. H. & M. R. Co. v. Powers*,

138 Fed. 264, *affd.* 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. 556.

⁸⁶ *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. 556.

⁸⁷ *Moffitt v. Kelly*, 218 U. S. 400, 54 L. ed. 1086, 31 Sup. Ct. 79.

⁸⁸ *Fremont E. & M. V. R. Co. v. Pennington County*, 22 S. Dak. 202, 116 N. W. 75.

⁸⁹ *Fremont, E. & M. V. R. Co. v. Pennington County*, 20 S. Dak. 270, 105 N. W. 929.

⁹⁰ *Sanderson v. Texarkana (Ark.)*, 146 S. W. 105.

§ 2756. **Impairment by statute allowing debtor to pay taxes of creditor and deduct same from debts.**—Some of the states have enacted statutes requiring a mortgagor to pay the taxes assessed against the mortgage interest in case of the default of the mortgagee and authorizing the mortgagor to deduct the same from the amount owing on the mortgage. These statutes have been held not to impair the obligation of contracts and this though the deduction is made from principal not yet due.⁹¹ So, a statute which requires the lessee of a railroad to deduct the taxes levied on the road from the rent stipulated to be paid on the lease and to pay the same to the state has been held not void, even with reference to existing leases, as impairing the obligation of a contract, particularly where both lessor and lessee and the rent due were proper subjects for taxation.⁹² There is some conflict on the question of the right of the state to require the payment by a corporation of taxes on bonds issued by such corporation and authorizing the corporation to deduct the amount of such taxes from interest payable on the bonds. It is generally conceded that the state has the right to enact such a statute with reference to bonds held by residents of the state of the corporation,⁹³ but not in the case of bonds held by nonresidents.⁹⁴ "Corporations," says the Supreme Court of the United States, "may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only

⁹¹ McCoppin v. McCartney, 60 Cal. 367; Hay v. Hill, 65 Cal. 383, 4 Pac. 378; Hamill v. Littner, 67 Cal. XIX, 7 Pac. 707; Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Cook v. Smith, 30 N. J. L. 387.

⁹² Vermont & C. R. Co. v. Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562. But see, Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

⁹³ Ammidown v. Freeland, 101 Mass. 303, 3 Am. Rep. 359; Maltby v. Reading & C. R. Co., 52 Pa. St. 140;

Delaware, L. & W. R. Co. v. Commonwealth, 66 Pa. St. 64, revd. 15 Wall. (U. S.) 326n, 21 L. ed. 189; Commonwealth v. Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406; Commonwealth v. Delaware & C. R. Co., 129 Pa. St. 458, 18 Atl. 414; Commonwealth v. New York & C. R. Co., 150 Pa. St. 234, 24 Atl. 609; Commonwealth v. Delaware & C. Canal Co., 150 Pa. St. 245, 24 Atl. 599.

⁹⁴ In re State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179, 4 Brewst. (U. S.) 183.

possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations in numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement. The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by nonresidents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."⁹⁵

§ 2757. Impairment by withdrawal of exemptions from

⁹⁵In *re State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, 21 L. ed. 179, 4 Brewst. (U. S.) 183.

taxation.—It may be said generally that when the conditions and considerations on which a valid grant of exemption from taxation are based have been fulfilled there exists a contract right which may not be impaired by subsequent enactments of modification or repeal.⁹⁶ But statutes granting exemptions from liability to taxation are closely construed by the courts. Taxation is the rule with every presumption to support it; while exemption is an exception with every presumption against it.⁹⁷ “A law which seeks

⁹⁶ *State v. Alabama Bible Society*, 134 Ala. 632, 32 So. 1011; *Oliver v. Memphis & L. R. Co.*, 30 Ark. 128; *Memphis & L. R. Co. v. Berry*, 41 Ark. 436, *affd.* 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. 299; *Bennett v. Nichols*, 9 Ariz. 138, 80 Pac. 392; *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 95 Pac. 443; *Tennessee v. Whitworth*, 22 Fed. 75, *affd.* 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. 645; *East Tennessee, V. & G. R. Co. v. Pickerd*, 24 Fed. 614, *revd.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. 640; *Barnes v. Kornegay*, 62 Fed. 671; *Gonzales v. Sullivan*, 16 Fla. 791; *State v. Georgia R. & C. Co.*, 54 Ga. 423; *People v. Soldiers' Home*, 95 Ill. 561; *State v. Baltimore & C. R. Co.*, 48 Md. 49; *Saginaw County v. Hubinger*, 137 Mich. 72, 100 N. W. 261; *O'Donnell v. Bailey*, 24 Miss. 386; *Mobile & O. R. Co. v. Moseley*, 52 Miss. 127; *North St. Louis Gymnastic Society v. Hagerman (Mo.)*, 135 S. W. 42; *South Pacific R. Co. v. Laclede County*, 57 Mo. 147; *Scotland County v. Missouri & C. R. Co.*, 65 Mo. 123; *State v. Westminster College*, 175 Mo. 52, 74 S. W. 990; *Northern Pacific R. Co. v. Garland*, 5 Mont. 146, 3 Pac. 134; *Worth v. Wilmington & C. R. Co.*, 89 N. Car. 291, 45 Am. Rep. 679; *Milan & C. Plank Road Co. v. Husted*, 3 Ohio St. 578; *Matheny v. Golden*, 5 Ohio St. 361; *Commonwealth v. Philadelphia & C. R. Co.*, 164 Pa. St. 252, 30 Atl. 145; *Columbia Water Power Co. v. Campbell*, 75 S. Car. 34, 54 S. E. 833; *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. (Tenn.) 442; *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. (U. S.) 439, 19 L. ed. 498; *Wilmington*

R. Co. v. Reid, 13 Wall. (U. S.) 264, 20 L. ed. 568; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36, 22 L. ed. 282; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *Wicomico County Comrs. v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. 21, *revg.* 135 Fed. 977, 70 C. C. A. 287; *Wright v. Georgia R. & C. Co.*, 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. 242; *Commonwealth v. Richmond & C. R. Co.*, 81 Va. 355; *Lake Drummond Canal & C. Co. v. Commonwealth*, 103 Va. 337, 49 S. E. 506, 68 L. R. A. 92.

⁹⁷ *Stein v. Mobile*, 17 Ala. 234; *Dauphin & L. F. Sts. R. Co. v. Kennerly*, 74 Ala. 583; *Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *Atlantic & P. R. Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244; *St. Louis, I. M. & S. & C. R. Co. v. Loftin*, 30 Ark. 693, *affd.* 98 U. S. 559, 25 L. ed. 222; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509; *In re Bull's Estate*, 153 Cal. 715, 96 Pac. 366; *American Smelting & C. Co. v. People*, 34 Colo. 240, 82 Pac. 531, *revd.* 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. 198; *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546, *affd.* 100 U. S. 491, 25 L. ed. 558; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 699; *Alexandria Canal R. & C. Co. v. District of Columbia*, 1 Mack. (D. C.) 217; *Macon v. Central R. & Banking Co.*, 50 Ga. 620; *Athens City Water Works Co. v. Athens*, 74 Ga. 413; *Salisbury v. Lane*, 7 Idaho 370, 63 Pac. 383; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *Presbyterian Theological Seminary v. People*, 101 Ill. 578; *In re Swigert*, 119 Ill. 83, 6 N. E. 469, 59 Am. Rep. 789, 123 Ill. 267, 14 N. E. 32; *Mont-*

to deprive the legislature of the power to tax must be so clear, explicit and determinate that there can be neither

- gomery v. Wyman, 130 Ill. 17, 22 N. E. 845; People v. Watseka Camp Meeting Assn., 160 Ill. 576, 43 N. E. 716; Bloomington Cemetery Assn. v. People, 170 Ill. 377, 48 N. E. 905; People v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; Northwestern University v. Hanberg, 237 Ill. 185, 86 N. E. 734; Miller v. Hageman, 114 Iowa 195, 86 N. W. 281; Kentucky &c. R. Co. v. Bourbon Co., 82 Ky. 497, 6 Ky. L. 495; Commonwealth v. Masonic Temple Co., 87 Ky. 349, 10 Ky. L. 325, 8 S. W. 699; Newport v. Commonwealth, 106 Ky. 434, 21 Ky. L. 42, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119; Galloway v. Memphis, 116 Tenn. 736, 94 S. W. 75; Norfolk P. & N. N. Co. v. Norfolk, 105 Va. 139, 52 S. E. 851. See also, Louisville, Cincinnati &c. R. Co. v. Commonwealth, 10 Bush. (Ky.) 43; Kentucky Cent. R. Co. v. Commonwealth, 87 Ky. 661, 10 Ky. L. 706, 10 S. W. 269; Clark v. Louisville Water Co., 90 Ky. 515, 12 Ky. L. 309, 14 S. W. 502, affd. 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. 346; German Bank v. Louisville, 108 Ky. 377, 22 Ky. L. 9, 56 S. W. 504; State v. Morgan, 28 La. Ann. 482, affd. 93 U. S. 217, 23 L. ed. 860; State v. New Orleans R. &c. Co., 116 La. 144, 40 So. 597; Portland & P. R. Co. v. Saco, 60 Maine 196; Bangor v. Rising Virtue Lodge, 73 Maine 428, 40 Am. Rep. 369; Buchanan v. Talbot County, 47 Md. 286; Anne Arundel v. Annapolis &c. R. Co., 47 Md. 592, affd. 103 U. S. 1, 26 L. ed. 359; Frederick County v. Sisters of Charity, 48 Md. 34; Baltimore v. Grand Lodge A. F. & A. M., 60 Md. 280; Schley v. Lee, 106 Md. 390, 67 Atl. 252; Lauer v. Baltimore, 110 Md. 447, 73 Atl. 162; Gordon v. Baltimore, 5 Gill (Md.) 231; Baltimore v. Baltimore & O. R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Portland Bank v. Apthorp, 12 Mass. 252; Commonwealth v. Bird, 12 Mass. 443; St. Peter's Church v. Scott Co., 12 Minn. 395; Chicago, M. & S. P. R. Co. v. Pfaender, 23 Minn. 217; Hennepin v. Bell, 43 Minn. 344, 45 N. W. 615; State v. Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Frantz v. Dobson, 64 Miss. 631, 2 So. 75, 60 Am. Rep. 68; State v. Simmons, 70 Miss. 485, 12 So. 477; Adams v. Yazoo &c. R. Co., 75 Miss. 275, 22 So. 824; Washington University v. Rowse, 42 Mo. 308, revd. 8 Wall. (U. S.) 439, 19 L. ed. 498; St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo. 150; St. Louis v. Manufacturers' Sav. Bank, 49 Mo. 574; Pacific R. Co. v. Cass County, 53 Mo. 17; Pacific R. Co. v. Maguire, 51 Mo. 142, revd. 20 Wall. (U. S.) 36, 22 L. ed. 282; State v. Chicago &c. R. Co., 89 Mo. 523, 14 S. W. 522, affd. 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. 693; Mount Mora Cemetery Assn. v. Casey, 210 Mo. 235, 109 S. W. 1; Trenton v. Humel, 134 Mo. App. 595, 114 S. W. 1131; Bellinger v. White, 5 Nebr. 399; Young Men's Christian Assn. v. Douglas, 60 Nebr. 642, 83 N. W. 924, 52 L. R. A. 123; Watson County v. Cowles, 61 Nebr. 216, 85 N. W. 35; Phillips Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589; Portsmouth Shoe Co. v. Portsmouth, 74 N. H. 222, 66 Atl. 1045; Trenton Water Power Co. v. Parker, 32 N. J. L. 426; State Board of Assessors v. Paterson & R. Co., 50 N. J. L. 446, 14 Atl. 610; Tippet v. McGrath, 71 N. J. L. 338, 59 Atl. 1118; Union Waxed & Parchment Paper Co. v. State Board of Assessors, 73 N. J. L. 374, 63 Atl. 1006; Sisters of Charity v. Cory, 73 N. J. L. 699, 65 Atl. 500; Morris Canal & Banking Co. v. State Board of Assessors, 76 N. J. L. 627, 71 Atl. 328; People v. Roper, 35 N. Y. 629; People v. Commissioners of Taxes of N. Y., 47 N. Y. 501; People v. Commissioners of Taxes &c., 76 N. Y. 64; People v. Commissioners, 82 N. Y. 459; Roosevelt Hospital v. New York, 84 N. Y. 108; People v. Davenport, 91 N. Y. 574; People v. Commissioners of Taxes of New York, 95 N. Y. 554; People v. Deehan, 153 N. Y. 528, 47 N. E. 787; People v. State Board of Tax Comrs., 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. 674; People v. Peck, 32 App. Div. (N. Y.) 624, 52 N. Y. S. 259, affd. 157 N. Y. 51, 51

doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made

N. E. 412; *In re Deutsch's Estate*, 107 App. Div. (N. Y.) 192, 95 N. Y. S. 65; *In re Mergentime's Estate*, 129 App. Div. (N. Y.) 367, 113 N. Y. S. 948, *affd.* 195 N. Y. 572, 88 N. E. 1125; *Wilmington & W. R. Co. v. Alsbroom*, 110 N. Car. 137, 14 S. E. 652; *State v. Petway*, 2 Jones Eq. (N. Car.) 396; *Cincinnati College v. State*, 19 Ohio 110; *Lima v. Cemetery Assn.*, 42 Ohio St. 128, 51 Am. Rep. 809; *Lee v. Sturges*, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556; *Hiberian Benev. Soc. v. Kelly*, 28 Ore. 173, 42 Pac. 3, 30 L. R. A. 167, 52 Am. St. 769; *Commonwealth v. Easton Bank*, 10 Pa. St. 442; *Bank of Pennsylvania v. Commonwealth*, 19 Pa. St. 144; *Academy of Fine Arts v. Philadelphia Co.*, 22 Pa. St. 496; *Miller v. Kirkpatrick*, 29 Pa. St. 226; *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9, 72 Am. Dec. 664n; *Iron City Bank v. Pittsburgh*, 37 Pa. St. 340; *Crawford v. Burrell Tp.*, 53 Pa. St. 219; *Erie R. Co. v. Commonwealth*, 66 Pa. St. 84, 5 Am. Rep. 351, *revd.* 15 Wall. (U. S.) 282, 21 L. ed. 164; *Jones & Nimick Mfg. Co. v. Commonwealth*, 69 Pa. St. 137; *Union Pass R. Co. v. Philadelphia*, 83 Pa. St. 429, *affd.* 101 U. S. 528, 25 L. ed. 912; *Philadelphia v. Ridge Avenue &c. R. Co.*, 102 Pa. St. 190; *Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171, 19 Atl. 490; *In re Commonwealth's Appeal*, 129 Pa. St. 346, 18 Atl. 133; *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045, *affd.* 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. 468; *Memphis v. Home Ins. Co.*, 91 Tenn. 558, 19 S. W. 1042; *Knoxville &c. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; *English v. Crenshaw*, 120 Tenn. 531, 110 S. W. 210, 17 L. R. A. (N. S.) 753, 127 Am. St. 1025n; *Morris v. Lone Star Chapter*, 68 Tex. 698, 5 S. W. 519; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 23 L. ed. 814; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222, *affd.* 30 Ark. 693; *Hoge v. Richmond & Danville R. Co.*, 99 U. S. 348, 25 L. ed. 303; *Annapolis & E. R. Co. v. Anne Arundel*, 103 U. S. 1, 26 L. ed. 359; *Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. 257; *Memphis Gas-Light Co. v. Taxing Dist.*, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. 205; *Memphis &c. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 831; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. 375; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. 625; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. 645; *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. 693; *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. 68; *New Orleans, C. & L. R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. 406; *Wilmington & W. R. Co. v. Alsbroom*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. 72; *New York v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. 645; *Keokuk &c. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. 592; *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. 471; *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230; *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 26, 45 L. ed. 408, 21 Sup. Ct. 282; *Central R. & Banking Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. 80; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall. (U. S.) 51, 18 L. ed. 137, 30 How. Pr. (N. Y.) 346; *Wilmington & W. R. Co. v. Reid*, 13 Wall. (U. S.) 264, 20 L. ed. 568; *Raleigh & G. R. Co. v. Reid*, 13 Wall. (U. S.) 269, 20 L. ed. 570; *Minot v. Philadelphia, W. & B. R. Co.*, 18 Wall. (U. S.) 206, 21 L. ed. 888; *Tresk v. Maguire*, 18 Wall. (U. S.) 391, 21 L. ed. 938; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46, 22 L. ed. 287; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 22 L. ed. 595; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527, 22

against its surrender, as the power was committed by the people to the government to be exercised and not to be alienated."^{97a} A constitutional convention has no more power to violate a valid contract of exemption from taxation than the legislature.⁹⁸ The exemption requires a consideration of some character. If there is no consideration the exemption is a mere gratuity and may be revoked at the pleasure of the legislature.⁹⁹ It seems to be well settled, however, that the exemption will be presumed to be upon a sufficient consideration and binding upon the state where the charter of a corporation contains the exemption from taxes or stipulates that the taxes shall be to a specified

L. ed. 805; *Bailey v. Magwire*, 22 Wall. (U. S.) 215, 22 L. ed. 850; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527, 22 L. ed. 805; *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.) 376, 13 L. ed. 461; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. ed. 997; *Rector & c. of Christ Church v. Philadelphia Co.*, 24 How. (U. S.) 300, 16 L. ed. 602; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 560, 7 L. ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. ed. 773; *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436, 17 L. ed. 173; *Gilman v. Sheboygan*, 2 Black (U. S.) 510, 17 L. ed. 305; *Norfolk, P. & N. N. Co. v. Norfolk*, 105 Va. 139, 52 S. E. 851; *Richmond v. Richmond & c. R. Co.*, 21 Grat. (Va.) 604; *Commonwealth v. Chesapeake & c. R. Co.*, 27 Grat. (Va.) 344, affd. 94 U. S. 718, 24 L. ed. 310; *Baltimore & O. R. Co. v. Marshall County*, 3 W. Va. 319; *Probasco v. Moundsville*, 11 W. Va. 501; *Weston v. Shawano County*, 44 Wis. 242; *State v. Anderson*, 90 Wis. 550, 63 N. W. 746. The immunity of a street railroad company from taxation, conferred by a statute subsequent to its incorporation, may be recalled by subsequent statute without impairing the obligation of the contract, since such act did not amount to a contract with the state. *Baltimore, C. & A. R. Co. v. Wicomico*, 103 Md. 277, 63 Atl. 678.

^{97a}*St. Louis v. Boatmen's Ins. & Trust Co.*, 47 Mo. 150.

⁹⁸*Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *Central R. & Banking Co. v. State*, 54 Ga. 401, revd. 92 U. S. 665, 23 L. ed. 757; *Adams v. Yazoo & c. R. Co.*, 77 Miss. 194, 24 So. 200, 28 So. 756, 60 L. R. A. 33, affd. 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. 240; *Scotland County v. Missouri & c. R. Co.*, 65 Mo. 123; *State v. Moore*, 5 Ohio St. 444; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401; *Richmond v. Richmond & c. R. Co.*, 21 Grat. (Va.) 604.

⁹⁹*Appeal Tax Court v. Grand Lodge*, 50 Md. 421; *Manistee & N. E. R. Co. v. Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 633; *Hanover Tp. v. Camp Meeting Assn.*, 76 N. J. L. 827, 71 Atl. 1134; *Hanover Tp. v. Camp Meeting Assn.*, 76 N. J. L. 65, 68 Atl. 753; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, affd. 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469; *Londonderry v. Berger*, 7 Leg. Gaz. (Pa.) 231; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. 346; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469. A tax exemption contained in the charter of an educational, charitable or beneficial association was held not a mere gratuity which could be withdrawn by the state at pleasure. *North St. Louis Gymnastic Soc. v. Hagerman* (Mo.), 135 S. W. 42.

amount only and it is accepted by the beneficiaries.¹ The right to withdraw exemption is clear where the constitution or the laws reserve to the state the right to alter or repeal general or special acts creating corporations to which exemptions are extended.² Under the principle of strict construction the exemption is generally held to apply to a beneficiary corporation as it existed at the time the privilege was granted, but not to include a corporation which has lost its individual corporate existence by a consolidation with another company.³

§ 2758. Impairment by withdrawal of exemptions from taxation—Illustrations.—It has been held that a statute annexing territory to a city and exempting such territory from liability for existing debts of the city does not create a contract which can not be impaired, but merely grants a revocable privilege.⁴ A charter contract of a university exempting it from taxation was held not impaired by a subsequent statute which taxed the interest of lessees of its lands under leases from the university, although the right to tax the interest of the lessee was not

¹ *Hunsaker v. Wright*, 30 Ill. 146; *Carondelet Canal & Navigation Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871; *First Division of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297; *Commonwealth v. Pottsville Water Co.*, 94 Pa. St. 516; *Spooner v. McConnell*, 1 McLean (U. S.) 337, Fed. Cas. No. 13245; *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.) 436, 17 L. ed. 173; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164, 3 L. ed. 303; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *McGee v. Mathis*, 4 Wall. (U. S.) 143, 18 L. ed. 314; *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. (U. S.) 439n, 19 L. ed. 498; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 21 L. ed. 204; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 22 L. ed. 595; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. ed. 997; *Gordon v.*

Appeal Tax Court, 3 How. (U. S.) 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369, 14 L. ed. 977; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401; *Mechanics' and Traders' Bank v. Debolt*, 18 How. (U. S.) 380, 15 L. ed. 458; *Mechanics' & Traders' Bank v. Thomas*, 18 How. (U. S.) 384, 15 L. ed. 460; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Morgan v. Cree*, 46 Vt. 773, 14 Am. Rep. 640.

² *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119; *People v. Gass*, 190 N. Y. 323, 83 N. E. 64, 123 Am. St. 549; *People v. Raymond*, 126 App. Div. (N. Y.) 720, 111 N. Y. S. 177.

³ *Adams v. Yazoo & C. R. Co.*, 77 Miss. 194, 24 So. 200, 28 So. 956, 60 L. R. A. 33, affd. 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. 240.

⁴ *Galloway v. Memphis*, 116 Tenn. 736, 94 S. W. 75.

provided for in the charter.⁵ Where a railroad franchise exempts the company from taxation except upon its net profits, there is an impairment of the charter contract by the imposition of a franchise tax.⁶ The contract obligation created by a statute exempting a bank from any other taxes than those prescribed therein is not impaired by a subsequent statute which changes the day when the bank is to report its property for assessment.⁷ A statute exempting state lands from taxation so long as the title exists in the state enters into a contract of purchase from the state, and a subsequent statute which attempts to subject to taxation the interest of persons under the contract of purchase before the execution of the deed impairs the obligation of the contract.⁸ Where the contract allows the exemption to pass to a consolidated company which may afterwards be formed, the state may withdraw the exemption from the consolidated company without impairing the original contract where the withdrawal statute is passed before any consolidation is consummated.⁹

§ 2759. Impairment of tax sale contracts.—The time fixed by statute for the redemption of land from tax sale is generally held to be such a contract right of the purchaser at the tax sale that it may not be impaired by a statute which extends the time for redemption.¹⁰ There is a like impairment of the obligation of the contract of purchasers at tax sales under statutes making the tax deed conclusive or perhaps even *prima facie* evidence of the regularity of the anterior proceedings, by the enactment of statutes which

⁵ *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. 375.

⁶ *Wright v. Georgia R. & Bkg. Co.*, 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. 242.

⁷ *Bank of Kentucky v. Commonwealth*, 207 U. S. 258, 52 L. ed. 197, 28 Sup. Ct. 82, affg. 29 Ky. L. 643, 94 S. W. 620.

⁸ *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443.

⁹ *Adams v. Yazoo &c. R. Co.*, 77 Miss. 194, 24 So. 200, 28 So. 956, 60

L. R. A. 33, affd. 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. 240.

¹⁰ *Hull v. State*, 29 Fla. 79, 11 So. 97, 16 L. R. A. 308, 30 Am. St. 95; *State v. Bradshaw*, 39 Fla. 137, 22 So. 296; *Dikeman v. Dikeman*, 11 Paige (N. Y.) 484; *Roberts v. First National Bank*, 8 N. Dak. 504, 79 N. W. 1049; *State v. Fylpaa*, 3 S. Dak. 586, 54 N. W. 599; *Robinson v. Howe*, 13 Wis. 341. But see, *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826; *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414; *International Life Ins. Co. v. Scales*, 27 Wis. 640.

repeal or materially modify this provision.¹¹ So, a statute which provides for the repayment of taxes, charges and interest to a purchaser at an invalid tax sale is part of the contract with such purchaser, and this right can not be affected by a subsequent change or repeal of the statute authorizing it.¹² A statute requiring one who holds under a tax-deed to take actual possession within five years or to bring a suit to recover possession within that time has been held to violate no contract right.¹³ So, a statute requiring a tax deed to be executed within a certain time has been held not to impair the obligation of a contract.¹⁴ A statute which provided that matters relative to the sale and conveyance of lands for taxes under prior statutes should be completed according to the laws under which they originated has been held not to impair the obligation of any contract, for such statute operated merely to secure the completion of inchoate tax titles in accordance with the laws existing at the time of the sale.¹⁵

§ 2760. **Impairment of grants of rights in streams.**—The courts do not readily incline to construe grants of rights in streams as exclusive so as to make a grant of a right in such waters an impairment of any earlier grants. Thus, in the matter of mill-dams the right given by a statute to construct a mill-dam has been held not to create a contract with the state which can not be impaired by subsequent legislation, for such a grant creates a privilege without consideration to the state, and such a privilege may be revoked by the state at any time.¹⁶ So, it has been held

¹¹ *Marx v. Hanthorn*, 30 Fed. 579, *affd.* 48 U. S. 172, 37 Fed. 410, 13 Sup. Ct. 508; *Tracy v. Reed*, 13 Sawy. (U. S.) 622, 38 Fed. 69, 2 L. R. A. 773; *Blakemore v. Cooper*, 15 N. Dak. 5, 106 N. W. 566, 4 L. R. A. (N. S.) 1074, 125 Am. St. 574. But see, *Strode v. Washer*, 17 Ore. 50, 16 Pac. 926; *Harris v. Harsch*, 29 Ore. 562, 46 Pac. 141; *Smith v. Cleveland*, 17 Wis. 556. And see generally, 1 *Elliott Ev.*, § 87.

¹² *Morgan v. Miami County*, 27 Kans. 89. See also, *Corbin v.*

Washington County, 1 McCrary (U. S.) 521, 3 Fed. 356.

¹³ *Barrett v. Holmes*, 102 U. S. 651, 26 L. ed. 291.

¹⁴ *Tuttle v. Block*, 104 Cal. 443, 38 Pac. 109. But see, *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447.

¹⁵ *Watkins v. Inge*, 24 Kans. 612. See also, *Lain v. Shepardson*, 18 Wis. 59.

¹⁶ *Cooley Const. Lim.* (6th ed.) 473; *State v. Gilmore*, 141 Mo. 506, 42 S. W. 817.

that the grant by the Minnesota legislature in territorial times to a water-power company to maintain and construct dams for the improvement of the water power owned or possessed by the company did not give such company a contract right to all the natural flow of the water in the river forever afterwards, so as to prevent the state from thereafter authorizing cities to take water from the river for public and municipal use.¹⁷ And, it has been held that the abandonment of a canal by a statute which contained a provision for the lease of the property to a railroad company and also provided that the vested rights of abutting property owners should not be impaired was not invalid as amounting to an impairment of a contract entered into by the state to keep a dam at a certain place to furnish water for a mill.¹⁸ So, it has been held that a statute which authorized the construction of a basin in the Hudson river and certain erections by which docks owned by individuals above were rendered less accessible by ships was not unconstitutional as amounting to an impairment of the obligation of the contract with such dock owners.¹⁹

§ 2761. Impairment of public land contracts.—An executed grant of lands by the United States, or one of the states of the union, duly accepted by the grantee, is a contract which may not be impaired by the provisions of later statutes or constitutions which seek to withdraw the grant or divert it to other persons.²⁰ The principle is the same

¹⁷ *St. Anthony Falls Water-Power Co. v. St. Paul*, 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. 157.

¹⁸ *Bought v. Columbus &c. R. Co.*, 58 Ohio St. 123, 50 N. E. 442.

¹⁹ *Lansing v. Smith*, 8 Cow. (N. Y.) 146, affd. 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

²⁰ *Grogan v. San Francisco*, 18 Cal. 590; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. 730, affd. 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. 110; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 153, revd. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696; *State v. Duluth &c. R. Co.*, 97 Fed. 353; *Bruce v. Schuy-*

ler, 9 Ill. 221, 46 Am. Dec. 447; *Kidd v. Central Trust &c. Co.*, 23 Ky. L. 1402, 65 S. W. 355; *Graded School District No. Two v. Bracken Academy*, 95 Ky. 436, 15 Ky. 856, 26 S. W. 8; *Doe v. Buford*, 1 Dana (Ky.) 481; *New Gloucester School Fund v. Bradbury*, 11 Maine 118, 26 Am. Dec. 515; *United States v. Minnesota &c. R. Co.*, 1 Minn. 127; *Commercial Bank v. Chambers*, 8 Smedes & M. (Miss.) 9; *Butler v. Chariton Co. Ct.*, 13 Mo. 112; *Koenig v. Omaha &c. R. Co.*, 3 Nebr. 373; *Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326, revd. 98 App. Div. (N. Y.)

in the case of the lease of state lands²¹ and contracts to convey land under which the conditions precedent have been fulfilled by the grantees.²² It is always to be borne in mind that when a state becomes a party to a contract the same rules or laws are applied to it as to private persons under like circumstances.²³ It is essential to the operation of the rule that the conditions of the grant should have been complied with by the grantee.²⁴ Thus, an act repealing a statute which confirmed to certain claimants their title to land upon complying with certain conditions precedent was held not a law impairing the obligations of contracts where the conditions had not been complied with at the time of the repeal.²⁵ And where the grant is for certain uses there is not an impairment of the contract by the enactment of a statute which merely changes the method of applying the property to the uses specified.²⁶ The confirmation of a Spanish land grant on the performance of conditions of survey and filing notes of such survey

212, 90 N. Y. S. 646; *Beekman v. Saratoga &c. R. Co.*, 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *People v. Clarke*, 9 N. Y. 349, Seld. Notes (N. Y.) 207; *Stanmire v. Taylor*, 48 N. Car. 207; *Iron City Bank v. Pittsburgh*, 37 Pa. St. 340; *Drew v. New York & E. R. Co.*,* 81 Pa. St. 46; *Houston & T. C. R. Co. v. Texas &c. R. Co.*, 70 Tex. 649, 8 S. W. 498; *Gray v. Davis*, 1 Woods (U. S.) 420, affd. 16 Wall. (U. S.) 203, 21 L. ed. 447; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. ed. 162; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. ed. 773; *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 477; *Pennyroy v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. 699; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. 610; *Trustees of Caledonia County Grammar School v. Burt*, 11 Vt. 632; *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405; *State v. Commissioners of School Lands*, 4 Wis. 414. A statutory right of the purchaser of timber

on public land to thereafter purchase such land is a contractual right which can not be taken away or impaired by a subsequent statute. *Wing v. Dunn* (Tex. Civ. App.), 127 S. W. 1101.

²¹ *State v. McPeak*, 31 Nebr. 139, 47 N. W. 691; *State v. Thayer*, 46 Nebr. 137, 64 N. W. 700; *State v. Richmond &c. R. Co.*, 73 N. Car. 527, 21 Am. Rep. 473.

²² *Montgomery v. Kassar*, 16 Cal. 189; *McCabe v. Goodwin*, 106 Cal. 486, 39 Pac. 941.

²³ *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 477; *Herrick v. Randolph*, 13 Vt. 525.

²⁴ *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. 384. See also, *Waggoner v. Flack*, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. 345.

²⁵ *VanHorne v. Dorrance*, 2 Dall. (U. S.) 304, 1 L. ed. 391, Fed. Cas. No. 16857.

²⁶ *Humphrey v. Whitney*, 3 Pick. (Mass.) 158. See also, *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. 603.

in a land office is not impaired by a statute which allows the recovery of lands claimed to be included in such grant, but which are in fact outside the boundary of the original grant.²⁷ It has been held that a decision of a court construing a contract for the conveyance of land can not be said to violate the constitutional provision against the enactment of laws impairing the obligation of a contract.²⁸

§ 2762. Impairment by amendment of charters of municipal corporations.—The constitutional prohibition against amendatory laws impairing the obligations of contracts does not apply to public corporations. These are political divisions of the state, and exercise in many respects governmental functions, and are not operated for the benefit of stockholders. To this class of corporations belong cities, towns, townships, counties, etc.²⁹ On the other hand, there is a class of corporations often denominated public corporations, but which are not, strictly speaking, of such a character. While it is true that they are organized for the carrying on of some public enterprise, and have for their objects undertakings which are of a public character, yet they are organized for the purpose of private gain, usually with a capital stock owned by individuals who embark in such public undertakings because of the prospective business profits. To this class belong railroad, street railway, canal, bridge, turnpike, water and gas companies, and the like, which are often legally denominated quasi-public corporations. The charters of all such corporations are within

²⁷ *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. 215.

²⁸ *Shepherd's Point Land Co. v. Atlantic Hotel*, 134 N. Car. 397, 46 S. E. 748.

²⁹ *Dean v. Davis*, 51 Cal. 406; *People v. Williams*, 56 Cal. 647; *Reclamation District No. 542 v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Harvard v. St. Clair & M. Levee & Drainage Co.*, 51 Ill. 130; *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139n; *Hagerstown v. Sehner*, 37 Md. 180; *Riddle v. Merrimack Locks &c.*, 7 Mass. 169, 5 Am. Dec. 35n; *Bigelow v. Randolph*, 14

Gray (Mass.) 541; *Governor v. Gridley, Walk. (Miss.)* 328; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347n; *Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669n, affd. 2 Denio (N. Y.) 433; *Board of Comrs. of Hamilton v. Mighels*, 7 Ohio St. 110, 30 Am. Dec. 194; *Finch v. Toledo*, 30 Ohio St. 37, 27 Am. Rep. 414; *State v. Powers*, 38 Ohio St. 54; *Cole v. Fire Engine Co. in East Greenwich*, 12 R. I. 202; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511, 13 L. ed. 518.

the protection of the constitutional prohibition.³⁰ There is still another class of corporations, organized by private persons for educational and charitable purposes, which are not intended even for private gain, but are instituted for the purpose of benefiting the public or some particular community or class of citizens. In this class are included colleges, universities, libraries, hospitals, orphanages, societies, etc. All these come within the protection of this constitutional prohibition, and the fact that they have received donations of money or property from the state makes no difference.³¹ Colleges, universities, academies, hospitals and others of this class are public only when exclusively endowed and controlled by the state.³² Corporations organized by private individuals for the purpose of advancing the agricultural interests of a state have been held to

³⁰ *St. Louis, I. M. & S. R. Co. v. Loftin*, 30 Ark. 693, affd. 98 U. S. 559, 25 L. ed. 222; *Derby Turnpike Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Covington v. Covington &c. Bridge Co.*, 10 Bush (Ky.) 69; *Society for Establishing Useful Manufacturers v. Morris Canal & Banking Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. ed. 961.

³¹ *County Commissioners v. Colorado Seminary*, 12 Colo. 497, 21 Pac. 490; *Louisville v. Louisville University*, 15 B. Mon. (Ky.) 642; *Montpelier Academy v. George*, 14 La. 395, 33 Am. Dec. 585; *Maryland University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765n; *Grand River College v. Robertson*, 67 Mo. App. 329; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Vincennes University v. Indiana*, 14 How. (U. S.) 268, 14 L. ed. 416. A dedication of land to a town grammar school was held to vest in the school a conditional title, and to create a contract which can not be impaired. *Caledonia Grammar School v. Howard*, 84 Vt. 1, 77 Atl. 877.

³² *Trustees of University of Alabama v. Winston*, 5 Stew. & P. (Ala.) 17; *Mobile School Comrs. v. Putnam*, 44 Ala. 506; *State v. Knowles*, 16 Fla. 577; *Cleveland v. Stewart*, 3 Ga. 283; *Dart v. Houston*, 22 Ga. 506; *Board of Education of Glynn County v. Brunswick*, 72 Ga. 353; *Trustees of Academy of Richmond County v. Augusta*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151n; *Schools v. Tatman*, 13 Ill. 27; *Board of Education of Illinois v. Greenebaum*, 39 Ill. 609; *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378; *State v. Carr*, 111 Ind. 335, 12 N. E. 318; *Louisville v. Louisville University*, 15 B. Mon. (Ky.) 642; *Maryland University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Head v. University of Missouri*, 47 Mo. 220; *Vincennes University v. Indiana*, 14 How. (U. S.) 268, 14 L. ed. 416; *Allen v. McKean*, 1 Sumn. (U. S.) 276, Fed. Cas. No. 229; *Lewis v. Whittle*, 77 Va. 415; *Phillips v. University of Virginia*, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284; *Maia's Admr. v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577; *Curtis' Admr. v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187.

be private and within the protection of the constitution, although they received donations from the state.³³

§ 2763. **Impairment of municipal obligations.**—The prohibition against the impairment of contracts is usually violated by any enactment which makes it possible for a county or municipality to evade liability on its valid obligations.³⁴ It is to be borne in mind, however, that the constitutional prohibition extends solely to legal contracts and not to mere moral obligations.³⁵ In the case of municipal bonds the provisions of the law, existing at the time of issuing the bonds, providing for a tax, form a part of the contract and these can not be impaired by any subsequent law. So, where at the time of issuance there exists an act authorizing an annual tax for the payment of the bonds, it is beyond the power of the legislature to repeal such act so far

³³ *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; *Brown v. South Kennebec Agri. Soc.*, 47 Maine 275, 74 Am. Dec. 484; *State v. Maryland Institute &c.*, 87 Md. 643, 41 Atl. 126; *Dunn v. Brown County Agricultural Society*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. 556.

³⁴ *Fort Madison v. Fort Madison Water Co.*, 134 Fed. 214, 67 C. C. A. 142; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488; *Condon v. Eureka Springs*, 135 Fed. 566; *Union Bank v. Oxford County*, 90 Fed. 7; *Denver v. New York Trust Co.*, 187 Fed. 890, 110 C. C. A. 24; *Chalstran v. Board of Education of Tp. High School Dist. No. 13*, 244 Ill. 470, 91 N. E. 712; *Ludlow v. Peck &c. Ventilating Co.*, 116 Ky. 608, 25 Ky. L. 831, 76 S. W. 377; *Kapp v. Washtenaw County*, 137 Mich. 431, 100 N. W. 603; *Gibbs v. Green*, 54 Miss. 592; *Moore v. State*, 67 Nebr. 535, 93 N. W. 733; *May v. Cass County*, 12 N. Dak. 137, 96 N. W. 292; *Freemont, E. & M. V. R. Co. v. Pennington County*, 20 S. Dak. 270, 105 N. W. 929; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W.

552; *Graham v. Folsom*, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. 245; *Board of Liquidation of New Orleans v. Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. 263; *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. 957. A statute empowering cities to call in any outstanding warrants for cancellation and reissue not oftener than once a year, and providing that warrants not presented in pursuance of said order shall be barred, was held to be void if construed to operate retroactively. *Condon v. Eureka Springs*, 135 Fed. 566. Where at the time a city contracted to pay water rentals the law required property to be assessed at its "true value," a subsequent statute providing that the property shall be assessed at twenty-five per cent. of its actual value is invalid in so far as it affects the ability of the city to meet its pre-existing contract to pay water rentals. *Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214, 67 C. C. A. 142.

³⁵ *New York Life Ins. Co. v. Cuyahoga County*, 106 Fed. 123, 45 C. C. A. 233; *Zane v. Hamilton County*, 189 U. S. 370, 47 L. ed. 588, 23 Sup. Ct. 538.

as concerns the bonds in question unless some other adequate remedy is substituted in its place.³⁶ In the case of ordinary municipal obligations the rule is that where the municipality has authority to make a contract and has made it, no subsequent legislation may abrogate or invalidate it.³⁷ A state has no power to deprive a municipality of the right to levy taxes to pay pre-existing debts where it leaves the municipality in existence and it had the power to levy such taxes at the time the debts were incurred.³⁸ The general rule is that the obligations of contracts are not impaired by the creation of a new municipality out of a portion of the territory of one already existing, since the latter remains liable for the debts created by it.³⁹ But there is a

³⁶ *Fort Madison v. Fort Madison Water Co.*, 134 Fed. 214, 67 C. C. A. 142; *United States v. Howard County*, 2 Fed. 1; *United States v. Judges of Scotland County*, 32 Fed. 714, *affd.* 140 U. S. 41, 35 L. ed. 351, 11 Sup. Ct. 697; *In re Copenhaver*, 54 Fed. 660; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. 1190; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. 398; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. 648; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Butz v. Muscatine*, 8 Wall. (U. S.) 575, 19 L. ed. 490; *Galena v. United States*, 5 Wall. (U. S.) 705, 18 L. ed. 560; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *State v. New Orleans*, 215 U. S. 170, 54 L. ed. 144, 30 Sup. Ct. 40.

³⁷ *Ludlow v. Peck & Co. Ventilating Co.*, 116 Ky. 608, 25 Ky. L. 831, 76 S. W. 377.

³⁸ *In re Copenhaver*, 54 Fed. 660; *United States v. Knox County*, 51 Fed. 880; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488; *Folsom v. Greenwood County*, 137 Fed. 449, 69 C. C. A. 473, *revd.* 130 Fed. 730; *Hammond v. Place*,

116 Mich. 628, 74 N. W. 1002, 72 Am. St. 543; *Broadfoot v. Fayetteville*, 124 N. Car. 478, 32 S. E. 804, 70 Am. St. 610; *Memphis v. Bethel* (Tenn.), 17 S. W. 191; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. 648; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. 398; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. 1190; *Fisk v. Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535, 18 L. ed. 403; *Galena v. United States*, 5 Wall. (U. S.) 705, 18 L. ed. 560; *Butz v. Muscatine*, 8 Wall. (U. S.) 575, 19 L. ed. 490; *Townsend Gas & Co. v. Hill*, 24 Wash. 469, 64 Pac. 778; *Eidemiller v. Tacoma*, 14 Wash. 376, 44 Pac. 877.

³⁹ *Board of Education v. State Board of Education*, 81 N. J. L. 211, 81 Atl. 163; *Attorney-General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. 27. The obligation of contracts of a municipality can not be impaired by the exercise by the state of its right to alter or destroy such corporation. *Graham v. Folsom*, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. 245. A state constitution as amended by a provision abolishing the corporation of certain townships was held void as

violation of the provision against impairment where a statute authorizing the reincorporation of municipalities requires a vote as to whether the new corporation shall assume the obligations of its predecessor.⁴⁰

The contract expressed by a municipal bond is the contract of the municipality and not of the petitioners for the issue of the bond. Hence, a change in the terms of the bonds by the issuance of refunding bonds can not be said to impair the obligation of a contract by a petitioner.⁴¹ And it seems that the principle is not so strictly construed in cases where the statute applies to public bonds held by another public corporation. Thus, it has been held that a statute which provided that municipal bonds should be redeemable at the pleasure of the municipal officers at any time after ten years did not, as between a township issuing the bonds and a county holding the same, impair the obligation of the contract as to bonds not maturing within ten years, on the theory that a public corporation could not acquire vested contract rights as to the time of maturity of bonds held by it against another public corporation.⁴² It has been held that a statute which validated certain school district warrants which before the enactment were absolutely void did not impair the obligation of contracts, this for the reason that it did not make the warrants relate back to the time of their issuance so as to give them priority over other obligations.⁴³ And it has been held that a statute which provided that interest should not be rendered against a county on county warrants or other evidence of county indebted-

against the previous bonded indebtedness of the townships. *Smith v. Walker*, 74 S. Car. 519, 54 S. E. 779.

⁴⁰ *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. 957.

⁴¹ *Haskell County v. National Life Ins. Co.*, 90 Fed. 228, 32 C. C. A. 591; *Pratt County v. Society for Savings*, 90 Fed. 233, 32 C. C. A. 596. Where the statute under which city water bonds were issued did not pledge the receipts of the city water department for

the payment thereof, a subsequent ordinance requiring the payment of such receipts into the general fund, and that the principal and interest of the bonds should be made subject to special appropriations, was held not to impair the obligations of the contract. *Sinclair v. Brightman*, 198 Mass. 248, 84 N. E. 453.

⁴² *Little River Township v. Reno County*, 65 Kans. 9, 68 Pac. 1105.

⁴³ *State v. Dorsey*, 19 Wash. 120, 52 Pac. 1065.

ness did not violate the constitutional prohibition.⁴⁴ The right of a bona fide purchaser of municipal bonds for value before maturity, and without notice of infirmity therein, to transfer them with all the rights with which he is vested, can not be impaired by subsequent statute.⁴⁵ It can not be claimed, however, that there was an impairment of the obligation by a statute where the purchaser of the municipal obligation took such obligation with knowledge of the right of the municipality to change its terms.⁴⁶ The rule that no statute can be enacted impairing the obligation of contracts "does not apply to dealing with a department of government concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public."⁴⁷

§ 2764. Laws affecting securities issued by the state.—The prohibition of the constitution applies to the contracts of the state and to those of its agents acting under its authority, as well as to contracts between individuals.⁴⁸ A state can no more impair by legislation the obligation of its own contracts than it can impair the obligation of the contracts of individuals.⁴⁹ On general questions of policy one legislature can not bind those which shall succeed it, but it is equally true that a legislature may make a contract which shall bind those which shall come after it.⁵⁰ When a state becomes a party to a contract, the same rules of law are applicable to her as to private persons in like circumstances.⁵¹ But a state may defeat the enforcement of its contract, for a state is incapable of being sued against its continuing consent.⁵² It may fail to make the necessary ap-

⁴⁴ *Read v. Mississippi County*, 69 Ark. 365, 53 S. W. 807, 86 Am. St. 202, *affd.* 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. 849.

⁴⁵ *Gamble v. Rural Independent School Dist.*, 132 Fed. 514, *revd.* 146 Fed. 113, 76 C. C. A. 539.

⁴⁶ *Board of Education of Leavenworth v. Phillips*, 67 Kans. 549, 73 Pac. 97, 100 Am. St. 475.

⁴⁷ *Board of Education of Leavenworth v. Phillips*, 67 Kans. 549, 73 Pac. 97, 100 Am. St. 475.

⁴⁸ *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395.

⁴⁹ *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. 545.

⁵⁰ *Woodruff v. Trapnall*, 10 How. (U. S.) 190, 13 L. ed. 383.

⁵¹ *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 477.

⁵² *Hans v. Louisiana*, 24 Fed. 55, *affd.* 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. 504.

propriation, in which case the courts are powerless to assist a party to enforce his contract against the state.⁵³ A state can not, under the guise of taxing its own population, relieve itself from what it has agreed to pay.⁵⁴ But the obligation of the state, evidenced by its bonds, is not impaired by the laws of another state taxing the bonds as the property of a resident of the latter state.⁵⁵ An act of the legislature requiring the state treasurer to make a call for valid outstanding state bonds for payment, and declaring that unless the bonds are presented within the time specified they shall be invalid, does not impair the obligation of contracts.⁵⁶ Nor is a joint resolution requiring the state treasurer to write off the books, as obligations of the state, certain past due bonds a law impairing the obligation of contracts.⁵⁷

§ 2765. Statutes relating to insolvency.—A state bankrupt or insolvent law discharging a person from debts contracted before such law is passed is void as impairing the obligation of contracts.⁵⁸ But such a law discharging a person from debts contracted after such law is passed has been held valid.⁵⁹ Therefore, to be effective as impairing the obligation of contracts, a statute must be one enacted after the making of the contract, the obligation of which is claimed to be impaired.⁶⁰ So, a discharge under a state bankrupt act can not affect debts contracted before the passage of the act, even if the act specifically provides for

⁵³ *Ristine v. State*, 20 Ind. 328; *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *Newell v. People*, 7 N. Y. 9.

⁵⁴ *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

⁵⁵ *Bonaparte v. Appeal Tax Court*, 104 U. S. 592, 26 L. ed. 845.

⁵⁶ *Tipton v. Smythe*, 78 Ark. 392, 94 S. W. 678, 7 L. R. A. (N. S.) 714.

⁵⁷ *Smith v. Jennings*, 67 S. Car. 324, 45 S. E. 821.

⁵⁸ *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Boardman v. De Forest*, 5 Conn. 1; *Schwartz v. Drinkwater*, 70 Maine 409; *Kimberly v. Ely*, 23 Mass. 440; *Betts v. Bagley*, 12 Pick. (Mass.) 572;

Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; *Olden v. Hallet*, 5 N. J. L. 466; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *Farmers' & Merchants' Bank v. Smith*, 19 U. S. 131, 5 L. ed. 37.

⁵⁹ *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Walsh v. Farrand*, 13 Mass. 19; *Lace v. Smith* (R. I.), 82 Atl. 268.

⁶⁰ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916; *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. 52.

such discharge.⁶¹ A creditor domiciled outside the state which grants a discharge under a state bankrupt act is not affected thereby unless he participates in the proceedings.⁶² And this is true even though the contract was made in the state where the discharge was given.⁶³ State bankrupt laws are suspended by the Federal Bankrupt Act of 1898, but an assignment for the benefit of creditors under a state act, made after the passage of the federal statute, is valid except on attack by the trustee in bankruptcy.⁶⁴

§ 2766. Statutes relating to preference of creditors.—

In nearly all of the states there are statutes intended to give certain creditors the right to priority of payment over other creditors of the same debtor. These statutes vary in their character and purpose. Such statutes are founded upon natural justice, and are for the protection of a peculiarly helpless and meritorious class of creditors, by giving them either a specific prior lien on the property of the debtor, or by securing to them priority of payment over all other claimants out of the proceeds of the debtor's property. Such statutes have been generally upheld by the courts.⁶⁵ Most of the cases attacking the constitutionality of these statutes raise the question as to the right of the legislature to give liens and priority of payment to laborers, subcontractors, and others having no direct contractual relation with the debtor, but the validity of the legislation

⁶¹ *Schwartz v. Drinkwater*, 70 Maine 409; *Elton v. O'Connor*, 6 N. Dak. 1, 68 N. W. 84, 33 L. R. A. 524; *Mather v. Bush*, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606.

⁶² *Security Savings & Trust Co. v. Rogers*, 6 Idaho 526, 57 Pac. 316; *Swift v. Winchester*, 96 Maine 480, 52 Atl. 1017, 90 Am. St. 414; *Haman v. Brennan*, 170 Mass. 405, 49 N. E. 655; *Pattée v. Paige*, 163 Mass. 352, 40 N. E. 108, 28 L. R. A. 451, 47 Am. St. 459; *Wilson v. Keels*, 54 S. Car. 545, 32 S. E. 702, 71 Am. St. 816; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. 134.

⁶³ *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237; *Pullen v. Hillman*, 84 Maine 129, 24 Atl. 795, 30 Am. St. 340; *Bedell v. Scruton*, 54 Vt. 493.

⁶⁴ *Armour Packing Co. v. Brown*, 76 Minn. 465, 79 N. W. 522; *Boese v. King*, 108 U. S. 379, 27 L. ed. 760, 2 Sup. Ct. 765.

⁶⁵ *Stern v. Simpson*, 62 Ala. 194; *Watson v. Johnson*, 33 Ark. 737; *Case v. Allen*, 21 Kans. 217, 30 Am. Rep. 425; *McMahon v. Lundin*, 57 Minn. 84, 58 N. W. 827; *Irwin v. Miller*, 72 Miss. 174, 16 So. 678; *Wooten v. Hill*, 98 N. Car. 48, 3 S. E. 846; *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303.

has been generally upheld.⁶⁶ Such statutes can not be said to impair the obligations of contracts because they operate only on contracts entered into subsequent to their enactment.⁶⁷ Nor are they invalid on the ground that they divest vested rights. It has generally been held that a legislature has power to regulate and control the priorities of all statutory liens which may be created after the declaration of the legislative will, and every contract is presumed to be entered into with reference to existing laws. The lien of a chattel mortgage, where the property remains in the possession and use of the mortgagor, or his assigns, is quite as much a creature of the statute as the preference or priority of payment secured to the laborer or employé by statutory enactment.⁶⁸ But liens which have attached to property, such as mechanics' liens, judgment liens, or mortgage liens, can not be divested by a subsequent statute, nor can their priority be affected.⁶⁹ Where there are two classes of creditors with already existing debts, a legislative act can not give to one class a preference, to the exclusion of the other class.⁷⁰ But where a party makes a contract with such valid statute before him, the law becomes a part of the contract and must be read into it.⁷¹

⁶⁶ *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283, 44 Am. St. 391; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Glacius v. Black*, 67 N. Y. 563; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

⁶⁷ *Jones v. Great Southern Fireproof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108, *revd.* 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. 690.

⁶⁸ *Langston v. Anderson*, 69 Ga. 65; *Small v. Hammer*, 156 Ind. 556, 60 N. E. 342; *Bass v. Doerman*, 112 Ind. 390, 14 N. E. 377; *Bell v. Hiner*, 16 Ind. App. 184, 44 N. E. 576; *St. Paul Title Ins. & Trust Co. v. Diagonal Coal Co.*, 95 Iowa 551, 64 N. W. 606; *Reynolds v. Black*, 91 Iowa 1, 58 N. W. 922; *Warren v. Woodard*, 70 N. Car. 382; *In re Hilderbrand's Appeal*, 39 Pa. St. 133.

⁶⁹ *Florence Gas &c. Co. v. Henby*, 101 Ala. 15, 13 So. 343; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. 137; *McFadden v. Blocker*, 2 Ind. Ter. 260, 48 S. W. 1043, 58 L. R. A. 878; *Shrigley v. Black*, 66 Kans. 213, 71 Pac. 301; *Blouin v. Ledet*, 109 La. 709, 33 So. 741; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. 1042; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. 715; *Garneau v. Mill Co.*, 8 Wash. 467, 36 Pac. 463.

⁷⁰ *Sun Mut. Ins. Co. v. Board of Liquidation*, 24 Fed. 4; *Commissioners for Liquidation of Atchafalaya R. & Bank Co. v. Bean*, 3 Rob. (La.) 414.

⁷¹ *Glacius v. Black*, 67 N. Y. 563; *Waters v. Wolf*, 162 Pa. St. 153, 29 Atl. 646, 42 Am. St. 815.

§ 2767. **Impairment of contracts by imposition of penalties.**—Generally speaking, the constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere.⁷² It follows that there is no impairment of a contract by the enactment of statutes which impose penalties on combinations and trusts organized before the enactment of the penal statute.⁷³ And it has been held that the legislature may declare the negligent breach of a pre-existing contract to be a criminal offense where the breach is in its nature prejudicial to the public good, though before it was only the subject of a suit for damages by the party injured.⁷⁴ The rule finds application in the case of statutes imposing penalties for the violation of duties by public utility corporations. "It is very generally settled that where a party agrees to furnish water to a city, or the inhabitants thereof, by a contract, he assumes a public duty; and we are of opinion that a wilful violation or neglect of a public duty, although growing out of contract, may be declared a misdemeanor and punishable as such, without impairing the obligation of the contract."⁷⁵ It has been held that there was no impairment of the obligation of a contract within the prohibition of the constitution by a statute which imposed a penalty on a tenant who, after breach of the lease and notice to quit, wrongfully continued in possession of the premises. The penalty in such a case was not imposed for the violation of the terms of the lease, but for the wrongful act in holding possession after notice to quit.⁷⁶

⁷² *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; *Blann v. State*, 39 Ala. 353, 84 Am. Dec. 788; *Brown v. Penobscot Bank*, 8 Mass. 445; *State v. Heger*, 194 Mo. 707, 93 S. W. 252; *Washington Toll Bridge Co. v. Beaufort County*, 81 N. Car. 491; *State v. Missouri & C. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783; *Western Union Tel. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934.

⁷³ *State v. Missouri & C. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783; *State v. Missouri, K. & T. R. Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783.

⁷⁴ *Blann v. State*, 39 Ala. 353, 84 Am. Dec. 788; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

⁷⁵ *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723.

⁷⁶ *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

§ 2768. Betterment laws not impairment of conveyances.

There is substantial agreement in the decisions to the effect that betterment laws which require the reimbursement of bona fide holders of lands by the actual owners of the title for improvements placed on such lands do not effect the impairment of contracts within the meaning of the constitution.⁷⁷ Such a law "does not impair the obligation of any contract between the owner and his grantor, or between the state and the owner. It interferes with no legal title. It interferes with and is an abridgement of the right to the immediate possession and beneficial enjoyment of property, as that right existed at common law, and, to that extent, impairs the interest which owners formerly had in lands. It can not be said to be an unjust or unreasonable limitation of the common-law right of possession, but, on the contrary, the provisions are reasonable."⁷⁸

§ 2769. Effect of scaling laws.—"Scaling laws" is a term applied to certain statutes, now obsolete, whereby a process of adjusting the difference in value between depreciated paper money and specie was established. During our late Civil War many contracts were made providing for payment in confederate currency. During the progress of that war this currency greatly depreciated in value or purchasing power, and when peace was declared it became worthless, and ceased to be current; but contracts made upon its purchasable quality existed in large numbers throughout the insurgent states. It was, therefore, manifest that if these contracts were to be enforced with anything like justice to the parties, evidence must be received as to the value of the currency at the time and in the locality where

⁷⁷ *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Griswold v. Bragg*, 48 Fed. 519; *Bacon v. Callender*, 6 Mass. 303; *Withington v. Corey*, 2 N. H. 115; *Lumb v. Pinckney*, 21 S. Car. 471; *Cahill v. Benson*, 19 Tex. Civ. App. 30, 46 S. W. 888; *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. (U. S.) 105, Fed. Cas. No. 13156; *Jackson v. Lamphire*, 3 Pet. (U. S.)

280, 7 L. ed. 679; *Curtis v. Whitney*, 13 Wall. (U. S.) 68, 20 L. ed. 513; *Albee v. May*, 2 Paine (U. S.) 74, Fed. Cas. No. 134; *Brown v. Storm*, 4 Vt. 37; *Whitney v. Richardson*, 31 Vt. 300; *Pacquette v. Pickness*, 19 Wis. 219. But see, *Nelson v. Allen*, 1 Yerg. (Tenn.) 360.

⁷⁸ *Griswold v. Bragg*, 48 Fed. 519.

the contracts were made. A number of the southern states, notably North Carolina and Virginia, enacted laws which allowed the court or jury trying a cause based upon such contract to place their own judgment upon the value of the contract in suit, and did not require them to take the value stipulated by the parties. Such statutes have been construed as sanctioning the impairment of contracts, which is not within the competency of a state legislature.⁷⁹ But some courts have held that statutes permitting parties to such contracts to introduce evidence of the true value and character of the consideration are not unconstitutional as impairing contract obligations.⁸⁰ The Supreme Court of the United States has repeatedly held that a contract, made within the insurgent states during the Civil War, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in confederate currency; and, if that fact is shown in an action upon the contract, no more can be recovered than the value of that currency in lawful money of the United States.⁸¹ A mutual benefit association which has absolutely promised to pay two thousand dollars on the death of a member in good standing can not, by by-law subsequently enacted, scale its obligation on such certificate one-half.⁸²

§ 2770. Withdrawal of personal exemption from public service as impairment.—Statutes and charters exempting certain classes of men from duty to render jury service while the beneficiaries are members of fire and militia com-

⁷⁹ *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. 179; *Wilmington & W. R. Co. v. King*, 91 U. S. 3, 23 L. ed. 186.

⁸⁰ *Kirtland v. Molton*, 41 Ala. 548; *Fath v. Bliss*, 43 Ala. 512; *Slaughter v. Culpepper*, 35 Ga. 25; *Rutland v. Copes*, 15 Rich. Law (S. Car.) 84.

⁸¹ *Rives v. Duke*, 105 U. S. 132, 26

L. ed. 1031; *Thorington v. Smith*, 8 Wall. (U. S.) 1, 19 L. ed. 361; *Wilmington & W. R. Co. v. King*, 91 U. S. 3, 23 L. ed. 186. But see, dissenting opinion of Mr. Justice Bradley in *Wilmington & W. R. Co. v. King*, 91 U. S. 3, 23 L. ed. 186.

⁸² *Bornstein v. District Grand Lodge*, 2 Cal. App. 624, 84 Pac. 271.

panies are generally regarded as conferring mere personal privileges which may be recalled. These provisions do not, as a general rule, reach the dignity of contracts.⁸³ It has been held, however, that a statute passed by one of the states during the Civil War which exempted from civil process all persons who had enrolled or might enroll themselves as members of any military company, mustered into the service of the United States or the state during their service, amounted to an impairment of the obligation of contracts, and was therefore void.⁸⁴

§ 2771. **Statutes relating to insurance.**—The charter of an insurance company is a contract which the state, under the constitutional inhibition against impairing obligation of contract, is bound to respect; but the power is inherent in every state to make such reasonable regulation concerning the general conduct of its affairs as the legislature, acting within the constitutional limitations, may from time to time prescribe.⁸⁵ Thus, a statute requiring insurance companies annually or on demand to furnish to the state superintendent of insurance or other proper officer a statement of their condition does not impair the obligation of the contract arising from a charter between the state and a company chartered previously to the passage of the act, and therefore is not unconstitutional.⁸⁶ A statute providing that foreign insurance companies carrying on business in a state shall be subject to the laws of the state and that an insurance policy issued by a foreign company to a citizen of the state shall be a contract of the state was held

⁸³ *Bloom v. State*, 20 Ga. 443; *In re Powell*, 5 Mo. App. 220. See also, *Gatlin v. Walton*, 60 N. Car. 325. But see, *Ex parte Goodin*, 67 Mo. 637.

⁸⁴ *Hasbrouck v. Shipman*, 16 Wis. 296.

⁸⁵ *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82, *affd.* 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681; *People v. State Ins. Co.*, 19 Mich. 392; *State v. Matthews*, 44 Mo. 523; *State v. Eagle*

Ins. Co., 50 Ohio St. 252, 33 N. E. 1056, *affd.* 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681.

⁸⁶ *State v. Matthews*, 44 Mo. 523; *State v. Eagle Ins. Co.*, 50 Ohio St. 252, 33 N. E. 1056, *affd.* 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681.

not to impair the obligations of contracts.⁸⁷ Under the reserved power of a state to alter or repeal statutes granting corporate charters, a statute authorizing an insurance company organized under the co-operative plan under the general law to reorganize under a new name, as a mutual level premium company, without the consent of its members, was held not invalid as impairing the obligation of contracts.⁸⁸ Also it has been held that a change by an insurance company from the assessment plan to the old line plan of insurance does not constitute an impairment of the obligation of contracts with prior members, no attempt being made to repudiate the contract of such members, and assessments levied thereon not being unreasonable.⁸⁹ Yet a statute imposing penalties on insurance companies for failure to pay losses within a certain time after receipt of proof of loss was held to impair the obligation of contracts, if construed to apply to policies issued prior to the taking effect of the statute.⁹⁰ But a statute which deals with remedies, such as the furnishing of proof of loss by insured persons, and fixing the penalty for nonpayment of the loss, within the time fixed by statute, was held not to impair the obligation of the contract.⁹¹ A statute repealing a former act declaring that suicide of a policyholder shall not be a defense is unconstitutional as impairing the obligations of contracts, if construed so as to destroy the protective provisions of policies issued prior to the enactment of the repealing statute.⁹² A statute exempting benefit associations from the provisions of the general insurance laws was held not to impair the obligation of a contract of a beneficiary in a certificate issued prior to the enactment of the statute.⁹³

⁸⁷ *Ownes v. Bankers' Life Ins. Co.*, 84 S. Car. 253, 66 S. E. 290, 137 Am. St. 845.

⁸⁸ *Polk v. Mutual Reserve Fund Life Assn.*, 207 U. S. 310, 52 L. ed. 222, 28 Sup. Ct. 65.

⁸⁹ *Iversen v. Minnesota Mut. Life Ins. Co.*, 137 Fed. 268.

⁹⁰ *Central Glass Co. v. Niagara Fire Ins. Co. (La.)*, 59 So. 972; *Snyder v. Supreme Ruler of Fraternal*

Mystic Circle, 122 Tenn. 248, 122 S. W. 981.

⁹¹ *Monteleone v. Seaboard Fire & Marine Ins. Co.*, 126 La. 807, 52 So. 1032.

⁹² *Modern Brotherhood of America v. Lock (Colo.)*, 125 Pac. 556. But see post, § 2773, n. 17.

⁹³ *Westerman v. Supreme Lodge K. P.*, 196 Mo. 670, 94 S. W. 470, 5 L. R. A. (N. S.) 1114.

§ 2772. **Change in method of payment of wages.**—Statutes regulating the method in which employes are to be paid have usually been held valid.⁹⁴ Thus, under the power reserved to the state in its constitution, it has been held that the legislature has the power to enact a statute requiring the weekly payment of wages in cash by all corporations, except steam railroads, which are required to pay semimonthly.⁹⁵ Also, under the power reserved to the legislature to amend laws applicable to the charters of steam railroad companies, a statute providing for the payment of weekly wages by practically all corporations except steam railroads, which are required to pay wages semimonthly, was held not to impair the obligation of contracts.⁹⁶ But there are cases holding such statutes invalid.⁹⁷ These statutes usually apply only to manufacturing or mining concerns, and on that account are sometimes held invalid for unreasonable discrimination.⁹⁸ But statutes regulating the time at which wages must be paid are generally held to be invalid.⁹⁹ On the other hand, statutes of this type have been held valid, even if certain societies or corporations are excepted from their operation.¹ It has been held that a statute providing that every person or corporation operating a steam surface railroad shall pay its employes semimonthly, while other employers are required to pay weekly, is a valid exercise

⁹⁴ *Shinner v. Garnett Gold-Min. Co.*, 96 Fed. 735; *Hanacock v. Yandén*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. 1; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

⁹⁵ *New York Cent. & H. R. R. Co. v. Williams*, 136 App. Div. (N. Y.) 904, 120 N. Y. S. 1137.

⁹⁶ *New York Cent. & H. R. R. Co. v. Williams*, 64 Misc. (N. Y.) 15, 118 N. Y. S. 785.

⁹⁷ *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492n; *State v. Haun*, 61 Kans. 146, 59 Pac. 340, 47 L. R. A. 369; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Godcharles v.*

Wigeman, 113 Pa. St. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. Rep. 863.

⁹⁸ *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.

⁹⁹ *Leep v. St. Louis & C. R. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. 109; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136.

¹ *New York Cent. & H. R. R. Co. v. Williams*, 136 App. Div. (N. Y.) 904, 120 N. Y. S. 1137, affg. 64 Misc. (N. Y.) 15, 118 N. Y. S. 785; *State v. Brown Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856.

of the police power.² Nor, according to such ruling, is such an act rendered invalid, as interfering with existing contracts, by reason of the fact that substantially all the employes of the railway company were in its employ prior to its adoption, and were aware of the company's rules of paying them monthly; nor is it invalid as an unwarranted interference with the freedom of contract.³ But it has been held that a statute requiring other corporations, companies or associations doing business in the state to make full settlement with, and pay in money, their employes engaged in manual or mechanical labor at least once in each calendar month, in the absence of a written agreement to the contrary, and providing a penalty, imposes a burden upon the corporations, companies and associations which was not imposed upon individuals, and is in violation of the fourteenth amendment of the federal constitution.⁴ It is generally held that if such statutes inhibit the employers and employes from contracting with reference to the payment of wages for a longer or shorter term than that mentioned in the statute, they are unconstitutional.⁵ Nearly all legislation is special, in one sense, either in the object sought to be attained or in its application to classes. And the general rule is that the legislature does not infringe the constitutional right of equal protection where all persons, whether natural or artificial, of such class, shall be treated alike under like circumstances and conditions.⁶ It is sometimes urged that such statutes are

² New York Cent. & H. R. R. Co. v. Williams, 64 Misc. (N. Y.) 15, 118 N. Y. S. 785.

³ New York Cent. & H. R. R. Co. v. Williams, 64 Misc. (N. Y.) 15, 118 N. Y. S. 785.

⁴ Smith v. Ohio Oil Co., 43 Ind. App. 735, 86 N. E. 1027.

⁵ Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; Republic & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. 765; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; San Antonio & A. P. R. Co. v. Wilson

(Tex. Civ. App.), 19 S. W. 910; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. 385; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. 499; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. Rep. 863.

⁶ Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. 1161; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 9 Sup. Ct. 281; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 20, 41 L. ed. 618, 17 Sup. Ct. 243; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315.

invalid because they restrict the rights of employers and employés to contract with each other. But it is the established doctrine of the law that the liberty of contract is not absolute but, on the other hand, is subject to restrictions imposed by the legislative branch of the government in the exercise of its power to promote the safety, health and welfare of the people. So, when the legislature speaks in the exercise of its powers to legislate, it thereby discloses what is the public policy, and any contract made which is opposed to public policy is void. Therefore, any contract that might be voluntarily entered into between persons or corporations and their employés, within the purview of the legislative enactment, for the payment of wages at a longer period than semimonthly, would be void, and could not deprive the employé of his right to request or demand the payment of his wages semimonthly.⁷ In Pennsylvania it is held that an act requiring every individual, firm, association or corporation employing wage earners, skilful or ordinary, laborers engaged at manual or clerical work, in the business of mining or manufacturing, or any employment to make semimonthly payment of wages in lawful money of the United States, violates the constitutional provision against the passage of laws impairing the obligation of contracts.⁸ Also, it is held in Indiana that a statute requiring every person, company, corporation or association employing any person to labor, or in any other service for hire, to make weekly payments for the full amount due therefor, is not within the police power of the state and deprives citizens of their liberty of contract and their property without due process of law.⁹

§ 2773. Statutes affecting defenses and parties.—A legislature can not create a new defense not permitted by law at the time the contract was entered into. Thus, it is held

⁷ Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255n, 140 Am. St. 103.
⁸ Commonwealth v. Isenberg, 4 Pa. Dist. 579, 8 Kulp (Luz. Leg. Reg.) 116.
⁹ Republic &c. Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136.

that a state bankruptcy law permitting discharge from liabilities of debtors is invalid as to past debts.¹⁰ Where the contract of a married woman is void at the time it is entered into, a subsequent statute requiring her to set up her defense of coverture is not unconstitutional as taking away a vested right.¹¹ But an act will be unconstitutional which declares that certain facts shall be a defense on previously existing contracts.¹² However, it is held that an act providing that a surety may plead any defense of which the principal may have availed himself, though construed as retrospective, is not unconstitutional as impairing the obligation of contracts for the reason that it relates to the remedy only.¹³ A statute giving a defendant, in a suit to foreclose a mortgage, nine months in which to file an answer was held valid, as it simply gave to the defendant an enlarged time for answering, leaving the remedy of the plaintiff in all other respects just as it existed under the previous law.¹⁴ It has been held that a statute taking away the defense of assumption of risk in a certain class of actions under certain conditions is unconstitutional as impairing the obligation of contracts.¹⁵ But a contrary opinion has been held in actions against railroad companies where the railroad company knew of the defect or was notified by the employé of the defect.¹⁶ So, also, a statute taking away the defense of suicide in actions against insurance companies has been held not unconstitutional as impairing the obligation of contracts.¹⁷ It is always within the power of a state legislature to regulate the modes of proceeding in the courts, in relation to past, as well as future con-

¹⁰ *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Union Bank v. Rugg*, 78 Minn. 256, 80 N. W. 1121; *Elton v. O'Connor*, 6 N. Dak. 1, 68 N. W. 84, 33 L. R. A. 524; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579.

¹¹ *Howard v. Gibson*, 22 Ky. L. 1294, 60 S. W. 191; *Turner v. Gill*, 105 Ky. 414, 20 Ky. L. 1253, 49 S. W. 311.

¹² *Cornell v. Hichens*, 11 Wis. 353.
¹³ *Flagg v. Locke*, 74 Vt. 320, 52 Atl. 424.

¹⁴ *Webb v. Moore*, 25 Ind. 4.

¹⁵ *El Paso & S. W. Co. v. Foth*, 101 Tex. 591, 100 S. W. 171, 105 S. W. 322.

¹⁶ *Missouri, K. & T. R. Co. v. Bailey (Tex.)*, 115 S. W. 601.

¹⁷ *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 112 Pac. 49. But see ante, § 2771, n. 92.

tracts.¹⁸ Thus, it has been held that a statute providing that a suit against the stockholders of an insolvent bank shall be prosecuted only in the name of the receiver is not unconstitutional as impairing the obligation of contracts where such statute amended a law giving the creditors of an insolvent bank the right to one suit against all stockholders by one creditor for the benefit of himself and all other creditors.¹⁹ Also, a statute, requiring that the sureties on an administrator's bond be made parties to a proceeding for voluntary accounting and for judgment on the bond which was executed before the statute was enacted has been held only to affect the procedure and does not impair the obligation of the contract.²⁰ And a statute authorizing the holder of a note to sue in his own name on a guaranty of collection endorsed on it is held to apply to guaranties existing at the time of its enactment as well as to the future guaranties.²¹ Also, statutes which change the rule as to parties necessary to the determination of a controversy may take effect upon prior, as well as subsequent, contracts and the actions arising thereon.²² An act of the legislature which authorizes a suit against the personal representative of a deceased joint debtor before obtaining judgment against the surviving debtor, the prior law making the debt in legal effect joint and several, but providing that the surviving debtor must be sued first, is clearly a change of remedy only and has been held valid.²³ On the other hand, a statute which, under cover of a change of parties, changes a claim against one party into numerous claims against several parties is invalid.²⁴

§ 2774. Statutes relating to pleadings and changes in

¹⁸ *Ralston v. Lothain*, 18 Ind. 303; *Hoa v. Lefranc*, 18 La. Ann. 393.

¹⁹ *Persons v. Gardner*, 42 App. Div. (N. Y.) 490, 26 Misc. (N. Y.) 663, 56 N. Y. S. 822, *affd.* 42 App. Div. (N. Y.) 490, 59 N. Y. S. 463.

²⁰ *Cookman v. Stoddard*, 132 App. Div. (N. Y.) 485, 116 N. Y. S. 901, *affd.* 200 N. Y. 563, 93 N. E. 1118.

²¹ *Waldron v. Haring*, 28 Mich. 493.

²² *Tompkins v. Forrestal*, 54 Minn. 119, 55 N. W. 813.

²³ *Island Savings Bank v. Galvin*, 20 R. I. 347, 39 Atl. 196.

²⁴ *Dyett v. Hyman*, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. 533.

law of evidence.—It may be stated, as a general rule, that whatever belongs merely to the remedy may be altered according to the laws of the state, provided the alteration does not impair the obligation of the contract.²⁵ If the legislature sees fit to change the law as to the manner of pleading either at law or in equity or in any summary or analogous proceeding and the statute takes effect before the defense is made, the party must conform to the new rule and he can not complain of having been deprived of a vested right.²⁶ And, where a statute regulating the foreclosure of mortgages by proceedings in equity gave the defendant nine months in which to file an answer, it was held valid, as it simply gave to the defendant an enlarged time for answering, leaving the remedy of the plaintiff in all other respects just as it existed under the previous law.²⁷ Also, an act requiring certain defenses to be specifically pleaded, such as coverture, affects the remedy only and does not impair the obligation of pre-existing contracts.²⁸ It was held in Maryland that an act requiring one who relies upon a certain usury statute to specially plead it and set up in his plea the sum actually due, with legal interest, was not unconstitutional as impairing the obligation of contracts.²⁹ It has been held, however, that any statute which prevents the enforcement of a contract or which materially abridges the remedy for enforcing it which existed at the time the contract was made is unconstitutional as impairing the obligation of contracts.³⁰ Laws which change the rules of evidence relate to the remedy only and the law which establishes a rule of evidence respecting certain past transactions can not ordinarily be said to impair the obligation of contracts.³¹ The fact that no person has

²⁵ *Ex parte Pollard*, 40 Ala. 77; *Bronson v. Kinzie*, 1 How. (U. S.) 311, 11 L. ed. 143; *Richardson v. Cook*, 37 Vt. 599, 88 Am. Dec. 622.

²⁶ *Lockett v. Usry*, 28 Ga. 345.

²⁷ *Webb v. Moore*, 25 Ind. 4.

²⁸ *Howard v. Gibson*, 22 Ky. L. 1294, 60 S. W. 491.

²⁹ *Grinder v. Nelson*, 9 Gill (Md.) 299, 52 Am. Dec. 694.

³⁰ *Cooper v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. 972, revg. *Cooper v. Commonwealth*, 85 Va. 528, 8 S. E. 247; *Bronson v. Kenzie*, 42 U. S. 311, 11 L. ed. 143; *Woodruff v. Trapnall*, 10 How. (U. S.) 190, 13 L. ed. 383.

³¹ *Herbert v. Easton*, 43 Ala. 547; *Tabor v. Ward*, 83 N. Car. 291; *Rich v. Flanders*, 39 N. H. 304; *Howard*

a vested right in the rules of evidence is universally recognized by the courts.³² Hence, the law concerning the competency of witnesses in force at the time of the trial, and not that in force when the contract was entered into, controls.³³ But in some cases changes in the law of evidence, making admissible evidence which before was inadmissible, are held to impair the obligation of contracts as to a party prejudiced thereby. Thus, it has been held that a statute providing that oral evidence is admissible to identify land insufficiently described in a written contract within the statute of frauds can not apply to a prior contract.³⁴ Also, where a physician was incompetent to testify as to knowledge acquired by him in a professional capacity, a subsequent statute making him competent has been held not to apply to pre-existing contracts.³⁵ So, also, an unreasonable change in the rules of evidence has been held void if applicable to pre-existing contracts.³⁶ In case a subsequent statute makes it impossible to prove a material fact, which under the law of evidence in force when the contract right was acquired could have been proved, it impairs the obligation of such prior contract.³⁷ By the weight of authority, a presumption which was conclusive when the contract right was acquired may be modified by statute so as to be *prima facie* only.³⁸ It has been held that the contract clause of the federal constitution was not violated by a statute making the entry on the official record of fore-

v. Moot, 64 N. Y. 262; Henry v. Henry, 31 S. Car. 1, 9 S. E. 726. See also, United States v. Luria, 184 Fed. 643.

³² Bannon v. Burnes, 39 Fed. 892; Immergart v. Gorgas, 41 Iowa 439; Morrill v. Douglass, 17 Kans. 291; In re Douglas, 41 La. Ann. 765, 6 So. 675; Virden v. Bowers, 55 Miss. 1; O'Bryan v. Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. 595; Raley v. Guinn, 76 Mo. 263; Callanan v. Hurley, 93 U. S. 387, 23 L. ed. 931; Brown v. Slauson, 23 Wis. 244.

³³ Walthall v. Walthall, 42 Ala. 450; Wormley v. Hamburg, 40 Iowa 22; O'Bryan v. Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. 595.

³⁴ Lowe v. Harris, 112 N. Car. 472, 17 S. E. 539, 22 L. R. A. 379.

³⁵ Davis v. Supreme Lodge Knights of Honor, 165 N. Y. 159, 58 N. E. 891.

³⁶ Davis v. Supreme Lodge Knights of Honor, 165 N. Y. 159, 58 N. E. 891; McGahey v. Virginia, 135 U. S. 662, 685, 34 L. ed. 304, 135 U. S. 662.

³⁷ Texas-Mexican R. Co. v. Locke, 74 Tex. 370, 12 S. W. 80.

³⁸ Harris v. Harsch, 29 Ore. 562, 46 Pac. 141. Contra, Tracy v. Reed, 13 Sawy. (U. S.) 622, 38 Fed. 69, 2 L. R. A. 773; Smith v. Cleveland, 17 Wis. 556.

closure to school land for default in payment prima facie evidence that the preliminary steps to the foreclosure were properly taken.³⁹ A statute relating to acknowledgments and providing that an officer's certificate need only state that the instrument was acknowledged before him, and the date thereof, was held to establish only a rule of evidence and not to impair the obligations of contracts in so far as it affected a cure of defective acknowledgments of married women.⁴⁰ And a statute requiring four months' notice of a purchase of land, at a delinquent tax sale, to the person in whose name the land stood at the time of the sale, was held not to impair the obligation of the contract, even if it applied to a sale made prior to the enactment of the statute which effected a change in the existing law.⁴¹ A statute requiring that a life insurance policy make reference to the application of the insured or that the files of the insurance company shall have a correct copy thereof attached thereto, otherwise it shall not be received in evidence, applies to rules and regulations that might thereafter be enacted and is not, for that reason, invalid as impairing the obligation of contracts.⁴²

³⁹ *Reitler v. Harris*, 223 U. S. 437, 136 S. W. 907, 34 L. R. A. (N. S.) 56 L. ed. 497, affg. 80 Kans. 148, 102 Pac. 249. See also, note to *Mobile R. Co. v. Turnipseed*, (219 U. S. 135) in Ann. Cas. 1912A 463, 465.

⁴⁰ *Eckles v. Wood*, 143 Ky. 451, 113 S. E. 749.

⁴¹ *Kelly v. Gwatkin*, 108 Va. 6, 60 S. E. 749.

⁴² *Supreme Lodge K. of P. v. Hunziker*, 27 Ky. L. 1201, 87 S. W. 1134.

CHAPTER LVIII.

EXTENT AND LIMITS OF POLICE POWER OVER CONTRACTS.

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§ 2775. **General nature.**—The true police power, as a general rule, does not produce a mental concept of a subject with well-defined and clear-cut limits. Instead, the meaning of the term is vague. A discussion of the general nature of the police power does not come within the scope of a work on contracts. It may be properly said, however, that the police power is a legislative power under which the public welfare is secured and promoted by the maintenance of safety and order; the advancement of the economic, moral, intellectual, aesthetic and political interests of the state and those under its control by such wholesome

and reasonable legislation, either with or without penalties, as is not repugnant to the constitution. It may be resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.¹ It is much easier to perceive and realize the existence and sources of the police power than to mark its boundaries or prescribe limits to its exercise. This power is, and, because of its very nature, must continue, incapable of any very exact definition or limitation.² It has been said that the police powers of a state are nothing more or less than the powers of the government inherent in every sovereignty to the extent of its domains. The police power is, in short, the power to govern men and things within the limits of the state.³ It extends to the control of things which, when used in a lawful and proper manner, are subjects of property and commerce and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals.⁴ The police power is inherent in the states, reserved to them by the constitution, save in exceptional cases, and necessary to their existence as organized governments.⁵

¹ *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383. See also, *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

² *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. 818; *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. ed. 394. See also, *Ives v. South Buffalo R. Co.* (N. Y.), 94 N. E. 431. It is "easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate." *New Orleans Gas Light Co. v. Louisiana &c. Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516.

³ *License Cases*, 5 How. (U. S.) 504; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *People v. Rosenberg*, 67 Hun. (N. Y.) 52, 22 N. Y. S. 56, 51 N. Y. St. 189, revd. 138 N. Y. 410, 34 N. E. 285; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 42 L. ed. 858, 19 Sup. Ct. 565.

⁴ *Teisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. 681.

⁵ *Reeves v. Corning*, 51 Fed. 774; *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; *Rochester v. West*, 29 App. Div. (N. Y.) 125, 51 N. Y. S. 482, affd. 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. 659; *State v. Fitzpatrick*, 16 R. L. 54, 11 Atl. 767; *Teisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. 681.

§ 2776. **General nature illustrated.**—Most of the legislation enacted under the police power in the interest of the public health, morals, safety or welfare affects the law of contracts only remotely. Only illustrations will be given which have a direct bearing on the subject of contracts. Under the police power the legislature may prohibit the sale of adulterated milk,⁶ and it may regulate and control the sale of intoxicating liquors.⁷ It has been held that, in the interest of the public welfare, the exclusive privilege of supplying the common schools of the state with textbooks of a specified character and price may be granted to certain persons.⁸ Under this power the business of those engaged in selling farm products and farm produce on commission may be regulated.⁹ A law which is not passed merely as a revenue measure, but as a protection to the public, by which hawkers and peddlers are required to obtain a license, is an exercise of the police power.¹⁰ It has also been held that a statute providing that one buying or selling cotton in the seed, in an amount less than that usually bailed, must reduce the sale to writing and deliver it to the nearest justice of the peace is a proper exercise of the police power, since it has for its object the prevention of fraud.¹¹

§ 2777. **Proper exercise not prohibited.**—Instead of a proper exercise of the police power being prohibited, there is general agreement to the effect that the constitution presumes the existence of police power and is to be con-

* *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360.

¹ *Territory v. O'Connor*, 5 Dak. 397, 41 N. E. 746, 3 L. R. A. 355; *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 51 N. E. 389; *Territory v. Guyot*, 9 Mont. 46, 22 Pac. 134; *In re Flake* (Tex. Civ. App.), 149 S. W. 146; *United States v. Sandoval*, 167 U. S. 278, 42 L. ed. 168, 17 Sup. Ct. 868; *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089, *affd.* 168 U. S. 262, 42 L. ed. 461, 18

Sup. Ct. 80; *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407.

⁶ *Bancroft v. Thayer*, 5 Sawy. (U. S.) 502, Fed. Cas. No. 835.

⁷ *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. 681.

⁸ *State v. Wheelock*, 95 Iowa 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. 442; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12, *revd.* 154 U. S. 626 appendix, 23 L. ed. 1009, 14 Sup. Ct. 1206.

¹¹ *State v. Moore*, 104 N. Car. 714, 10 S. E. 143, 17 Am. St. 696.

strued accordingly.¹² The rights secured to the people by the constitution are not understood as interfering with the power of the state to pass such laws as are reasonably necessary to protect the health and safety of society in general.¹³ The police power of a state pervades every department of business and reaches to every interest and every subject of profit or enjoyment.¹⁴ As will be seen in the immediately succeeding section, the police power can not be contracted away, and the state would be remiss in its duty if it failed to properly exercise its police power.¹⁵

§ 2778. Police power can not be contracted away.—Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there is no doubt that the legislature can not by any contract divest itself of the power to exercise its police power.¹⁶ The police power is incapable of alienation.¹⁷ Subjects properly within the police power belong to that class of objects

¹² *Carthage v. Fredrick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. 490.

¹³ *Deems v. Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541, 45 Am. St. 339.

¹⁴ *Mosley v. Walker*, 7 B. & C. 40; *State v. Webster*, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212; *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. 645.

¹⁵ *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345, citing *Cooley's Const. Lim.* (5th ed.) page 706.

¹⁶ *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273, and cases cited; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

¹⁷ *In re Westbrook's Appeal*, 57 Conn. 95, 17 Atl. 368; *Bulkley v. New York & C. R. Co.*, 27 Conn. 479; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep.

71; *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84; *Jones v. Galena & C. U. R. Co.*, 16 Iowa 6; *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Brimmer v. Boston*, 102 Mass. 19; *Detroit v. Fort Wayne & E. R. Co.*, 90 Mich. 646, 51 N. W. 688; *Horn v. Atlantic & St. L. R. R. Co.*, 35 N. H. 169; *Fielders v. North Jersey St. R. Co.*, 67 N. J. L. 76, 50 Atl. 533, revd. 68 N. J. L. 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. 552; *State v. Hoboken*, 41 N. J. L. 71; *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; *People v. Geneva & C. Trac. Co.*, 112 App. Div. (N. Y.) 581, 98 N. Y. S. 719, affd. in 186 N. Y. 516, 78 N. E. 1109; *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360; *New Orleans Gas Light Co. v. Louisiana Light & C. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Thorpe v. Rutland & C. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

which demand the application of the maxim, *salus populi suprema lex*; and this is to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can be no more bargained away than the power itself.¹⁸ No legislature can curtail the power of its successors to make such laws as they may deem proper in matters involving an exercise of the police power.¹⁹ This principle strips a person of the right to enter into a contract impairing the power which the state has and must have for the maintenance of peace and safety and the protection of health and morals. If it were otherwise one who apprehended that a police regulation might be enacted affecting property owned by him might, by entering into a contract inconsistent with the enforcement of such an enactment prior to its passage, nullify its effect.²⁰ Where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the state legislature chooses to exercise it.²¹ The doctrine that a municipality does not have the right to license the use of a part of the street or public highway, or other public property, without such authority having been delegated to it by the legislature, is based on the theory that the granting of such a right amounts to a surrender and breach of the duty of the municipality to exercise a continuing control over streets and other public property for the benefit of the public generally.²² On the same principle the state can not by its own act enter into a contract or grant an irrevocable liquor license which will hamper or bind subsequent legislatures in the exercise of the state's police power over the liquor

¹⁸ *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

¹⁹ *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Butchers' Union Slaughterhouse & Live Stock Landing Co. v. Crescent City &c. Slaughter House Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. 652.

²⁰ *People v. Hawley*, 3 Mich. 330.

²¹ *State v. Smith*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759; *State v. Hoskins*, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759.

²² *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186n. Compare with, *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. 893, *affd.* 145 U. S. 175, 36 L. ed. 666, 2 Sup. Ct. 880.

traffic.²³ The surrender or alienation of the police power would lead to disastrous consequences, and any attempt to surrender or alienate this power, or to fetter it so as to impair its usefulness, would undoubtedly be declared void. The state may, however, delegate its police power in a sense to municipal corporations.²⁴

§ 2779. Limitations on its exercise.—Section 10, article 1, of the Constitution of the United States provides that: “No state shall * * * pass any * * * law impairing the obligation of contracts.” Article 5 of the amendments to the constitution provides that no person shall be deprived of his property without due process of law, and article 14 of the amendments strengthens and adds to article 5 by providing that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” That clause of article 1, section 8, which gives congress power to regulate commerce with foreign nations and among the several states and with the Indian tribes, imposes a very real restriction on the power of the state to pass laws relating to articles of interstate commerce. That clause in the constitution which prohibits the enactment of a law impairing the obligation of contracts is a specific limitation on laws disguised as police legislation with reference to contracts. The other parts of the federal constitution mentioned affect only, in a general way, the police power. In fact, it is difficult to see how that part of the constitution which guarantees

²³ Powell v. State, 69 Ala. 10; Brown v. State, 82 Ga. 224, 7 S. E. 915; Melton v. Moultrie, 114 Ga. 462, 40 S. E. 302; McKinney v. Salem, 77 Ind. 213; Columbus City v. Certcomp, 61 Iowa 672, 17 N. W. 47; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Calder v. Kurby, 5 Gray (Mass.) 597; Pleuler v. State, 11 Nebr. 547, 10 N. W. 481; State v. Holmes, 38 N. H. 225; Metropol-

itan Board of Excise v. Barrie, 34 N. Y. 657. See, however, Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376; Hirn v. State, 1 Ohio St. 15.

²⁴ State v. New Brunswick, 30 N. J. L. 395, 32 N. J. L. 548; Chambersburg v. Manko, 39 N. J. L. 496; Elmendorf v. Albany, 17 Hun. (N. Y.) 81.

rights in property, due process of law, and equal protection of the laws can be said to abridge the police power of the legislature. It is hard to see how any law which in fact abridged any of these rights could be referred to a power which is to be exercised only in behalf of the general welfare. When these clauses are said to limit the police power of the legislature it is believed that the police power and legislative powers in general are confused. The clauses under consideration may operate as limitations on the general powers of the legislature, but not on its police powers. There is no question but that the police power is always subject to the constitution.²⁵ Neither the state nor its municipalities can destroy contract and vested rights by improper regulations and enactments under the guise of the exercise of the police power.²⁶ It is generally held that a right granted by a municipality, by ordinance, for a valuable consideration, constitutes an irrevocable contract, at least where it is accepted and acted upon by the grantee and money is expended upon the faith thereof.²⁷ In cases of this character the vested right and the obligation of the contract can not be materially impaired by attempting to withdraw the consent of the municipality, or imposing other conditions not contemplated by the contract or law and not properly police regulations.²⁸ It is for

²⁵ Cooley's Constitutional Limitations, 719; *State v. Kansas City &c. R. Co.*, 32 Fed. 722; *Ives v. South Buffalo R. Co.* (N. Y.), 94 N. E. 431; *In re Jacobs*, 98 N. Y. 98, 2 N. Y. Cr. 639, 50 Am. Rep. 636; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. 1126.

²⁶ Cooley Const. Lim. (6th ed.) 707; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 153, revd. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Williams v. Citizens' R. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. 201; *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692,

2 L. R. A. 255n, 7 Am. St. 684; *Rutland Elec. Light Co. v. Marble City &c. Co.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. 868; *Inhabitants of Summit Tp. v. New York &c. Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146. We mean, of course, where the right to revoke, repeal or amend is not reserved.

²⁷ See 2 Elliott Roads & Streets (3d ed.) § 938; *Suburban Light &c. Co. v. East Orange* (N. J. Eq.), 41 Atl. 865; *Rutland Elec. Light Co. v. Marble City &c. Co.*, 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. 868. Compare, however, as to mere license, *Elizabeth City v. Banks*, 150 N. Car. 407, 64 S. E. 189, 22 L. R. A. 925, and note.

²⁸ *Sunset Telephone &c. Co. v. Medford*, 115 Fed. 202; *Morris-*

the courts to determine whether an act of the legislature which interferes with the rights or personal liberty of the citizen ostensibly in the exercise of the police power is a proper and reasonable exercise of the power.²⁹

§ 2780. Police power of congress.—Under the federal constitution the police power in the main resides in the states. It was the opinion of the men who fashioned our government that control over social and economic interests could best be exercised by the individual states except when legislation by the states would interfere with national development. However, there are certain matters concerning which the federal government may enact police legislation. It has power to regulate and control interstate commerce; it may legislate regarding bankruptcies, patents and copyrights, suppress lotteries by denying to them the use of the mails, and adopt such measures as will promote peace and order in the performance of its functions of sovereignty.

§ 2781. Freedom of contract as a constitutional right.—The constitution seeks to preserve for the individual his right to personal security, his right to personal liberty and his right to private property. Liberty and the right to acquire and hold property mean and include the right to

town v. East Tenn. Tel. Co., 115 Fed. 304, 53 C. C. A. 132; Owensboro v. Cumberland Tel. & C. Co., 174 Fed. 739; St. Louis v. Western Union Tel. Co., 63 Fed. 68, affd. 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct. 608; Old Colony Trust Co. v. Wichita, 123 Fed. 762; Africa v. Knoxville, 70 Fed. 729, revd. 77 Fed. 501; People v. Chicago, W. D. R. Co., 118 Ill. 113, 7 N. E. 116; Western Paving & C. Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770n, 25 Am. St. 462n; New Orleans v. Great Southern Tel. & T. Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. 502n; Electric R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; Michigan Tel. Co. v. St.

Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87n, 80 Am. St. 520; St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. 370; Plattsmouth v. Nebraska Tel. Co., 80 Nebr. 460, 114 N. W. 588, 14 L. R. A. (N. S.) 654n, 127 Am. St. 779; Hudson Tel. Co. v. Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; North Hudson County R. Co. v. Hoboken, 41 N. J. L. 71; Willcox v. Consolidated Gas. Co., 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192; State v. Sheboygan, 114 Wis. 505, 90 N. W. 441.

²⁹ Austin v. Murray, 16 Pick. (Mass.) 121; State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847.

make and enforce contracts. Thus, the right to use, buy and sell property and to contract in respect thereto is protected by the constitution.³⁰ The right to contract is a property right.³¹ This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers.³² It is not a fundamental unrestrictable constitutional right, but is subject to reasonable restraint and regulation in the interest of the public welfare and public health.³³ Usury laws are universally upheld.³⁴ The United States Supreme Court has upheld a statute which required insurance companies to pay the full value of a policy, in case the thing insured was a total loss by fire, instead of its cash value.³⁵ It has also upheld legislation passed in the interest of laboring men which had for its object the preservation of the health, safety and morals of the workers.³⁶

§ 2782. Labor legislation in general.—There is a vast amount of what is for convenience termed “labor legislation” which is but remotely connected with the police power of the state. Many bureaus and commissions are appointed to investigate and report on labor conditions. Boards of arbitration exist to which labor disputes may be voluntarily submitted for settlement. The state also regulates convict labor in its prisons and free labor employed by it in the prosecution of state work. Such legislation is not generally classed as an exercise of the police

³⁰ *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315. See also, *Freund Police Power*, §§ 498 et seq.

³¹ *Kelly v. Johnson*, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573n.

³² *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383.

³³ *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N. E. 823. “The right to contract is not, and never has been, in any country where, as in ours, the common law prevails and constitutes the source of all civil law, entirely beyond legislative control. The statute of

frauds enables contracting parties to avoid contracts not in writing.” *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 76 Am. St. 396.

³⁴ *Elliott Contracts*, § 960.

³⁵ *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281. See also, *Dugger v. Mechanics’ and Traders’ Ins. Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992.

³⁶ *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. 1.

power. In such cases the state is the proprietor, and merely lays down the rules by which it will conduct its business. There is a great mass of legislation, however, which has for its object the protection of the health, safety and morals of those who work in mines, factories and at hazardous employments. The employment of women and children and the conditions under which they shall work are subjects of much regulation. Laws of this character are clearly enacted under the police power of the state.

§ 2783. **Restricting hours of labor.**—The right of a state to exercise its police power in the regulation of hours and conditions of employment in dangerous and unhealthy places is undisputed.⁸⁷ In important mining states the employment of women is usually prohibited.⁸⁸ In those states in which manufacturing is an important industry, the working hours of women are generally restricted to sixty hours a week, or ten hours a day.⁸⁹ In the leading case on this phase of the subject it was said: "It (the statute) does not forbid any person, firm or corporation from employing as many persons or as much labor as such person, firm or corporation may desire; nor does it forbid any person to work as many hours a day, or a week, as he chooses. It merely provides that in an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary

⁸⁷ *Holden v. Hardy*, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103, *affd.* 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383. In 1907, by act of Congress, the hours of railway telegraphers were limited to nine hours, and of trainmen on interstate trains to sixteen hours. See *Baltimore & C. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. 621.

⁸⁸ See statutes of Pennsylvania (3 Purdon's Digest 2572), Indiana (Burns' Rev. Stats. 1908, § 8594),

Washington (Gen. Stat. 1910, § 6569), Wyoming and West Virginia.

⁸⁹ See statutes of Georgia, Louisiana, Connecticut, Michigan, Nebraska, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, New Jersey, New York, South Carolina, Virginia. See, generally, the note to *Withey v. Bloem* (163 Mich. 419, 128 N. W. 913), in 35 L. R. A. (N. S.) 628 and references there made to other notes in the same series.

to resort to either of those sources of power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary. It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she shall work. The obvious and conclusive reply to this is, that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature that it becomes unnecessary to inquire whether it is a matter of grievance of which the defendant has a right to complain."⁴⁰ Practically all the states forbid or regulate the employment of minors under a designated age, in mines and factories and sometimes in other establishments, such as hotels and the like. Thus, it has been held competent for the legislature to prohibit the employment of children for acting, singing, or otherwise performing in public.⁴¹ Statutes which limit the hours of labor for adults, irrespective of sex, are at the present time exceptional, and are confined to certain occupations of a special character in which there is an imperative need of regulation, either in order that the physical well-being of the employé may be conserved or on the ground of public safety. This latter reason exists when incapacity on the part of the employé to perform his work on account of overwork might bring disaster to the public. Thus, there is a federal statute which prohibits common carriers engaged in the transportation of passengers or property from one state or ter-

⁴⁰ *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383. Compare, however, with *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. 315. See also, *People v. Elderling*, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893 and note;

Commonwealth v. Riley, 210 Mass. 387, 97 N. E. 367.

⁴¹ *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. 788. See also, notes in 17 L. R. A. (N. S.) 602 and 24 L. R. A. (N. S.) 1121.

ritory to another state or territory from requiring or permitting trainmen to be or remain on duty for a longer period than sixteen hours continuous service. The same statute fixes nine hours as the maximum continuous service for telegraph operators or train despatchers who transmit or receive orders pertaining to or affecting train movements.⁴² However, in some states ten hours a day is fixed as a day's work for street railroad employes, but they are given the right to work overtime for extra compensation.⁴³ A maximum number of continuous hours which an employe shall labor has been fixed in some states for pharmacists and drug clerks,⁴⁴ miners,⁴⁵ bakers,⁴⁶ employes in brick yards⁴⁷ and in cotton and woolen mills.⁴⁸

§ 2784. In regard to the wage rate.—During the time of Queen Elizabeth a law was enacted which gave justices of the peace power to fix the wages of laborers.⁴⁹ This statute was abrogated during the reign of George III.⁵⁰ In this country it is only within very recent times that the minimum wage question has been seriously considered. In 1912 Massachusetts passed an act establishing a minimum wage commission and providing for the determination of minimum wages for women and minors. It is made the duty of the commission to inquire into the wages paid to female or minor employes in any occupation in the commonwealth and if, after an investigation, the commission is of the opinion that in the occupation in question the wages paid to such employes are inadequate to supply the necessary cost of living to maintain the worker in health, it shall establish a wages board to consider the needs of the employes. On the submission of the report of

⁴² Vol. 34, pt. 1, United States Statutes at Large, 1416. See also, 2 Burns Indiana Rev. Stats. (1908) § 5304, and statutes in New York and Michigan. See *People v. Erie R. Co.*, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. 828.

⁴³ See statutes of New York, Ohio and Pennsylvania.

⁴⁴ New York laws (1900) ch. 453.

⁴⁵ See statutes of Utah and Colo-

rado limiting day's work to eight hours.

⁴⁶ See New York, New Jersey, Pennsylvania and Missouri statutes.

⁴⁷ New York.

⁴⁸ See Georgia, South Carolina and Maryland statutes.

⁴⁹ 5 Elizabeth ch. 4, § 16-19.

⁵⁰ 53 George III, ch. 40.

this board to the commission and its approval by the commission, a minimum wage may be established. The act does not become effective until July, 1913, and has not been passed upon by the courts as yet.⁵¹ A bill which copied closely the Massachusetts law on this subject was introduced at the 1913 session of the Indiana legislature, but it failed to pass. It is difficult to forecast what the courts will hold when the validity of such legislation is called in question.⁵² The constitution of Louisiana expressly provides that: "No law shall be passed fixing the price of manual labor."⁵³ A wage scale may be adopted by the government, or it may enact a law providing that a contractor in the execution of his contract for government work shall pay rates of wages and observe hours of labor not less favorable than those commonly recognized by employers and trade societies (or in the absence of such those which prevail among good employers) in the trade in the district where the work is carried out.⁵⁴ As has been pointed out, however, such legislation is not enacted under the police power.⁵⁵

§ 2785. In regard to the method of paying wages.— Statutes regulating the payment of wages may require that wages be paid at stated intervals, such as every week, every two weeks or every month, or that the payment be made in cash or check. Statutes which provide for the payment of employes at stated intervals are usually held valid when the statutes are general and uniform and operate upon all persons who come within the class to which they apply, the classification not being narrow, unreasonable or arbitrary.⁵⁶ However, a statute which

⁵¹ Acts Mass. 1912, chapter 706, p. 780.

⁵² See *In re Preston*, 63 Ohio St. 428, 59 N. E. 101, 52 L. R. A. 523, 81 Am. St. 642.

⁵³ Constitution of Louisiana (1904), § 51.

⁵⁴ 131 London Law Times 437.

⁵⁵ See § 2782, Labor Legislation in general.

⁵⁶ *Leep v. St. Louis, I. M. & S. R.*

Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. 109; *Seelyville Coal & Min. Co. v. McGlosson*, 166 Ind. 561, 77 N. E. 1044, 117 Am. St. 396; *Opinion of Justices*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; *State v. Brown & C. Mfg. Co.*, 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. Compare, however, with *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338

deprived both the employer and employé in all lines of labor of the right to contract for employment except upon the condition that the wages earned by the employé should be paid weekly has been held unconstitutional.⁵⁷ Some courts have very severely condemned legislation of this character, saying that such legislation places the workman under tutelage,⁵⁸ and classes him with the idiot, the lunatic and felon.⁵⁹ It is also generally held that the legislature has the right and power to enact a law forbidding the execution of a contract by which the employé expressly waives his right to demand and receive his wages in lawful money of the United States.⁶⁰ But if the acts are discriminatory they are unconstitutional.⁶¹

§ 2786. **Protecting labor unions.**—Massachusetts has enacted a law which provides that: "No person shall, himself or by his agent, coerce or compel a person into a written or verbal agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person."⁶² A number of states, including California, Colorado, Illinois, Indiana, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Ohio and Wisconsin, have enacted laws similar to this. The Illinois,⁶³ Minnesota,⁶⁴ Mis-

⁵⁷ Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136.

⁵⁸ Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. See also, Godcharles v. Wigeman, 113 Pa. St. 431.

⁵⁹ State v. Haun, 61 Kans. 146, 59 Pac. 340, 47 L. R. A. 369.

⁶⁰ Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. 396, holding that the right to establish a standard value is analogous to the right to establish a standard of weights and measures and that it is of deepest importance to the government that it should unyieldingly maintain the right to protect the money which it makes the standard of value. See also, Peel Splint Coal Co. v. State, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

⁶¹ Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492 (statute declared void on the ground that it was discriminatory); State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Godcharles v. Wigeman, 113 Pa. St. 431; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. 863; State v. Fire Creek Coal & Co., 33 W. Va. 788, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. 891.

⁶² Revised Laws Mass. (1902) ch. 106, § 12.

⁶³ Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. 176.

⁶⁴ State v. Daniels, 118 Minn. 528, 136 N. W. 587 (following Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 13 Am. & Eng. Ann. Cas. 764, 28 Sup. Ct. 277).

souri,⁶⁵ New York⁶⁶ and Wisconsin⁶⁷ statutes were declared unconstitutional.⁶⁸ The Supreme Court of Kansas upheld a statute of this character. The court reviews the various decisions on the subject and distinguishes the Kansas statute from the statutes passed in other states and subsequently declared unconstitutional. The court said that the state had the right to protect the freedom and independence of employes from any encroachment thereon.⁶⁹

§ 2787. Gaming contracts.—Gaming was not at first condemned as injurious per se. One of the first statutes enacted against gaming and wagering had for its object the encouragement of warlike pastimes and the discouragement of games which diverted the people from martial exercises.⁷⁰ Modern statutes, both in England and the United States, recognize gambling as an evil to be suppressed in the interests of the public welfare and the state at large, and hence are passed under the state's police power. Thus, lotteries are a proper subject for the exercise of this power.⁷¹

§ 2788. Contracts in restraint of trade.—Combinations, monopolies or trusts which place a restraint on trade are presumed to work an injury to the public. Within the last twenty years there has been a remarkable numerical growth of what are commonly termed "trusts." This has led to the passage of "anti-trust" laws by the federal government and practically all the states. Legislation of this

⁶⁵ *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443.

⁶⁶ *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. 902, 7 Am. & Eng. Ann. Cas. 118.

⁶⁷ *State v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748, 91 Am. St. 934.

⁶⁸ See also, the case of *Adair v. United States*, 208 U. S. 161, 29 Sup. Ct. 277, 52 L. ed. 436, 13 Am. & Eng. Ann. Cas. 764, for a discussion of similar federal statutes.

⁶⁹ *State v. Coppage*, 87 Kans. 752, 125 Pac. 8. The court was unable to distinguish the Kansas statute from the Minnesota statute, but said that the Minnesota court had declared its statutes void on the authority of *Adair v. United States*, 208 U. S. 161, and that this case did not require them to so hold.

⁷⁰ Act, 33 Henry VIII, ch. 9.

⁷¹ *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079. See ante, 2 Elliott Contracts, chapter 26, for a full discussion of the subject of Gaming and Wagering.

character falls within the scope of the police power, and is applicable to corporations.⁷²

§ 2789. Building regulations.—A city may make reasonable regulations in regard to the construction, character and nature of buildings within the corporate limits. Prohibiting the erection of wooden buildings in fire limits is a proper exercise of police power,⁷³ and prohibition of the erection ordinarily prevents the removal of such buildings from one portion of the limits to another.⁷⁴ A permit to erect a dwelling according to specifications submitted is not violated, however, by the erection of a building, the first floor to be used as a store and the second floor as a dwelling.⁷⁵ Power to regulate the safety, height and thickness of walls and buildings does not authorize the passage of an ordinance imposing a penalty for the erection of a building without the approval of the city engineer.⁷⁶ It has also been held that the police power will sustain the enactment of ordinances prohibiting persons from erecting buildings within the limits of the town without a permit from the proper board.⁷⁷ But it is held in a recent case that an ordinance prohibiting the erection of store buildings on a residence street without consent of a majority of the property owners is unreasonable, arbitrary and oppressive, and not justified as an exercise of the police power.^{77a}

§ 2790. Concerning common carriers.—Carriers, the same as every other owner of property, no matter how absolute

⁷² *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319; *People v. North River Sugar &c. Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. 843; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553. For a complete discussion of contracts in restraint of trade. see chaps. 22 and 23, 2 Elliott on Contracts.

⁷³ *State v. O'Neil*, 49 La. Ann. 1171, 22 So. 352.

⁷⁴ *Eureka City v. Wilson*, 15 Utah 67, 48 Pac. 150, 62 Am. St. 904.

⁷⁵ *St. Louis v. Dorr*, 136 Mo. 370, 37 S. W. 1108.

⁷⁶ *State v. Zurich*, 49 La. Ann. 447, 21 So. 977. See also, *New Orleans v. Danneman*, 51 La. Ann. 1093, 25 So. 931.

⁷⁷ *Easton v. Covey*, 74 Md. 262, 22 Atl. 266.

^{77a} *Willison v. Cooke* (Colo.), 130 Pac. 828. As to regulation of bill boards see cases cited in opinion in above case, and also note in 21 L. R. A. (N. S.) 735.

and unqualified his title, hold their property subject to the implied condition that the use shall not be injurious to the public, and are amenable to regulations prescribed under the police power of the state.⁷⁸ There are many decisions which hold that the legislature may enact a law applicable to railroad companies exclusively, prescribing who shall and who shall not be deemed fellow-servants under a common master.⁷⁹ It has been held that a statute making railroad companies absolutely liable to persons injured on their trains, except where the injury is attributable to the criminal negligence of the person injured or to a violation of a rule or regulation of the company, is constitutional.⁸⁰

§ 2791. Regulation of hack-stands and hotel runners.—

A city under its police power may enact an ordinance authorizing its police officers to prescribe the place where hacks and other vehicles shall stand at a railroad depot while waiting for passengers and requiring the drivers of such vehicles to obey the directions of the police officer with reference thereto.⁸¹ Under the provisions of a village charter giving the trustees power "to restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public-houses, places of resort or for any other place or purpose whatsoever;" and under an ordinance of the village prohibiting such persons from soliciting "within the corporate limits of this village"—it is as unlawful to do the prohibited acts on the private property of the de-

⁷⁸ Elliott on Railroads (2d ed.) § 44. See 32 Cent. L. J. 181, et seq.

⁷⁹ Georgia R. Co. v. Ivey, 73 Ga. 499, 28 Am. & Eng. R. Cas. 392; Georgia R. & Banking Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. 301; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Missouri Pac. R. Co. v. Mackey, 33 Kans. 298, 6 Pac. 291, affd. 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. 1161; Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep.

771, 11 Am. & Eng. R. Cas. 256, affd. 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. 1176; In re Ten Hour Law, 24 R. I. 603, 54 Atl. 602, 61 L. R. A. 612; Campbell v. Cook, 86 Texas 630, 26 S. W. 486, 40 Am. St. 878; Austin Rapid Transit R. Co. v. Groethe (Tex. Civ. App.), 31 S. W. 197; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. 609; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. 419.

⁸⁰ Union Pac. R. Co. v. Porter, 38 Nebr. 226, 56 N. W. 808.

⁸¹ Veneman v. Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. 100.

fendant as in the public streets.⁸² But it has been held, however, that an ordinance providing that cabs shall stand on certain parts of certain streets, and that any violation thereof shall be a misdemeanor, does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor.⁸³ It has been held that a rule of the board of police of Boston providing that no person shall use "any hackney carriage unless he is licensed thereto by the board," and that every vehicle "used for the conveyance of persons for hire from place to place within the city, except a horse car, shall be deemed a hackney carriage," applies to all vehicles used in the city for the conveyance of persons for hire, whether the vehicles stand in public places or in the stables of the owners.⁸⁴

§ 2792. **Concerning insurance.**—Under its police power it has been held that the state has full control over the business of insurance, whether conducted by a domestic or foreign company or by an association or an individual.⁸⁵ It may permit the business to be carried on by corporations only,⁸⁶ and it may prescribe the conditions upon which domestic or foreign corporations may engage in the business.⁸⁷ Foreign corporations may be entirely excluded from the state,⁸⁸ or admitted upon such terms as are judged proper for the protection of the policyholders within the state. These conditions may extend to the form and legal effect of the company's policy as well as to the general manner of the transaction of its business.⁸⁹ Rates may also be regu-

⁸² *Niagara Falls v. Salt*, 45 Hun (N. Y.) 41, 9 N. Y. St. 577. See also, *Oswego v. Collins*, 38 Hun (N. Y.) 171.

⁸³ *Helena v. Gray*, 7 Mont. 486, 17 Pac. 564.

⁸⁴ *Commonwealth v. Page*, 155 Mass. 227, 29 N. E. 512.

⁸⁵ *People v. Holmes*, 151 App. Div. (N. Y.) 257, 135 N. Y. S. 467. See also, *Bell v. Louisville Board of Fire Underwriters*, 146 Ky. 841, 143 S. W. 388.

⁸⁶ *Commonwealth v. Vrooman*, 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 40 Am. St. 603.

⁸⁷ As to the power to regulate and control the business of insurance companies already created, see *State v. Eagle Ins. Co.*, 50 Ohio St. 252, 33 N. E. 1056, *affd.* 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868; *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

⁸⁸ *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. 638; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281.

⁸⁹ *Berry v. Knights Templars' &c. Indemnity Co.*, 46 Fed. 439, *affd.* 50 Fed. 511, 1 C. C. A. 561. See *Com-*

lated.⁹⁰ Discriminatory rates and rebates to the insured may be prohibited.⁹¹ The license of a foreign insurance company to do business within the state may be revoked upon its violation of a state law, such as a statute prohibiting the removal of a cause of action from a state to a federal court.⁹²

§ 2793. Concerning sales.—In the exercise of its police power the state has placed many restrictions on the barter or sale of goods and property. Thus, it is well settled that in the absence of anything in the state constitution forbidding such legislation, the state may restrict or prohibit, except for medicinal, sacramental and mechanical uses, the sale of intoxicating liquors within its borders.⁹³ Statutes restricting or prohibiting the sale of oleomargarine have been upheld.⁹⁴ The giving of trading stamps in connection with the sale of goods has been prohibited and the statute upheld on the theory that the giving of them involved an element of gaming,⁹⁵ although other states have declared such legislation unconstitutional.⁹⁶ Various statutes have been enacted affecting the validity of deals in futures and margins.⁹⁷ The states of Illinois, Indiana, Min-

monwealth v. Nutting, 175 Mass. 154, 55 N. E. 895, 78 Am. St. 483, affd. 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. 238; State v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

⁹⁰ German Alliance Ins. Co. v. Barnes, 189 Fed. 769.

⁹¹ People v. Hartford Life Ins. Co., 252 Ill. 398, 96 N. E. 1049.

⁹² Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619.

⁹³ Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205. See also, Sarrls v. Commonwealth, 83 Ky. 327, 7 Ky. L. (abstract) 300, 7 Ky. L. 473; Commonwealth v. Fowler, 96 Ky. 166, 16 Ky. L. 360, 28 S. W. 786, 33 L. R. A. 839.

⁹⁴ Wright v. State, 88 Md. 436, 41 Atl. 795; Butler v. Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. 638; Powell v. Commonwealth, 114 Pa. St. 265, 7 Atl. 913, 6 Am. Rep.

350, affd. 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. 992, 1257. See also, Allardt v. People, 177 Ill. 501, 64 N. E. 533; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. 154.

⁹⁵ Lansburgh v. District of Columbia, 11 App. D. C. 512; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L. R. A. (N. S.) 957 and note.

⁹⁶ People v. Dycker, 72 App. Div. (N. Y.) 308, 76 N. Y. S. 111; State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. 818; Young v. Commonwealth, 101 Va. 853, 45 S. E. 327. See also, note, 30 L. R. A. (N. S.) 957; 2 Elliott on Contracts, § 701.

⁹⁷ Const. Cal. (1911) art. 4, § 26; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. 229, affd. 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. 425.

nesota, Pennsylvania and perhaps others have enacted legislation preventing the sale of passenger tickets by persons who have purchased them without any intention of using them themselves and who are not the agents of the carrier. This anti-scalpers legislation has been upheld by the courts of the above states.⁹⁸ Legislation of this character has been declared unconstitutional by the courts of Texas⁹⁹ and New York¹ for special reasons. Laws regulating weights, measures and containers, adulterations, imitations and substitutes are found in practically all the states. The statute of frauds provides that no contract for the sale of any goods, wares or merchandise for the price of ten pounds sterling or upwards shall be allowed to be good unless the buyer shall accept part of the goods sold and actually receives the same or gives something in earnest or part payment or some note or memorandum of the bargain is signed by the parties to be charged.² Laws restricting or prohibiting the sale of a given article or by certain people can rightfully be upheld on the theory that they are a valid exercise of the police power when enacted for the protection of the public or, where passed to prevent fraud, on the theory that the public has an interest in the prevention of fraud.

§ 2794. Corporate charter as a contract and state regulation.—Although corporate charters are to be regarded as contracts, between the state and the corporation,³ and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter con-

⁹⁸ *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. 329; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Commonwealth v. Keary*, 198 Pa. 500, 48 Atl. 472.

⁹⁹ *Jannin v. State*, 42 Texas Cr. 631, 51 S. W. 1126, 62 S. W. 419, 53 L. R. A. 349, 96 Am. St. 821.

¹ *People v. Warden City Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763.

² See § 17 Statute of Frauds. See

further, concerning statute of frauds, 2 Elliott on Contracts, ch. 30. See also as to laws regarding sales in bulk, note in Ann. Cas. 1912C 706.

³ 1 Thomp. on Corp. (2d ed.), §§ 312 et seq; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369, 14 L. ed. 977; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

tract, removed from the sphere of state regulation. The rights and privileges which come into existence under the charter are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation.⁴ Ample power resides in the legislature to regulate a corporation in the use of its franchises and powers whenever their exercise intrenches upon the public health, morals or safety.⁵ Various statutes have been held to be a legitimate exercise of the police power inherent in the several states.⁶ The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. An act of the legislature of Connecticut relating to railway grade crossings, being directed to the extinction of grade crossings as a menace to public safety, was held a proper exercise of the police power of the state.⁷ A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some provision in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.⁸ The courts have uniformly upheld statutes making railroad companies liable for damages caused by fire as constitutional.⁹

* Cooley's Constitutional Limitations (6th ed.) 709; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. 832; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47; *Chicago, Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681.

⁴ *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *New Orleans Gas Light Co. v. Louisiana & Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

⁵ See *Thorpe v. Rutland & C. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, as to the power of the state legislature to impose upon railroad companies the duty of maintaining fences, and

to construct and maintain cattle-guards. *Ohio & C. R. Co. v. McClelland*, 25 Ill. 140; *Kansas Pacific R. Co. v. Mower*, 16 Kans. 573; *Norris v. Androscoggin R. Co.*, 39 Maine 273, 63 Am. Dec. 621; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164, 5 Am. Rep. 360.

⁷ *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437.

⁸ *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334; *Stone v. Farmers' Loan & Co.*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

⁹ 3 Elliott on Railroads (2d ed.) § 1223; *Union Pac. R. Co. v. DeBusk*,

§ 2795. License to pursue business prejudicial to safety and morals.—The object of a license, it has been held, is to confer a right that does not exist without a license.¹⁰ A license to pursue a business prejudicial to the public safety and morals is not the grant of a vested right. Thus, in the case of licenses to sell liquor it has been held that they are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles and by the United States Constitution against subsequent legislation, nor are they property in any legal or constitutional sense. They are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the state, are issued in the exercise of its police powers and are subject to the direction of the state government, which may modify, revoke or continue them as it may deem fit.¹¹ Such license may at any time be revoked by the power which issued it without incurring any obligation to compensate the holder for the loss sustained by reason of such revocation or to return the fees or any part

12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. 221; *Grissell v. Housatonic R. Co.*, 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138; *Rodemacher v. Milwaukee & C. R. Co.*, 41 Iowa 297, 20 Am. Rep. 592; *Mathews v. St. Louis & C. R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, affd. 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611; *Hooksett v. Concord R. R.*, 38 N. H. 242; *McCandless v. Richmond & C. R. Co.*, 38 S. Car. 103, 16 S. E. 429, 18 L. R. A. 440; *Jensen v. South Dakota Cent. R. Co.*, 25 S. Dak. 506, 127 N. W. 650, Ann. Cas. 1912C 700.
¹⁰ *Chilvers v. People*, 11 Mich. 43; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672.

¹¹ *Powell v. State*, 69 Ala. 10; *Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536; *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407; *La Croix v. Commissioners*, 50 Conn. 321, 47 Am. Rep. 648; *Kresser v. Lyman*, 74 Fed. 765; *Sprayberry v. Atlanta*, 87 Ga. 120, 13 S. E. 197; *Brown v. State*, 82 Ga. 224, 7 S. E. 915; *Moore v. Indianapolis*, 120 Ind.

483, 22 N. E. 424; *Nelson v. State*, 17 Ind. App. 403, 46 N. E. 941; *McCoy v. Clark*, 104 Iowa 491, 73 N. W. 1050; *Columbus City v. Cutcomp*, 61 Iowa 672, 17 N. W. 47; *State v. New Orleans*, 113 La. 371, 36 So. 999; *Pleuler v. State*, 11 Nebr. 547; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Calder v. Kurby*, 5 Gray (Mass.) 597; *Commonwealth v. Brennan*, 103 Mass. 70; *Hearn v. Brogan*, 64 Miss. 334, 1 So. 246; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. Lichta*, 130 Mo. App. 284, 109 S. W. 825; *Martin v. State*, 23 Nebr. 371, 36 N. W. 554, affd. 27 Nebr. 325, 43 N. W. 108; *State v. Roberts*, 74 N. H. 476, 69 Atl. 722; *State v. Corron*, 73 N. H. 434, 62 Atl. 1044; *Meehan v. Board of Comrs. of Jersey City*, 73 N. J. L. 382, 64 Atl. 689; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Rowland v. State*, 12 Tex. App. 418. See also, *Moler v. Whisman*, 131 Ky. 104, 114 S. W. 742, 40 L. R. A. (N. S.) 637 and note.

thereof paid for the license, and, even during the time for which the license is to run the fee therefor may be increased.¹² Subsequent to the issuance of the license a municipality may be authorized to license the sale of intoxicating liquors and the right to sell be made conditional upon the obtaining of this second license.¹³ The same principles are applicable to licenses issued to lotteries. The privilege of conducting the lottery may be revoked at any time when the public good requires such action, and this whether it is to be paid for or not.¹⁴ The right of the state to license the sale of pistols has been upheld.¹⁵

§ 2796. License to use streets or public property.—

Where a municipal corporation has authority to license the use of the streets by railroad companies, or other like companies, the company which secures such right takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.¹⁶ It is upon this principle that it has been correctly held that a municipal corporation may displace the tracks of a street railway and prevent its operation for a reasonable time when it becomes necessary in order to enable the municipality to construct a sewer.¹⁷ The grant of permission to use a highway does not authorize the railroad company to which the grant is made to unnecessarily or unreasonably interfere

¹² *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *McKinney v. Salem*, 77 Ind. 213; *State v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *Prohibitory Amendment Cases*, 24 Kans. 700; *Burnside v. Lincoln County Court*, 86 Ky. 423, 9 Ky. L. 635, 6 S. W. 276; *State v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273.

¹³ *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577; *Decker v. McGowan*, 59 Ga. 805; *McKismey v. Salem*, 77 Ind. 213.

¹⁴ *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367; *State v. Morris*, 77 N. Car. 512; *Stone v. Mississippi*,

101 U. S. 814, 25 L. ed. 1079; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. 199. See also, *Kellum v. State*, 66 Ind. 588; *State v. Woodward*, 89 Ind. 110, 46 Am. Rep. 160; *Justice v. Commonwealth*, 81 Va. 209.

¹⁵ *Caswell v. State* (Tex. Civ. App.), 148 S. W. 1159.

¹⁶ *Chicago v. Chicago Union Trac. Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666.

¹⁷ *Michigan Tel. Co. v. Charlotte*, 93 Fed. 11; *Macon Consolidated St. R. Co. v. Macon*, 112 Ga. 782, 38 S. E. 60; *Kirby v. Citizens R. Co.*, 48 Md. 168, 30 Am. Rep. 455; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261. But see, *Eddy v. Ottawa City Passenger R. Co.*, 31 U. C. Q. B. 569.

with the public while laying down or repairing its tracks.¹⁸ The grant of a right to use a street does not by any means imply that the municipality surrenders the right to make needful police regulations.¹⁹

§ 2797. **Impairing obligation of contract.**—It has already been pointed out that all contract obligations are protected from impairment by state legislation by the provisions of the federal constitution.²⁰ The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious.²¹ It is difficult to determine the extent of the restriction placed on the police power by this clause of the federal constitution. It may be said, however, that impairment of the interest of the party obligated only is forbidden. Thus, railroad rates may be regulated notwithstanding the fact that the railroad company has previously entered into a contract which is rendered impossible of performance by the fixing of such rate.²² Legislation concerning the pressure in gas pipes,²³ the building of frame buildings within certain fire limits,²⁴ the elevation or depression of railroad tracks²⁵ has been upheld, notwithstanding that in each case it affected existing con-

¹⁸ *Kyne v. Wilmington & N. R. Co.*, 8 *Houst. (Del.)* 185, 14 *Atl.* 922; *Atchison, T. & S. F. R. Co. v. Miller*, 39 *Kans.* 419, 18 *Pac.* 486; *Dallas & C. R. Co. v. Able*, 72 *Tex.* 150, 9 *S. W.* 871. See also, *Grand Trunk Western R. Co. v. South Bend*, 174 *Ind.* 203, 89 *N. E.* 885, 91 *N. E.* 809, 36 *L. R. A. (N. S.)* 850n.

¹⁹ *Chicago B. & Q. R. Co. v. Quincy*, 139 *Ill.* 355, 28 *N. E.* 1069; *Vincennes v. Citizens' Gas Light Co.*, 132 *Ind.* 114, 31 *N. E.* 573, 16 *L. R. A.* 485; *Wabash R. Co. v. Defiance*, 167 *U. S.* 88, 42 *L. ed.* 87, 17 *Sup. Ct.* 748; *Missouri v. Murphy*, 170 *U. S.* 78, 18 *Sup. Ct.* 505, 42 *L. ed.* 955.

²⁰ See ante, § 2779.

²¹ *People v. Com. Council*, 140 *N.*

Y. 300, 35 *N. E.* 485, 37 *Am. St.* 563.

²² *Buffalo East Side R. Co. v. Buffalo Street R. Co.*, 111 *N. Y.* 132, 19 *N. E.* 63, 2 *L. R. A.* 284; *Chicago, B. & Q. R. Co. v. Iowa*, 94 *U. S.* 155, 24 *L. ed.* 94. See also, *Portland Ry. & C. Co. v. Portland*, 200 *Fed.* 890.

²³ *Jameson v. Indiana Natural Gas & Oil Co.*, 128 *Ind.* 555, 28 *N. E.* 76, 12 *L. R. A.* 652.

²⁴ *Salem v. Waynes*, 123 *Mass.* 372; *Knoxville v. Bird*, 12 *Lea (Tenn.)* 121, 49 *Am. Rep.* 326.

²⁵ See *Branson v. Philadelphia*, 47 *Pa. St.* 329. See also, *Emporia v. Atchison & C. Ry. Co. (Kans.)*, 129 *Pac.* 161.

tracts. In each of these cases the sovereign power was merely exercising an authority essential to its existence, to wit, protecting the welfare of its citizens, an authority which private individuals can not abridge by contracts between themselves.²⁶ However, where complainant's assignors were authorized by ordinance to lay, acquire and maintain pipes in a designated city for the purpose of supplying natural gas to said city and its inhabitants, which ordinance was legally adopted, accompanied by all legal requirements, and properly accepted, a subsequent ordinance which required that a specified pressure be maintained when it was well known that it was impossible to maintain such pressure has been said to impair the obligation of a contract and to be within the prohibition of the federal constitution.²⁷

§ 2798. Bankruptcy laws and the like.—Bankruptcy and insolvency laws which affect contracts entered into prior to the passage of such acts impair the obligation of such contracts within the meaning of the federal constitution.²⁸ Such an act, however, does not impair the obligation of a contract entered into subsequently to its passage for the reason that the law of the country where the contract is made constitutes the law of the contract so formed and enters into and becomes a part of such contract.²⁹

§ 2799. Regulation of telegraph and telephone lines in streets.—The construction and maintenance of telegraph and telephone lines in public streets is a matter peculiarly within the regulatory powers of municipalities. While a city may not, under its existing laws, prevent a telephone company from using the streets to erect and maintain a telephone line, it has the right, under its general police power, to regulate the manner of construction and maintenance.³⁰ A city may, for example, compel the placing of

²⁶ *People v. Hawley*, 3 Mich. 330.

²⁷ *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500.

²⁸ *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529;

Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; ante, § 2725.

²⁹ *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606; ante, § 2725.

³⁰ *Richmond v. Southern Bell Tel.*

wires underground when in the exercise of its discretion this is required for public convenience. But this power is not to be exercised at mere whim or caprice. It should be appropriate to, and commensurate with, the public necessity for the protection and promotion of public morals, health, safety, necessity or convenience.³¹ The city may also prescribe the manner of laying and using a pipe traversing a public street where a corporation has obtained the right to lay a pipe for the transportation of oil.³²

§ 2800. Regulation of markets.—A market is a public place appointed by public authority where all sorts of things necessary to the subsistence or for the convenience of life are sold; or, in other words, it is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.³³ In this country the authority to establish and regulate markets falls within the police power of the state, and the right to exercise such authority may be conferred by the state upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets.³⁴ There has been some conflict of authority among the earlier cases as to whether a grant of power to "establish and regulate markets" implies, when standing alone, authority to prohibit sale out-

&c. Co., 85 Fed. 19, 28 C. C. A. 659, affd. 174 U. S. 761, 19 Sup. Ct. 778, 43 L. ed. 1162; *Wichita v. Missouri &c. Tel. Co.*, 70 Kans. 441, 78 Pac. 886; *Rochester v. Bell Telephone Co.*, 52 App. Div. (N. Y.) 6, 64 N. Y. S. 804.

³¹ *Burlington v. Burlington Street R. Co.*, 49 Iowa 144, 31 Am. Rep. 145; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; *Geneva v. Geneva Tel. Co.*, 30 Misc. (N. Y.) 236, 62 N. Y. S. 172; *People v. King*, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. 389.

³² *Benton v. Elizabeth*, 61 N. J.

L. 411, 39 Atl. 683, 906, affd. 61 N. J. L. 693, 40 Atl. 1132.

³³ *Prince v. Lewis*, 5 B. & C. 363; *Jacksonville v. Ledwith*, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69, 23 Am. St. 558; *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282; *Burlington v. Dankwardt*, 73 Iowa 170, 34 S. W. 801; *Cincinnati v. Buckingham*, 10 Ohio 257; *Maclin v. Newbern*, 70 N. Car. 12.

³⁴ *Ex parte Byrd*, 84 Ala. 17, 4 So. 397, 5 Am. St. 328; *Bowling Green v. Carson*, 10 Bush. (Ky.) 64; *First Municipality v. Cutting*, 4 La. Ann. 335; *Natal v. Louisiana*, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. ed. 288.

side of the duly established markets; but the weight and current of the later cases show that the delegation of the first mentioned power includes the other.³⁵

§ 2801. Control of location of livery stables.—It has been held that a city has the power to make it unlawful to locate, build or keep a livery stable in any block in which two-thirds of the buildings are residences unless the consent of the owners of a majority of the lots is obtained.³⁶ The city, if it sees fit, may, it is held, prohibit absolutely location of stables in residence districts.³⁷

§ 2802. Regulation of practice of medicine under police power.—The state has the undoubted right, in the exercise of its police power, to prescribe the qualifications of persons desiring to practice medicine, and may enact reasonable regulations for the examination and registration of physicians and, generally, the practice of medicine and surgery.³⁸ The same principle governs the matter of the

³⁵ *Ex parte Byrd*, 84 Ala. 17, 4 So. 397, 5 Am. St. 328; *Jacksonville v. Ledwith*, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69, 23 Am. St. 558; *State v. Gisch*, 31 La. Ann. 544; *Gossigi v. New Orleans*, 41 La. Ann. 522, 6 So. 534; *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *People v. Keir*, 78 Mich. 98, 43 N. W. 1039; *St. Louis v. Weber*, 44 Mo. 547; *State v. Pendergrass*, 106 N. Car. 664, 10 S. E. 1002; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *Newson v. Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *Ex parte Canto*, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609. But see, *Bethune v. Hughes*, 28 Ga. 560, 73 Am. Dec. 789; *St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), 72 Am. Dec. 89.

³⁶ *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. 325; *Shiras v. Olinger*, 50 Iowa 571, 32 Am. Rep. 138. But see, *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

³⁷ *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. 325. But see, *Phillips v. City of Denver*, 19 Colo. 179, 34 Pac. 902, 41

Am. St. 230; *Crowley v. West*, 52 La. Ann. 526, 27 So. 53, 47 L. R. A. 652, 78 Am. St. 355; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

³⁸ *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *Richardson v. State*, 47 Ark. 562, 2 S. W. 187; *State v. McCrary*, 77 Ark. 611, 92 S. W. 775; *Thompson v. Van Lear*, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. (N. S.) 588; *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. 315; *Smith v. People*, 51 Colo. 270, 117 Pac. 612; *Czarra v. Medical Supervisors*, 25 App. (D. C.) 443; *Barton v. Schmershall*, 21 Idaho 562, 122 Pac. 385; *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995; *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228; *State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431; *Driscoll v. Commonwealth*, 93 Ky. 393, 14 Ky. L. 376, 20 S. W. 431, 703; *State v. Lutz*, 136 Mo. 633, 38 S. W. 323; *Lincoln Medical College v. Poynter*, 60 Nebr. 228, 82 N. W. 855; *State v. Chapman*, 70 N. J. L. 339, 57 Atl. 1133; *In re*

examination and registration of dentists.³⁹ The practice of medicine is but a mere privilege on the exercise of which the state may impose such reasonable conditions as it may deem advisable.⁴⁰ But it has been held that the state is without power to deprive patients of the right to use methods of treatment requiring less skill and learning on the part of the practitioner than is requisite to constitute a doctor of medicine or a surgeon.⁴¹

§ 2803. Police power to prevent fraud by adulteration.—

The police power of the state is ample to protect the public from fraud in the sale of food products. The state may, for example, prohibit or place restrictions on the sale of adulterated milk,⁴² or butter,⁴³ or other articles of table use,⁴⁴ and it may not be material, on an inquiry into the violation of such laws, that the adulterated product is harmless.⁴⁵ "It is enough that adulteration such as prescribed by the statute may defraud or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices, and that it ought to be prohibited. To defeat the act prohibiting such conduct, it is not enough to show that

Roe Chung, 9 N. Mex. 130, 49 Pac. 952; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835, 106 Am. St. 570; State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. 605; State v. Doran (S. Dak.), 134 N. W. 53; Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. ed. 563; Meffert v. Packer, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. ed. 350; State v. Currans, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; People v. Fulda, 52 Hun. (N. Y.) 65, 4 N. Y. S. 945, 7 N. Y. Cr. 1, 23 N. Y. St. 418.

³⁹ Gosnell v. State, 52 Ark. 228, 12 S. W. 392; Kettles v. People, 221 Ill. 221, 77 N. E. 472; State v. Chapman, 70 N. J. L. 339, 57 Atl. 1133. So as to barbers. Moler v. Whisman (Mo.), 147 S. W. 985, 40 L. R. A. (N. S.) 629 and note.

⁴⁰ State v. Edmunds, 127 Iowa 333, 101 N. W. 431.

⁴¹ State v. Biggs, 133 N. Car. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. 731.

⁴² State v. Schlenker, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280; Commonwealth v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Commonwealth v. Gordon, 159 Mass. 8, 33 N. E. 709; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. 419.

⁴³ State v. Myers, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. 887.

⁴⁴ State v. Weeden, 17 Wyo. 418, 100 Pac. 114 (maple syrup).

⁴⁵ State v. Schlenker, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360; Commonwealth v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Commonwealth v. Gordon, 159 Mass. 8, 33 N. E. 709.

in the particular case the article sold was innocuous. Criminal intent is not an essential element of the offense described in the statute, and need not be shown in order to justify a conviction."⁴⁶ The state may require the fact of adulteration to appear on the package in which the articles are sold, and where this is the case the offense consists in the failure to attach the label containing the information of adulteration.⁴⁷ The power may be exercised as to any article of commerce which may be so adulterated as to defraud the public.⁴⁸ But these statutes are closely construed, and where it is specifically set out in the statute what shall constitute an adulteration the courts will not, ordinarily, extend the statute to include things not falling within the enumeration.⁴⁹

§ 2804. Workmen's compensation laws an exercise of police powers.—The modern industrial laws which create a new remedy for the payment of claims for injuries received in the master and servant relation are best sustained as an exercise of the police powers of the state.⁵⁰ These laws abolish the doctrine of fault as a ground of liability. One of the courts called upon to construe a compensation act which it was contended amounted to an improper exercise of the police power of the state said: "In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law

⁴⁶ *State v. Schlenker*, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360. Citing, *Commonwealth v. Smith*, 103 Mass. 444; *Commonwealth v. Farren*, 9 Allen (Mass.) 489; *Commonwealth v. Nichols*, 10 Allen (Mass.) 199; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Smith*, 10 R. I. 258.

⁴⁷ *Alcorn Cotton Oil Co. v. State*, 100 Miss. 299, 56 So. 397.

⁴⁸ *American Linseed Oil Co. v. Wheaton*, 25 S. Dak. 60, 125 N. W. 127. See also, *People v. Price* (Ill.), 101 N. E. 196.

⁴⁹ *State v. Weeden*, 17 Wyo. 418, 100 Pac. 114. See as to validity of legislation to prevent fraud in weight and measures, *State v. Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C 248 and note.

⁵⁰ *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 108, 119 Pac. 554; *Yaple v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *State v. Clausen*, 65 Wash. 156, 117 Pac. 1107; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209.

which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution. The clause of the constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust and capricious interference with personal rights, not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the constitution, is reasonableness, as contradistinguished from arbitrary or capricious action."⁵¹

§ 2805. Bank depositors' guarantee acts an exercise of police power.—There is an example of the exercise of police powers by the state in the comparatively recent acts for the protection of bank depositors. These statutes usually create boards with power to levy on banks of the state a certain per cent. of the average daily deposits of the bank for the purpose of creating a guaranty fund for the reimbursement of depositors in the event of any of the banks becoming insolvent and unable to repay deposits. The validity of laws of this character is sustained by the Supreme Court of the United States on the ground that they are a legitimate exercise of the police power of the state.⁵² The court, in effect, says that the police power extends to all the great public needs.⁵³ "It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their

⁵¹ State v. Clausen, 65 Wash. 156, 117 Pac. 1101.

⁵² Noble State Bank v. Haskell, 219 U. S. 104, 44 L. ed. 112, 31 Sup. Ct. 299, 32 L. R. A. (N. S.) 1062; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup.

Ct. 189; Assaria State Bank v. Doley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. 189.

⁵³ Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. 864.

sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank.⁵⁴ The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end.⁵⁵ So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now.⁵⁶ It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the

⁵⁴ *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255.

⁵⁵ *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. 633.

⁵⁶ *People v. Walker*, 17 N. Y. 502; *Danby Bank v. State Treasurer*, 39

Vt. 92. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. 174; *Kidd & Co. v. Musselman Grocer Co.*, 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. 606.

others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.⁵⁷ It will serve as a datum on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line."⁵⁸

§ 2806. Municipality not liable for failure to exercise police powers.—The general rule is that a municipal corporation is not liable for damages resulting from the improper or negligent exercise of its police powers.⁵⁹ Accordingly, it is generally held that a municipal corporation is not liable in damages for a nuisance which has been created through the improvident or improper exercise of its police or governmental powers. For example, the city of Boston was held not liable for damages sustained by an individual by the firing of a cannon on Boston Common, although such firing was under a license from the city authorities, whatever might be the liability of a private landowner who gave a license for the firing of cannon upon his premises, because the city held the Common for a public purpose and controlled it in the exercise of its governmental powers, and not for private or corporate gain.⁶⁰ For stronger reasons, it has been held that a city is not liable for the breaking of plate-glass doors in a building by the firing of an anvil on the Fourth of July, with the permission of the mayor, where the permission was given, not in pursuance, but in violation of, an ordinance. The court reasoned that no actionable breach of corporate duty can be predicated upon the failure to

⁵⁷ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. 529, 14 Am. & Eng. Ann. Cas. 560.

⁵⁸ *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 31 Sup. Ct. 186, 32 L. R. A. (N. S.) 1062.

⁵⁹ *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Cochrane v. Frostburgh*, 81 Md. 54, 31 Atl. 703,

27 L. R. A. 728, 48 Am. St. 479; *Betham v. Philadelphia*, 196 Pa. St. 302, 46 Atl. 448; *Smith v. Selinsgrove*, 199 Pa. 615, 49 Atl. 213; *Afflick v. Bates*, 21 R. I. 281, 43 Atl. 539, 79 Am. St. 801.

⁶⁰ *Lincoln v. Boston*, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. 601.

enforce an ordinance prohibiting the firing of gunpowder or other explosive substances, and that even if the act of the mayor constituted the wrongdoers licensees of the corporation, still, no liability would attach to it, since the thing for the doing of which the license was granted was not dangerous in itself.⁶¹

§ 2807. Private rights of persons or property.—It should be constantly borne in mind, however, that to justify the state in interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, and impose unusual and unnecessary restriction upon lawful occupations.⁶² The law will not allow the rights of property to be invaded under the guise of protection when it is manifest that such is not the object and purpose of the regulation.⁶³

⁶¹ *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532, 9 Am. St. 837.

⁶² *In re Race Horse*, 70 Fed. 598, revd. 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. ed. 244; *Grossman v. Caminez*, 79 App. Div. (N. Y.) 15, 79 N. Y. S. 900 and authorities cited; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. 499.

⁶³ *Whiteley v. Terry*, 83 App. Div. (N. Y.) 197, 82 N. Y. S. 89. Div. N. Y.) 197, 82 N. Y. S. 89. See also, *Lawton v. Steele*, 152 U. S. 132, 38 L. ed. 385, 14 Sup. Ct. 499; *Daugherty v. Thomas* (Mich.), 140 N. W. 615.

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